THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

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

REPORT AND RECOMMENDATION OF
THE AD HOC HEARING COMMITTEE

Respondents, John F. Kennedy & Kathleen A. Dolan, are charged with violating D.C. Rule of Professional Conduct 1.15(a) by intentional, reckless, or negligent misappropriation, commingling, and failing to maintain records, as well as Rules 1.5(a) (unreasonable fees), 1.5(c) (contingency fee written statement), 1.15(c) (promptly notify and deliver funds and provide an accounting), 1.2(a) (abide by clients' decisions), 1.4(a) (keep clients reasonably informed), 1.4(b) (reasonably explain matters to permit clients to make informed decisions), 1.4(c) (communicate

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

settlement offer), 1.5(b) (written fee agreement), 1.8(f) (conflict of interest without clients' informed consent), and 8.4(c) (dishonesty) of the District of Columbia Rules of Professional Conduct (the "Rules"), arising from Respondents' representation of current or former employees pursuing wage claims against their employer, Inter-Con Security Systems, Inc. ("Inter-Con"), through litigation, collective action arbitration, settlement negotiations, and alleged misappropriation of settlement funds.

Disciplinary Counsel contends that Respondents committed all of the charged violations and should be disbarred as a sanction for their misconduct, or in the alternative, receive a three-year suspension with a fitness requirement, and Respondents should be required to disgorge $85,913.32 of fees, with interest, to the D.C. Bar's Client Security Fund.[1]

Respondents contend that no Rules were violated. Respondents further contend, however, that in the event the Hearing Committee accepts Disciplinary Counsel's legal theory regarding the ownership of statutory fees under FLSA, this would be a case where "the respondents' 'honest, but erroneous belief' that they were entitled to withdraw the misappropriated funds constituted 'simple negligence'[.]" Respondent's Hearing Committee Brief ("R. Br.") at 71 (quoting *In re Hewett*, 11 A.3d 279, 285 (D.C. 2011)). In support of this argument, Respondents state that Respondent Kennedy believed that the attorneys' fees were his earned fees from the fee-shifting nature of the FLSA collective action, and that he properly

---

[1] As explained, *infra*, Disciplinary Counsel appears not to have discussed its Rule 1.5(c) allegation in its Brief.

sought and obtained individual settlement authority from each claimant. Respondents assert that, if any other Rule violations are found, the appropriate sanction is reprimand or informal admonition.

As set forth below, the Hearing Committee finds that Disciplinary Counsel established by clear and convincing evidence that both Respondents violated Rules 1.2(a), 1.4(a), 1.4(b), 1.4(c), 1.5(b), 1.8(f), in Count I, and that Respondent Kennedy violated Rule 8.4(c). Disciplinary Counsel further established by clear and convincing evidence that both Respondents violated Rules 1.15(a) (misappropriation and recordkeeping), 1.15(c), and 1.5(a) in Count II, but that Respondent Kennedy's misappropriation was intentional, whereas Respondent Dolan's misappropriation was negligent. Disciplinary Counsel failed to establish by clear and convincing evidence violations of Rules 1.15(a) (commingling), 1.5(c), or 8.4(c) as charged in Count II. The Hearing Committee concludes that Respondent Kennedy's dishonest and intentional misappropriation warrants disbarment under *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc). In the event Respondent Kennedy's misappropriation is determined to be negligent rather than intentional or reckless, the Hearing Committee recommends the alternative sanction of a three-year suspension with proof of fitness. The Hearing Committee concludes that Respondent Dolan's negligent misappropriation and other Rule violations warrants a nine-month suspension with proof of fitness. Finally, the Hearing Committee recommends that the issue of disgorgement of the $85,913.32 in excess fees be

addressed during reinstatement proceedings. *See In re Hager*, 812 A.2d 904, 923 (D.C. 2002).

I. PROCEDURAL HISTORY

On July 8, 2016, Disciplinary Counsel served Respondents with a Specification of Charges ("Specification"). The Specification alleges that Respondents violated the following Rules:

Count I (Inter-Con Litigation and Arbitration)

- 1.2(a), in that Respondents failed to abide by their clients' decisions concerning the objectives of the representation, and/or failed to abide by their clients' decisions whether to accept an offer of settlement of a matter;
- 1.4(a), in that Respondents failed to keep their clients reasonably informed about the status of the Inter-Con matter;
- 1.4(b), in that Respondents failed to explain a matter to their clients to the extent reasonably necessary to permit the clients to make informed decisions regarding the representation;
- 1.4(c), in that Respondents failed to inform their clients of the substance of Inter-Con's settlement offer;
- 1.5(b), in that Respondents failed to communicate in writing the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client would be responsible before or within a reasonable time after commencing the representation;
- 1.8(f), in that Respondents, while representing two or more clients, participated in making an aggregate settlement of claims for their clients without the informed, written consent from each client; and
- 8.4(c), in that Respondents engaged in conduct involving dishonesty.

Specification ¶ 53(a)-(g).

Count II (Respondents' IOLTA Account)

- 1.5(a), in that Respondents' attorney's fees were unreasonable;
- 1.5(c), in that upon conclusion of the contingent fee matter, Respondents failed to provide their clients with a written statement explaining the outcome of the matter and the method and determination of the remittance to the client;
- 1.15(a), in that Respondents intentionally, recklessly, or negligently misappropriated entrusted funds;
- 1.15(a), in that Respondents failed to hold entrusted client funds in their possession in connection with a representation separate from the firm's funds (commingling);
- 1.15(a), in that Respondents failed to keep and/or maintain complete records of entrusted funds;
- 1.15(c), in that Respondents failed to promptly notify their clients that the firm had received funds or other property which the clients had an interest, and/or deliver funds to which the clients were entitled, and/or provide an accounting; and
- 8.4(c), in that Respondents engaged in conduct involving dishonesty.

Specification ¶ 80(a)-(f).

Respondents filed their Answer on July 28, 2016. Respondents' initial counsel filed motions to dismiss on February 24, 2017, and July 24, 2017, and Respondents' second counsel clarified the arguments for dismissal during a post-hearing conference held on April 23, 2018. Disciplinary Counsel filed oppositions to the motions on March 1, 2017 and July 28, 2017, and opposed dismissal during the April 23, 2018 post-hearing conference. We include a recommended disposition of Respondents' motions below.

A hearing was held before this Ad Hoc Hearing Committee (the "Hearing Committee") on the following dates: April 24-27, 2017, and March 26, 27, and 29 of 2018. Disciplinary Counsel was represented at the hearing by then-Assistant

Disciplinary Counsel Becky Neal and Assistant Disciplinary Counsel Sean O'Brien. Respondents were present and represented by counsel during the hearing dates held on April 24-27, 2017 by Lauri E. Cleary, Esquire, and Stanley J. Reed, Esquire, and on March 26, 27, and 29 of 2018 by Noah A. Clements, Esquire.

During the course of the hearing, Disciplinary Counsel called as witnesses: Respondents John F. Kennedy and Kathleen A. Dolan, and Marshall Bruce Babson, Michael Joseph Murphy, Jermaine Marvin Fitzgerald, Michel Larry Ashton, and Daniel Joseph Quagliarello. Respondents testified on their own behalf.

During the course of the hearing, Disciplinary Counsel submitted numbered exhibits in notebooks DX A through DX L. Prior to the hearing, Respondents' first set of counsel submitted RX 1 through RX 144. Respondents' successor counsel withdrew all of Respondents exhibits with Disciplinary Counsel's consent. Disciplinary Counsel subsequently filed several of Respondents' prior exhibits in notebook DX R.[2] Throughout the course of the hearing the Hearing Committee addressed numerous privilege disputes raised by the parties related to the admissibility of exhibits. After the conclusion of the hearing, the parties filed a stipulated list of admitted exhibits which included their agreed upon redactions. The parties stipulate that all of Disciplinary Counsel's numbered exhibits in notebooks DX A through DX L and DX R were admitted without objection, except: A43, A44, A60, and A61 which Disciplinary Counsel did not seek to admit; and A39, A42, and

---

[2] Specifically, DX R1, 2, 6, 14, 24, 27, 42, 43, 49, 52, 56, 57, 66, 81, 82, 84, 91, 93, 106, 113, 116, 117, 129, 143, and 144.

R143 which were admitted over Respondents' objections (Tr. 1453-56, 1657, 1676-77).

Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the ethical violations set forth in the specification of charges. Tr. 1846; *see* Board Rule 11.11. Disciplinary Counsel did not submit evidence in aggravation of sanction. Tr. 1847. Respondents' Counsel argued in mitigation: delay in the proceedings (Tr. 1847-48), the Respondents' "27 years of practice without disciplinary any violations" (Tr. 1848), the Respondents' children's "serious medical issues" and the resulting death of their daughter (Tr. 1849-50), and the fact that none of their Inter-Con clients filed a complaint (Tr. 1850-51).

A post-hearing conference was held on April 23, 2018 to hear argument on the Respondents' Motion to Dismiss on the grounds that Disciplinary Counsel violated Board Rule 2.9(b), that was originally filed on February 24, 2017 and renewed at the conclusion of the hearing.

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on May 4, 2018 ("DC Br."). Respondents filed their Hearing Brief on June 4, 2018 ("R. Br.") and a Supplemental Hearing Brief on June 22, 2018. Disciplinary Counsel filed its Reply on July 6, 2018 ("DC Reply Br.").

II. FINDINGS OF FACT

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

A. Background

1. Respondent Kennedy is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on April 27, 1988, and assigned Bar number 413509. DX A1 at 2.[3]

2. Respondent Dolan is member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on June 19, 1991, and assigned Bar number 428925. DX A1 at 1; Tr. 1548-49 (Dolan). Respondent Dolan is also licensed in Maryland. Stip. at 1, ¶ 2.

3. Respondents are married and the only partners and lawyers in the firm Kennedy & Dolan. Stip. at 2, ¶ 3; DX A8 at 1; Tr. 195-96 (Kennedy).

---

[3] "DX" refers to Disciplinary Counsel's exhibits. "Tr." refers to the transcript of the hearing held in April 2017 and March 2018. "Answer" refers to Respondents' Answer filed on July 28, 2016 and found at DX A4, in response to the Specification of Charges. "Stip." refers to the Joint Statement of Stipulated Facts found at DX A59 filed on January 9, 2017. "FF" refers to Disciplinary Counsel's numbered Proposed Findings of Fact.

4. In general, Respondent Dolan "dealt with the administrative stuff," including the trust accounts. Tr. 194, 1497 (Kennedy). Respondents employed support staff to assist with their practice, but Respondent Kennedy usually typed his own letters. DX A8 at 1; Tr. 198-99, 205-06 (Kennedy).

5. Both Respondents participated in the Inter-Con litigation and arbitration, which give rise to the charges here. Respondent Kennedy was the lead lawyer on the case, and was primarily responsible for communicating with the clients. These client communications are central to Disciplinary Counsel's case against Respondents, especially the allegation that Respondents were dishonest with the clients. Thus, even though Respondent Dolan testified that she "was completely involved in this case," (Answer at 5, ¶ 7; Stip. at 3, ¶ 6; Tr. 1555-56 (Dolan)), we have carefully examined the evidence regarding communications with the clients, as discussed below.[4]

---

[4] Respondent Dolan's involvement included communicating with Inter-Con Counsel on substantive issues; preparing, researching, and editing pleadings; reviewing and editing communication to clients; preparing for depositions; and preparing for the arbitration hearing. As discussed below, she was aware of Respondent Kennedy's settlement negotiations, but Disciplinary Counsel did not prove by clear and convincing evidence that she knew that Respondent Kennedy was dishonest with the clients. *See, e.g.*, DX A59 at 3; DX B6 at 1, 3; B21; DX C86 at 4; DX B39 at 1-2, DX D10 at 1; DX E8 at 2; DX E11 at 1; DX E20 at 2; DX E22 at 1; DX E27 at 1; DX E31 at 3; DX E32 at 1; DX E33 at 1; DX E40 at 1-2; DX E43 at 1-3; DX E52 at 1; DX E53 at 1; DX E57 at 1; DX F11 at 3; DX F39 at 4; DX F80 at 3; F81 at 7; F87 at 1; F90 at 5; DX G4 at 1; DX G13 at 7; DX G25 at 1; DX I8 at 6-8; DX I9 at 8 DX L4 at 43; DX L8 at 35; Tr. 1617 (Dolan: "I've met Ms. Perry many times and I've emailed her many times and I've talked to her many times.").

B. Inter-Con Litigation and Arbitration

6. Inter-Con Security Systems, Inc., is a company that provided guard and security services to many government agencies and departments. Tr. 78 (Babson); Tr. 645-46 (Fitzgerald).

7. Between late 2000 and 2002, several current and former employees of Inter-Con hired Kennedy & Dolan to pursue wage claims against the company. Answer at 4 ¶ 4, Stip. at 2, ¶ 4; Tr. 766-68 (Ashton). Among those employees were Jermaine Fitzgerald, Jacqueline Perry and Michael Ashton, who would become the named claimants in the Inter-Con litigation and arbitration. DX A50 at 1 (Fitzgerald); DX B8 at 1 (Perry); DX L2 at 5, 15, 54 (Ashton); DX H34 at 1-2 (Fitzgerald substituted as lead claimant).

8. Respondents entered into written "attorney-client agreements," with each of the named claimants. DX L3 at 2 (Mr. Fitzgerald, December 27, 2000), DX L7 (Ms. Perry, September 16, 2002); DX L2 at 2 (Mr. Ashton, August 4, 2004); *see also* Tr. 651, 768-69; Answer at 4, ¶ 4. Each agreement set forth the scope of the representation, how costs and expenses would be paid, and provided for a contingency fee of **40%** (emphasis in original) if the case were filed, mediated, or arbitrated. DX L2 at 2 (Ashton); DX L3 at 2 (Fitzgerald); DX L7 at 3 (Perry); *see also* Stip. at 2 ¶ 4.

9. After executing the attorney-client agreements, Respondents asked Mr. Fitzgerald and Ms. Perry to sign "opt-in" forms, which they did. DX L3 at 7-8; DX L7 at 13, Tr. 1088-89 (Kennedy). The opt-in statement provided in full:

> I, _____, hereby certify I am willfully and voluntarily choosing to participate as a plaintiff in the above-named lawsuit filed by Security Officers/Special Police Officers of Inter-Con Services Corporation against Inter-Con Services Corporation for back-wages and liquidated damages, interest, attorneys' fees and costs and other relief deemed appropriate by this Court.

DX L3 at 8; DX L7 at 13; *see also* DX A50 at 11.

10. In August 2001, Respondents filed suit on behalf of Mr. Fitzgerald against Inter-Con in the Superior Court for the District of Columbia. DX A50. Due to a mandatory arbitration clause in Mr. Fitzgerald's contract, the Superior Court action was dismissed, and, on March 11, 2003, the case proceeded to arbitration at JAMS, a major alternative dispute resolution provider. Stip. at 3-4, ¶ 10; DX A54; DX B8; Tr. 84-85, 145-46 (Babson).

11. Respondents instituted the Inter-Con arbitration as a "collective action," pursuant to the Fair Labor Standards Act, 29 U.S.C. § 216(b) (FLSA) and District of Columbia Code §32-1012, whereby a named claimant can sue an employer on behalf of herself and other employees who are "similarly situated." DX B8; Stip. at 3-4, ¶ 10; Tr. 80 (Babson). Ms. Perry was the named claimant, but Mr. Fitzgerald later replaced Ms. Perry as the lead claimant. DX B8 at 1; DX B15 at 1; DX H34 at 1-2 (Arbitrator Order dated January 17, 2008). Mr. Ashton was the claimant in a separate, related arbitration. DX L2 at 5 (Ashton).

12. The term "class" is used to describe both a group of plaintiffs in an opt-in collective action, or as a term of art referring to a class of plaintiffs in a Rule 23 opt-out class action. Tr. 97-98, 177-179 (Babson). At no time was the Inter-Con litigation or arbitration certified as a Rule 23 class action. Tr. 179 (Stipulation by Respondents' counsel); Tr. 1104, 1109 (Kennedy); C78 at 2; DX C82 at 1; C86 at 2; DX E37 at 1; DX F11 at 1; DX L8 at 35.

13. Respondents knew that a collective action, unlike a class action, requires a potential claimant to "opt-in" or consent in writing to become a party in the litigation. Stip. at 4, ¶ 10; Tr. 80, 178-79 (Babson); Tr. 1071-72, 1104, 1210 (Kennedy). On the other hand, a Rule 23 action, also known as an "opt-out class action," binds all employees who fit within the definition of the class, unless they affirmatively opt-out of the suit. DX C86 at 1 (Respondent Kennedy letter to arbitrator citing Fed. R. Civ. P. 23).

14. Respondents knew that in a collective action, the arbitrator will authorize the circulation of a notice advising potential claimants of the pendency of the case and of their opportunity to opt in. Tr. 90-91 (Babson). This procedure of approving and sending notice to potential, similarly situated claimants is referred to as a "conditional certification," but it does not actually certify a "class" or create a class-action. *See* ODC Br. Appendix 1, Answers to Specific Committee Questions About Class and Collective Actions, *infra*.

15. On March 24, 2004, Respondents mailed to over 100 potential claimants the Notice and Opt-in Certificate/Consent to Join forms that they prepared.

DX B42 at 1-28; Answer at 9, ¶ 20; Tr. 261 (Kennedy). Respondents state in their Answer that "[Respondents] further admit that at that time no retainer or fee agreements were executed with those claimants, since they understood the 'opt-in' certificate to suffice in this type of collective action." Answer at 9, ¶ 20. The Notice Respondents sent to potential claimants stated that "you will not be required to pay attorney's fees directly. The plaintiffs' attorneys will receive a part of any money judgment entered in favor of the class." DX B41 at 2, ¶ 5. No money judgment was entered in the Perry or Ashton arbitrations. DX F83 at 6-18.

16. By the end of April 2004, Respondents received more than 100 signed opt-in forms from claimants who joined the arbitration and designated Respondent Kennedy as their attorney. Stip. at 4, ¶ 14; Stip. at 5, ¶ 16; *see also* DX B42; DX B48 at 1. Except for the named claimants, who signed the 40% contingency agreements, Respondents did not execute a written attorney-client agreement with the 100 opt-in claimants at that time. Answer at 9, ¶ 20; Tr. 263, 272 (Kennedy). On May 13, 2004, Respondents sent the claimants a letter informing them of multiple potential claims against Inter-Con and that for claims involving withholding the last paycheck, "[a]ll fees and costs must be paid by Inter-Con so you will get 100% of your owed amount, if any." DX B50 at 1.

17. Respondents understood that they had established an attorney-client relationship with each individual claimant. Tr. 284, 1104-05; (Kennedy); DX C78 at 2 (Respondent Kennedy's June 6, 2006 email to arbitrator: "this is not a Rule 23 class action. . . . I . . . represent each individual who opts into the case"); *see also*

DX E37 at 1 (Respondent Kennedy's Jan. 26, 2008 letter to claimants: "I am ethically required by [the] DC Bar rules to have a signed attorney-client agreement with you."); Answer at 14, ¶ 37 (by January 2008, "the arbitrator still had not certified the class and Respondents wanted to be certain that they documented their retention by each individual who had opted in . . . .").

18. To communicate with their numerous clients, Respondent Kennedy regularly sent them status "update" letters by hard copies, or sometimes by email, and addressed to the group. Tr. 269-70 (Kennedy); Tr. 712 (Fitzgerald); Tr. 854 (Quagliarello); DX B50 at 1-2 (May 13, 2004 letter from Kennedy); DX B57 at 1-3 (July 1, 2004 letter from Kennedy); DX C5 at 1 (Feb. 13, 2005 letter from Kennedy).

Respondent Kennedy testified:

> I wrote 32 over the period of time, or 33, giving them an update. If you have a hundred people, you can't call them, you can't send them all emails, so I write them letters, and this [DX B50] is an update.

Tr. 268-69 (Kennedy); *see also* DC Br. Appendix 2 (List of Client Updates).

Respondent Dolan reviewed and edited correspondence signed by Respondent Kennedy and submitted in arbitration, including the October 20, 2006 letter." *See, e.g.*, DX I6 at 38 (November 3, 2006 Time Sheet: "Wrote letter to clients after reviewing prior orders and notes. 3.2 hours[/]Discussed with KAD 30 minutes jt. atty time[/]102 letters to clients"); DX C88 at 1; *see also* DX I1 at 20; DX I2 at 18, 32, 34; DX I4 at 60; DX at I5 at 27, 32, 50, 55, 60; DX I6 at 3-5, 9, 26, 36; DX I7 at 12, 14, 36; and DX I8 at 6-8; DX E62 at 1. *See generally* R. Br. at 4 (Respondents'

Response to ODC FF 5) (agreeing that "both Respondents knew about each other's communications with other parties and clients").

19. In April 2005, Inter-Con moved to disqualify Respondents as "class counsel" for the claimants. DX H6 at 5-16; *see* FF 14, *supra*. Over Respondents' objection, in June 2006, the arbitrator granted the motion. DX H9 at 1-8; DX H13 at 1, 3; Tr. 1095-96 (Kennedy).

20. In asking for reconsideration of the order, Respondents stated that they were ***not*** class counsel and that they had individual attorney-client relationships with each claimant. For example, in a letter dated October 20, 2006, Respondent Kennedy told the arbitrator:

> Despite what Inter-Con represented, I am not "class counsel." This is not a **class** action. Per the FLSA [Fair Labor Standards Act] and the D.C. Code, under which this arbitration was brought, this is a **collective** action with individual plaintiffs who signed attorney-client agreements with underlying counsel."

DX C82 at 1 (emphasis in original). A week later, on October 26, 2006, Respondent Kennedy sent a letter to the arbitrator stating:

> The claimants in this matter have hired me to represent them and they have signed individual attorney-client agreements. No on[e] else can interfere with that relationship other than the clients, none of whom has contacted me, or you, for that matter, to say he/she agrees with this arbitrator's decision.

DX C86 at 2. Contrary to Respondent Kennedy's representations to the arbitrator, Respondents did not have signed attorney-client agreements with each client at that time—only the named claimants. DX C76 at 2; DX C78 at 2; DX C82 at 1; DX C86

at 2; DX D27 at 1; DX D29 at 1; Tr. 289-92, Tr. 299-302 (Kennedy). *But see* Tr. 262, 285-86 (Kennedy).

21. On January 29, 2007, the first arbitrator resigned for personal reasons. DX H13 at 5.

22. In February 2007, the parties selected Arbitrator von Kann to replace the previous arbitrator. DX D1 at 1; Answer at 11, ¶ 27. He entered Order No. 16, which permitted the parties to file "a motion to alter any ruling made by the prior arbitrator." DX H16 at 2. Respondents moved to set aside the previous order that removed them as counsel; the motion was granted. Answer at 11, ¶ 27; DX H16 at 9; DX H17 at 1, 7-8, 11-12. Arbitrator von Kann, starting with a clean slate, sent a new notice to all potential claimants and required all claimants (even those who had opted-in before) to file a new opt-in form. DX H17 at 7-8; DX H19 at 8-9 (July 2007 Notice); DX D35 at 1-2; Tr. 1532-33 (Kennedy). Unlike the 2004 opt-in process, the 2007 notice and opt-in were sent to potential claimants directly by JAMS, the arbitration service. DX H17 at 12, 14; H19 at 1. JAMS sent the new notice and opt-in forms entitled "Joinder of Claimant," and the arbitrator authorized Respondents to send a letter to their clients explaining the necessity of completing the form to join the arbitration. DX H17 at 12-14; DX D30 at 2-3.

23. The 2007 Notice informed potential claimants who were considering whether to opt-in: "If you prevail in your claim against Inter-Con, Inter-Con will be required to pay your reasonable attorney's fees. If you do not prevail, you may or

may not be required to pay your attorney's fees and costs depending on the terms under which he or she agreed to represent you." DX H19 at 9.

24. The 2007 opt-in form provided claimants who opted in three options for representation: 1) *pro se* representation; 2) Respondent Kennedy; or 3) another attorney of their choice. DX D35 at 2; DX L8 at 1. Most of the 100 claimants chose Respondent Kennedy as their attorney. Answer at 13, ¶ 32.

25. Respondents did not provide the claimants who chose Kennedy to represent them via the 2007 opt-in form with a written fee agreement at that time. Answer at 13, ¶ 32. The opt-in form itself did not set forth the basis of the Respondents' fee (contingent or hourly) or the rate of the fee (a percentage or hourly amount). DX L2 at 101.

26. The opt-in forms were to be sent back to JAMS by September 21, 2007, but additional forms trickled in after that date, and the last claimants were added to the arbitration on November 6, 2007. DX H19 at 9; H22 at 2; H24 at 1; H26 at 3. In November 2007, Arbitrator von Kann scheduled the arbitration hearing for February 11-15, 2008. DX H20 at 1-3.

C. <u>Settlement Negotiations and Respondents' 2008 Written Fee Agreements</u>

27. On January 7, 2008, Arbitrator von Kann issued a summary judgment decision that effectively dismissed the claims of more than half the claimants based on the statute of limitations, and dismissed some of the claims for the other claimants. DX H30; DX E4 (dismissed "best and easiest claim"); Tr. 1171 (Kennedy: "[I]t . . . knocked out like seventy-five of the hundred plaintiffs."); 1510-

11 (Kennedy); DX E8 at 5 (estimating 71% of the Claimants will be struck); DX E5 ("It is NOT a good ruling. Took the best case we had away."). As Respondents put it, "[t]here was no way of anticipating that [the summary judgment order] would so severely limit the number of Claimants and remedies." DX E8 at 8.

After the arbitrator issued the summary judgment order on January 7, 2008 disposing of many claims and clients, Respondent Kennedy requested that the arbitrator "issue a separate Order listing the final 'class'. . . " on January 11, 2008. DX E8 at 1, 7. Arbitrator von Kann issued an order listing "all Claimants who are currently participating in the case" on January 18, 2008. DX H35 at 1-6.

28. On January 23, 2008, Respondents initiated settlement negotiations with Inter-Con because the summary judgment orders "knocked out so much." DX E31 at 1-3; Tr. 1180-81 (Kennedy). In a letter addressed to Michael Murphy, Inter-Con's attorney, Respondent Kennedy offered to settle the clients' claims, attorneys' fees, and costs for $700,000. DX E31 at 2; Tr. 1224 (Kennedy); *see also* E17 at 1; DX E39 at 1; DX E44 at 1, 6. Respondent Kennedy told Inter-Con that Respondents' hourly "fees [were] approaching one-million dollars ($1,000,000)." DX E31 at 1-2.

29. At the time they made their opening settlement offer, Respondents knew that the only existing fee agreements—which they had entered into eight years before with the lead claimants, Mr. Fitzgerald, Ms. Perry, and Mr. Ashton—entitled them to a contingency fee of 40%. *See* FF 8.

30. On January 26, 2008, Respondent Kennedy sent a letter to Respondents' clients informing them the arbitration hearing was scheduled for February 11-15, 2008. DX E37 at 1. Respondent Kennedy did not tell the clients that Respondents had offered to settle the arbitration for $700,000, including attorneys' fees and costs. DX E37; *see also* DX E31 at 1-2; DX E45 at 1; Tr. 1197-98, 1242-45 (Kennedy); DX G31.

31. With the January 26, 2008 letter, Respondent Kennedy enclosed an "attorney-client agreement" for each client to sign and return. DX E37 at 1-2; *see also* DX E37 at 17; DX L8 at 19. Respondent Kennedy wrote that "[b]ecause the arbitrator in this case as of last night has not formally certified this matter as a class action yet," Respondent Kennedy was "ethically required by DC Bar rules to have a signed attorney-client agreement with you." DX E37 at 1; Answer at 14, ¶ 37.

32. Respondents' new fee agreement provided—for the first time—that Respondents had the option of calculating their attorneys' fees based on an hourly rate: "Attorney will be paid at 40% of the recovery ***or*** at an hourly rate pursuant to the applicable Adjustable Laffey Matrix in Washington, DC at his choosing upon recovery or upon application to the arbitrator for payment of attorneys fees and costs pursuant to applicable statutes." DX E37 at 4, ¶¶ 4, 20 (emphasis added); Answer at 14, ¶ 37; Tr. 853 (Quagliarello); Tr. 1221-22, 1226-28 (Kennedy). *Compare* DX L2 at 2 (Ashton), DX L3 at 2 (Fitzgerald), *and* DX L7 at 3 (Perry), *with* L8 at 19 (Quagliarello).

33. When Respondent Kennedy sent the clients the January 2008 attorney-client agreement, he did not inform them that Respondents had calculated their hourly fees to be approaching $1,000,000, or that they had sent Inter-Con a settlement offer for $700,000. Answer at 14, ¶ 37; DX E31 at 1-3; DX E37 at 1; DX E45 at 1; Tr. 1198, 1242-45 (Kennedy).

34. On January 28, 2008, Respondent Kennedy sent a status update letter to the clients but did not inform them that Respondents had initiated settlement negotiations. DX E38 at 1. Respondent Kennedy told the clients to come to a meeting on February 2, 2008, to prepare for the hearing scheduled to begin on February 11, 2008. *Id.* Respondent Kennedy also informed the clients that "[i]n addition to preparing, we will discuss the strategy of the case, the viability of your claims, discuss options and answer any questions." *Id.*

35. On January 29, 2008, Inter-Con countered Respondents' settlement offer with $150,000, including attorneys' fees. DX E39 at 1. Respondent Kennedy and Inter-Con continued to exchange counter-offers via e-mail. DX E44.

36. On January 30, 2008, Mr. Murphy sent Respondents a list of the claimants who opted into the arbitration in 2007 with the corresponding dates of their employment at Inter-Con. DX E41. That same day, Respondent Kennedy sent a letter to those claimants whom Respondent Kennedy believed either no longer had claims or had been removed because of the statute of limitations, notifying them that they had been excluded. DX D42 at 1; DX R82 at 1; *see also* Stip. at 8-9, ¶ 34.

37. On January 31, 2008, Inter-Con offered to settle for $310,000 and Respondent Kennedy replied, "certainly, if offered, $330,000 would guarantee this case would be closed." DX E44 at 6-7. Respondents had not obtained settlement authority from any clients. Tr. 1242 (Kennedy).

38. Respondent Kennedy scheduled a February 2, 2008 meeting with clients in the Inter-Con matter to prepare for the scheduled hearing. DX E38 at 1; Tr. 1249 (Kennedy). The meeting was not well-attended. DX E48 at 1-2; Tr. 1251-52 (Kennedy). At the meeting, and in an update letter sent that same day, Respondent Kennedy informed clients that Respondents were engaged in settlement negotiations. DX E47 at 1, 2, 4; DX E48 at 1 ("This case could resolve itself this week without a hearing . . . .).

39. At the February 2, 2008 meeting, Respondent Kennedy provided attending clients with a form, to be signed by the clients, stating in part: "I give full authority to Mr. Kennedy to settle for as much as he believes is reasonable for any and all claims I may have had with Inter-Con arising from this action and give him the power to sign any and all papers, releases [sic] for me." Tr. 1253-54; DX E47 at 2. Notes used by Respondent Kennedy at this February 2 meeting, and also used as an outline in calls with clients on the weekend of the February 2 meeting, do not include any information on proposed settlement amounts or structure.

40. Also on February 2, 2008, Respondent Kennedy sent an update letter to those clients who had not attended the February 2 meeting and to those clients whom Respondents had not otherwise heard back from about the Inter-Con matter. Answer

at 14-15, ¶ 38; Stip. at 10, ¶¶ 39-40; DX E48 at 1, 3; *see, e.g.*, DX L8 at 22-23 (Quagliarello); Tr. 1259, 1260-62 (Kennedy). In the letter Respondent Kennedy told the clients that if they did not answer an attached settlement form and return it immediately, "**you risk being excluded from the case and/or not getting anything from it**." DX E48 at 1 (emphasis in original). The form asked a series of seven questions about the client's relevant work circumstances at Inter-Con and about the client's final paycheck. Additionally, above the final line on the form for the client's signature, the form included this statement:

> I give full authority to Mr. Kennedy to settle for as much as he believes is reasonable for any and all claims I may have had with Inter-Con arising from this action and give him the power to sign any and all papers/releases for me.

Many of the clients signed this authorization. *See, e.g.*, DX E65 at 1; DX E66 at 1; DX E67 at 1.

41. On February 8, 2008 Respondent Kennedy sent a letter similar to the February 2 letter to opt-in claimants who had not yet contacted or responded to Kennedy; it stated, in part:

> If you are receiving this letter, we have not heard back from you despite several letters and requests sent to you. Enclosed, please find a form which was already sent to you pre-stamped and pre-addressed to make it very easy for you. **You have chosen to ignore it.**
>
> DX E62 at 2 (emphasis in original).

42. With this February 8 letter, Respondent Kennedy re-sent the same claimant questionnaire that as had been sent with the February 2 letter. *Compare* DX E62 at 3, *with* E48 at 3. On February 5, 2008, Respondent Kennedy and Mr.

Murphy signed a memorandum of understanding (MOU) (*see* DX E55 at 1-5), pursuant to which Inter-Con agreed to pay $320,000, and Respondent Kennedy "agree[d] to provide counsel for Inter-Con with a listing enumerating the specific settlement amounts to be paid to each claimant." DX E61 (Signed MOU); *see* Answer at 15, ¶ 39. The agreement memorialized in the MOU was contingent upon Respondents obtaining signed individual releases of all claims from each of their clients. DX E61.

43. After agreeing to the settlement terms set forth in the February 5, 2008 MOU, the lawyers filed a joint motion to stay the February 11, 2008 hearing. Answer at 15, ¶ 40. Arbitrator von Kann stayed the hearing until March 19, 2008. DX H47.

44. The day after signing the MOU, on February 6, 2008, Respondent Kennedy informed his Inter-Con clients in an update letter that the arbitration had "settled pending final paperwork," and that "settlement in this matter now was better for all concerned." DX E59 at 1. Respondent Kennedy did not enclose with this letter a copy of the February 5, 2008 MOU and he did not include in the letter even such basic information about the settlement terms as the $320,000 lump-sum settlement amount, the amount Respondents would take as their fee (which far exceeded $320,000 if based on their hourly rate), or that Respondents were responsible for determining the amount disbursed to each client. DX E61 at 3, ¶ 4; DX E59 at 1; *see also* Tr. 1279-85, 1382-84 (Kennedy).

45. Respondent Kennedy sent many emails about the settlement to individual clients but did not mention in any of these emails the terms of the MOU, nor did he provide the clients a copy of the MOU. *See, e.g.*, DX E60 at 1; DX E63 at 1; DX L3 at 30; DX L8 at 24-27; DX R93; Tr. 860, 862 (Quagliarello).

46. In communications with clients about the settlement, Respondent Kennedy misled the clients by telling them that they had no obligation to pay attorneys' fees and that Inter-Con would pay Respondents' fees. DX L6 at 7; DX E63 at 1 ("you will pay me nothing. . . . all fees & costs are paid by Inter-Con by statute."); Tr. 208-09, 220-21, 272-73, 275, 1074-76, 1079-80, 1090-92, 1113, 1141-42, 1161, 1231, 1282, 1289-92, 1341-42, 1379, 1386, 1485 ("[T]hey knew that our fees were going to be paid and costs were going to be paid by InterCon."), 1512-13 (Kennedy). Contrary to Respondent Kennedy' statements to the clients, however, the MOU specifically stated that "each side agrees to separately bear all of its own costs and attorney's fees . . . ." Answer at 15, ¶ 42; *see also* Tr. 1088, 1092 (Kennedy). By assuring the clients they would owe no attorneys' fees, Respondent Kennedy concealed that the clients would be paying Respondents' fees out of the clients' settlement funds.

47. Respondents never told their clients the specific terms of the agreement, including the total settlement amount of $320,000, the amount of their fees, or the amount paid for each client's claim. *See, e.g.*, Tr. 1289-91 (Kennedy). Three of Respondents' clients in the Inter-Con matter, Mr. Ashton, Mr. Fitzgerald, and Mr. Quagliarello, confirmed they never knew the total amount of the settlement until

they learned from the Office of Disciplinary Counsel that the case settled for $320,000. Tr. 677-85, 739-40 (Mr. Fitzgerald "learned [about the settlement amount and Respondents' fees] from [his] discussions with Disciplinary Counsel"); Tr. 862, 908, 913 (Quagliarello); *see also* Tr. 789-95 (Ashton: "We never discussed [the settlement amount] . . . . We never – I never – I didn't know anything about that, we never talked about that. He never disclosed that to me."), 803-04; Tr. 1240-41, 1285 (Kennedy); DX E48 at 2; DX E72 at 2; DX E73; DX E74; DX L7 at 142-44; DX L8 at 20; DX G20 at 1 (November 5, 2008 email from Ms. Perry to Respondent Kennedy: "I was never told the settlement amount.").

48. Respondent Kennedy testified the settlement amount, the amount of their fees, and the amounts paid to each claimant were not "material" and their clients "didn't care." *See* Tr. 1112-13 (did not "think they really cared"), 1287 ("They didn't care [about the final settlement amount]."), 1292 (the clients "do not need to know what the attorney's fees are paid for, because they didn't care"); 1318 (total amount immaterial), 1320 (hourly fees immaterial), 1341 (total amount immaterial), 1364 (other claimant amounts immaterial); 1379 (total amount immaterial). Mr. Fitzgerald, who was the lead claimant at the time of the settlement, disagreed. Tr. 707 (Fitzgerald: "that information should have been provided to me without me even asking . . . we would like to know exactly how the money was distributed"); H34 (Fitzgerald lead claimant as of January 17, 2008)).

49. Respondent Kennedy deliberately concealed the settlement details because he believed disclosing the individual settlement amounts and the amount of Respondents' fees would put the settlement at risk. Respondent Kennedy testified:

> [E]verybody had to sign on. That's clear, absolutely clear. And disclosing to them the amounts of what everybody else got, what they got, the attorney's fees probably, would have put that at risk.

Tr. 1289-90 (Kennedy).

50. The only information Respondent Kennedy gave each client was (1) the amount that the client received, and (2) that Inter-Con would pay unspecified attorneys' fees. DX G32 at 1-3 (December 30, 2008 update letter); Answer at 21, ¶ 62; DX F3 at 2 ("you'd get about $100.00 and I'd sign a universal release for you"); DX E63 at 1 ("you will pay me nothing. . . . all fees & costs are paid by Inter-Con by statute"); *see also* Tr. 679-81, 696-99, 706-07 (Fitzgerald); Tr. 908 (Quagliarello); Tr. 787-88, 789-90, 795-796, 799, 801-03, 822-23 (Ashton); Tr. 1281-82, 1291-93, 1341-42, 1363-64, 1378-79, 1385-87 (Kennedy). Respondents contend these were the only "essential terms" of the settlement. Answer at 15, ¶ 41; Tr. 1281-82, 1341-42 (Kennedy); *cf.* Answer at 15, ¶ 39 ("[Respondents] provided each client with essential information regarding their individual interests in the settlement.").

D. <u>Final Settlement Agreement</u>

51. On February 28, 2008, Respondent Kennedy and Inter-Con began consideration of the terms of the final settlement or master "agreement." DX E75 at 1-10; *see also* DX E80 at 1; Tr. 489, 496 (Murphy). The Final Agreement

incorporated by reference a separate, individual Release of Claims (Release). DX E75 at 1-10; DX E80 at 1; Tr. 489 (Murphy). The Final Agreement reflected Inter-Con's agreement to pay $320,000 to settle all claims, including attorneys' fees and costs. DX E61 at 3, ¶ 4 (MOU); DX E75 at 5-6, ¶ 4 (Agreement). Under the Final Agreement, Respondents alone decided how to allocate the settlement funds:

> (1) Respondents determined and provided Inter-Con with the specific amount payable to each client and to Respondents "as attorneys' fees and costs;"
>
> (2) Based on Respondents' instruction, Inter-Con issued checks to each client made payable to the client;
>
> (3) Based on Respondents' calculation and instruction, Inter-Con issued Respondents a check payable to Respondents' firm; and
>
> (4) All checks were delivered to Respondents.

DX E75 at 5-6, ¶ 4; DX F34 at 5, ¶ 4.

52. Under the MOU and Final Agreement, all 122 claimants who opted into the arbitration were required to sign both the Final Agreement and the Individual Release—even those claimants whose claims had been dismissed pursuant to the arbitrator's January 7, 2008 summary judgment ruling. DX E72 at 1-2; DX E73 at 1; DX E74 at 1; DX E75 at 1; F34 at 2-3; F36 at 8-12; Tr. 492-93, 507-08 (Murphy).

53. Respondents did not receive responses from all the clients. DX F5 at 1; DX F8 at 1-2. Respondent Kennedy and Mr. Murphy agreed that Respondents would seek to withdraw from non-responsive clients, and the total settlement amount of $320,000 would be reduced to reflect the number of clients who were dismissed. DX F8 at 1-2, 5; DX F9 at 11; F13 at 2; F17 at 1-9; DX F39 at 1.

54. On April 16, 2008, Respondent Kennedy filed a "Consent Motion" asking JAMS to send notices to non-responsive claimants, and "failing a timely response, dismiss those Claimants' claims with prejudice." DX F22 at 1-6. The arbitrator granted the consent motion and stayed the arbitration until May 15, 2008. DX H49 at 1-2.

E. Client Authority to Sign the Final Settlement Agreement

55. In a letter dated April 24, 2008, Mr. Murphy sent Respondent Kennedy the Agreements and Releases for each individual claimant to sign. DX F34 at 1-15. Mr. Murphy reminded Respondent Kennedy that Inter-Con needed signatures from each claimant:

> As we discussed . . . if you will be executing these papers for any individual claimant, I will need some written documentation from the claimant that the claimant has authorized you to accept the settlement and sign the Final Settlement Agreement and the Individual Release of Claims.

F34 at 1; *Id.* at 3-4, ¶ 2; *Id.* at 7-8, ¶ 9; Tr. 492-93 (Murphy).

56. Under pressure to obtain written authorization to settle on the clients' behalf, between April 2008 and May 2008, Respondent Kennedy contacted clients via email and regular mail, asking them to give Respondent Kennedy "full power and authority to sign any and all paperwork in the case against Inter-Con on my behalf." DX F46 at 1-2 (May 10); *see also* Answer at 16, ¶ 46; DX F36 at 1-6; DX F37 at 2; DX F38 at 1 ("[A]ll you have to do is say 'okay, you can sign whatever' in your response to this to make things easier."); *Id.* at 2-3, 5; DX F39 at 6-7; DX F41

at 1; DX F47 at 1 (May 10), 4-8; DX F53 at 1, 16-21 (May 17); DX L3 at 35 (Fitzgerald); DX L8 at 27-28 (Quagliarello).

57. Respondents did not send their clients a copy of the Agreement or disclose its basic provisions. Tr. 685-87, 742-43 (Fitzgerald); Tr. 796-97 (Ashton); Tr. 861-62 (Quagliarello). Respondent Kennedy testified:

> **Question**: Mr. Kennedy, did you ever send a copy of this Final Settlement Agreement to any of the claimants in this action?
>
> **Respondent**: No. I had releases from them to sign whatever papers were necessary to speed it along so they get their money. Mike [Murphy] knew that and he was fine with it.

Tr. 1337; *see also* Tr. 1341 ("They didn't ask") (Kennedy); *but see* DX F2; DX F3 at 1-2; Tr. 1318 (Kennedy).

58. On April 28, 2008, Respondent Kennedy sent a letter asking the clients for written authorization to settle. DX F36 at 1; Tr. 1341-44, 1346; *see also* 1354-55 (Kennedy). Respondent Kennedy enclosed only the Release and an authorization to sign all paperwork, neither of which contained the settlement terms. Tr. 1354-55; *see also* Tr. 1341-44, 1346; DX F36 at 1. Respondent Kennedy described the enclosures as follows:

> I have enclosed individual settlement releases Inter-Con sent me. **You need to sign at the bottom of the page marked with the green tab and also the attached authorization** and either mail them **both** back to me in the enclosed envelope, fax them to me, e-mail them or simply e-mail

me saying you give me full authorization to sign whatever paperwork is necessary to effectuate the settlement in this case as discussed.

DX F36 at 1-6 (emphasis in original). The enclosed "authorization" was a slip of paper for the clients' to sign and return:

> I, _____ (print name) hereby give John Kennedy, and his law firm, Kennedy & Dolan, full power and authority to execute any and all paperwork for me to effectuate settlement in the Inter-Con arbitration.

DX F36 at 6; Tr. 1344-45 (Kennedy).

59. Respondent Kennedy concealed the settlement terms from the Inter-Con clients by sending them only copies of the Release without sending them copies of the Final Settlement Agreement or explaining its basic terms. DX F36. Respondent Kennedy testified:

> **Question**: Between April 2008 and May 2008, you had regular contact with your clients, correct?
>
> **Respondent**: Yes.
>
> **Question**: And you did not provide them with a copy of the Final Settlement Agreement, correct?
>
> **Respondent**: They didn't ask and they gave me full authority to sign what was necessary.
>
> **Question**: You did not, in your communications with your clients, tell them the final terms of the settlement agreement, correct?
>
> **Respondent**: The final amount, the 3[1]0,000?
>
> **Question**: The total settlement amount.
>
> **Respondent**: Correct.

Question: You did not tell them how many other claimants had agreed to settle this case either, did you?

Respondent: Again, that's similar – it was not material. In my opinion, it was not material.

Tr. 1340-41, 1364 (Kennedy).

60. Respondents' clients returned the requested paperwork without knowing the terms of the settlement. Tr. 685-86, 742-43 (Fitzgerald); Tr. 796 (Ashton); Tr. 861-62 (Quagliarello); DX F46 at 13-21 (May 10, 2008 signed release and authorization); DX F76 at 3; DX L2 at 110-14 (Ashton); DX L3 at 45 (Fitzgerald). Approximately 30 claimants did not respond to Respondent Kennedy's communications, and Respondent Kennedy and Inter-Con jointly asked the arbitrator to send final notices and dismiss non-responsive claimants, which he did. *See* DX H49; DX H50; DX H51.

61. On May 13, 2008, Respondent Kennedy told Inter-Con that Respondent Kennedy had received signed Releases or "written authority to sign all papers . . . from everyone [all the clients participating in the settlement]," and delivered the documents to Mr. Murphy. DX F49 at 2; *see also* Tr. 508-09, 516 (Murphy). The lawyers filed a joint motion to extend the stay until May 23, 2008. DX F48 at 9; DX F49 at 1, 4; DX H52 at 1.

62. On May 23, 2008, Respondent Kennedy and Mr. Murphy filed a joint motion with Arbitrator von Kann stating that the parties had entered into a private settlement of all claims, seeking "an Order dismissing with [] prejudice all claims in

this matter with each party to bears [sic] its own attorneys' fees and costs." DX F63 at 2.

63. On July 15, 2008, Respondent Kennedy went to Mr. Murphy's office and signed the Agreement on behalf of Respondents' clients. Answer at 17, ¶ 48; F83 at 6-18. The Final Agreement included 90 clients, and Inter-Con and Respondent Kennedy agreed to reduce the settlement amount from $320,000 to $310,000 (to account for the clients who were non-responsive and did not sign a release). Answer at 17, ¶ 47; DX G27 at 1-2; Tr. 511-12, 520-21 (Murphy). Respondent Kennedy signed each client's name to the Agreement (90 signatures), based on each client's individual, written, but inadequately informed authorization to sign paperwork on his or her behalf. DX F83 at 14-18; Tr. 1362-63 (Kennedy).

64. Arbitrator von Kann dismissed all the claimants from the arbitration. DX H50-H55 at 1; DX G3 at 1, 3; Tr. 509-10 (Murphy). Arbitrator von Kann never saw or reviewed the terms of the Agreement. Tr. 1339; 1379-80 (Mr. Kennedy understood that "no one reviewed [his] fees").

65. The Agreement required Respondents to obtain a court order of dismissal in the original *Fitzgerald* suit filed as a D.C. Superior Court case and Mr. Ashton's parallel arbitration reflecting the claims had settled. DX E75 at 4-5, ¶ 3; Tr. 519, 531 (Murphy).

66. On July 21, 2008, Respondent Kennedy filed a motion to withdraw the Ashton arbitration, which was granted. DX F81-82; Tr. 530-31 (Murphy). The

parties did not submit and the arbitrator did not review the Final Agreement. Tr. 521-22, 531-32 (Murphy).

67. In August 2008, Respondent Kennedy filed a motion for a consent order in the *Fitzgerald* Superior Court case. DX A55 at 1; Tr. 521-22 (Murphy). On November 4, 2008, the court granted the consent order, noting the arbitration had been dismissed with prejudice. DX A58 at 1; DX G18 at 1. The parties did not submit, and the court did not review the Final Agreement. Tr. 522 (Murphy).

F. <u>Settlement Funds Calculated and Disbursed</u>

68. On November 5, 2008, the day after the parties received the D.C. Superior Court order stating the case had been resolved, Mr. Murphy asked Respondent Kennedy to send him "the specific settlement amounts per claimant and also the amount that is payable to your firm." DX G19 at 1; Answer at 17, ¶ 49; *see* A58 at 2.

69. Respondent Kennedy applied a universal formula for each client who had viable claims, except for Mr. Ashton and Mr. Muse, to whom they paid the amount of their final paycheck, without interest. DX L11 at 30, 39; Tr. 1469-70, 1476 (Kennedy); Tr. 800-01 (Ashton). For the clients with viable claims, Respondent Kennedy applied a formula of $80 per month for each month they worked at Inter-Con. DX L11 at 29; *Id.* at 9 (Handwritten "$80"); Tr. 1390, 1395-96, 1472-73, 1475 (Kennedy). Respondent Kennedy did not consider the individual circumstances of each client (hourly rate, hours worked, individual claims), and told some, but not all, of the clients that the award represented a return of their union

dues. *See* DX L8 at 39 (Quagliarello); DX G24 at 4, 13-14; Tr. 1395-99, 1382, 1472-73, 1483-84, 1508-09 (Kennedy). Several clients received an additional $500 each because they were deposed during discovery. DX L11 at 9; Tr. 1462-63, 1479 (Kennedy). Respondent Kennedy paid the remaining clients, those whom Respondent Kennedy determined had no surviving claims, between $50 and several hundred dollars. DX L11 at 29, 31, 48; Tr. 1390, 1401-02, 1460, 1473-75 (Kennedy). Respondent Kennedy did not communicate the method of calculation to the clients clearly, consistently, or in writing. Tr. 1369 (Kennedy).

70. On November 10, 2008, Respondent Kennedy sent an email to the claimants telling them that the checks would be issued within 45-days and asking them to verify their mailing addresses. DX G22 at 1. Various clients, including Ms. Perry, asked questions about the settlement. Respondents never told them about the $310,000 lump-sum settlement, that Respondents were responsible for how the settlement would be apportioned and disbursed, that Respondents planned to take $210,000 from the settlement as their fee, what the other claimants were receiving, or how they calculated what each claimant would receive. DX G22 at 1; Tr. 1393, 1389-90 (Kennedy). Respondent Kennedy testified:

> **Question:** Who do you think [knew the total settlement amount]?
>
> **Respondent:** Well, again, I did have conversations with some, the lead plaintiffs, and somebody asked me what the final settlement amount they were told.
>
> **Question:** If somebody asked you?
>
> **Respondent:** Yeah.

Question: Ok. I thought you testified earlier nobody asked you.

Respondent: You know something, I don't have any specific recollections of like one particular person asking, but I do know that, if they asked me, I would have told them.

Question: When you signed this on their behalf, you had not at this point told them how much your fees would be out of the settlement amount, the 3[1]0,000, correct?

Respondent: Correct.

Question: You had not told them how many claimants were involved in the matter, correct?

Respondent: That is well in my opinion immaterial, it wasn't material.

Tr. 1363-64 (Kennedy); *see also* DX G20 at 1; DX L8 at 38-39; DX L3 at 49; Tr. 689-90; Tr. 709, 730-31, 747 (Fitzgerald); *see also* DX G24 at 5-6; Tr. 1393-95 (Kennedy).

71. On November 12, 2008, Respondent Kennedy sent Mr. Murphy a letter and a one-page list of clients setting forth the amounts to be paid to each client. DX G27 at 1-2. He instructed Mr. Murphy to make a check for attorneys' fees payable to Kennedy and Dolan for "[t]he remaining balance" in the amount of $209,913.32. *Id.* at 1. The 90 clients received a total of $100,086.68. *Id.* at 1-2; *see also* DX L11 at 29 (handwritten "$100,086.68"); Tr. 1480. Inter-Con issued individual checks made payable to each of the claimants per Respondent Kennedy's instructions. DX G25 at 1; Tr. 1480, 1489-90 (Kennedy). Respondents did not send this one-page list to their clients or otherwise notify them how much each claimant

received. Tr. 693 (Fitzgerald); Tr. 865-66, 912 (Quagliarello); Tr. 786-87; 796 (Ashton).

72. On December 31, 2008, based on Respondent Kennedy's instructions, Inter-Con delivered to Respondents' office the checks made payable to the clients in the amounts that Respondent Kennedy had calculated. DX G31 at 1-2.

73. That same day, Inter-Con delivered to Respondents a check made payable to Respondents in the amount of $209,913.32. DX G28 at 1-2; *see also* Stip. at 12, ¶ 52. Respondents did not calculate attorneys' fees and costs either as an hourly rate or as a 40% contingency. Respondents' fee, if calculated as 40% of the $310,000 settlement, would be $124,000. Answer at 21, ¶ 62; Stip. at 12, ¶ 53; *see also* Answer at 20, ¶ 59 ("Respondents admit they received $210,000 in fees, but deny that their fees for the case were limited by the referenced fee agreements, and therefore deny they were authorized to receive only $124,000 [40% of the $310,000 settlement]." Respondent Kennedy testified that they took $210,000 of the $310,000 settlement "as a reasonable fee, based upon the amount of costs we had and the number of hours over the eight-year period." Tr. 1484 (Kennedy); *see also* Tr. 1497 (Kennedy).

74. Respondents stated in their answer that "they informed each client of their fees." Answer at 21, ¶ 63. No documents corroborate that statement. *See* FF 47. No one, other than Inter-Con, knew that Respondents received $210,000 of the $310,000 settlement, including the clients or the arbitrator. Tr. 1380-81 (Kennedy: "No one reviewed my fees. I guess you could say – well, yeah."); FF 47-

50, 57, 59, 64-66. Two of Respondents' former clients who were the "lead plaintiffs" testified they were never told the amount of the settlement ($310,000) or the amount of fees Respondents collected ($210,000). FF 47.

75. Respondent Kennedy sent a final update letter, dated December 30, 2008, to each client with the check issued by Inter-Con made payable to that client. DX G32. They did not enclose the Final Agreement. *Id.* The three-page, single-spaced letter did not disclose any of the settlement terms. *Id.*; *see also* Tr. 1491-92 (Kennedy).

G. <u>General Trust Account Information</u>

76. At all relevant times, Respondents maintained a trust account and an operating account, and at least two personal accounts at Wachovia Bank. Answer at 21, ¶ 64; DX K24 at 24-1; Tr. 1550-51, 1554 (Dolan); Stip. at 12, ¶ 54.

77. Respondent Kennedy and Respondent Dolan both had access to their trust and operating accounts, and they had exclusive signatory authority on the accounts. Stip. at 12, ¶ 54; Tr. 1554-55 (Dolan). Respondents sometimes authorized their secretary to sign one of their names on checks paid from their trust account, or to endorse checks and deposit funds into the trust account. Tr. 1494, 1496 (Kennedy); Tr. 1552-53 (Dolan). Both Respondents disbursed funds from the trust account, but Respondent Dolan assumed primary responsibility for oversight of the trust account. DX A8 at 1; DX G25 at 1; DX J1 at 18-19; DX J2 at 14; DX J9 at 36; Tr. 1498-1501 (Kennedy); Tr. 1556-1557 (Dolan).

78. From at least January 2007 through September 2011, Respondents Kennedy and Dolan regularly deposited client funds into their trust account. Stip. at 12, ¶ 55; *see also* Tr. 1628 (Dolan).

79. Respondent Dolan testified that it was permissible for them to leave their earned attorneys' fees in their trust account as long as they withdrew the earned fees within the same "tax year" they were earned. Tr. 1581, 1624, 1627-29 (Dolan).

80. In June 2010, Disciplinary Counsel received notice from Wachovia Bank of an overdraft from Respondents' trust account. DX A5. Disciplinary Counsel docketed an investigation, and on at least five occasions subpoenaed or asked Respondents to provide their records of their trust account funds. DX A7 at 1-2 (July 23, 2010); DX A9 at 1 (September 23, 2010); DX A12 at 1-4 (February 1, 2011); DX A15 at 1-4 (August 13, 2013); and DX A18 at 1-2 (November 1, 2013). Respondents never provided such records. DX A11 at 1; DX A13 at 1; DX A14 at 1; DX A19 at 1-2.

81. From January 2007 through September 2011, Respondents failed to maintain complete records of client or third-party funds deposited into their trust account. Answer at 22, ¶ 66; Tr. 1582, 1589 (Dolan). For example, Respondents failed to keep:

> (a) a check register listing all transactions and a running balance, including the deposits and withdrawals, with the amount, date, source, and purpose or client matter;
>
> (b) individual client ledgers showing the amount of funds received, disbursed, and balance relating to each client matter; and

(c) records showing the regular reconciliation of bank statements.

Answer at 22, ¶ 66; Tr. 1582, 1589 (Dolan).

82. The only records Respondents maintained relating to the disbursement of client and third-party funds were disbursement sheets or cost sheet breakdowns that they kept in individual client files. *Id.*; DX R143; Tr. 1370-71 (Kennedy); Tr. 1572-76, 1580, 1582 ("I call a disbursement sheet a ledger."), 1612 (Dolan). The disbursement sheets set forth the total amount of the settlement, the amounts disbursed, including attorneys' fees, and the method of calculating the funds paid to Respondents, the client, and third parties. *See, e.g.*, DX R143 at 1-38. Even up to and through the conclusion of the hearing in this matter, Respondents did not maintain client ledgers for each individual matter, nor did they maintain *any* record for their trust account that chronologically shows deposits and disbursements. Tr. 1589 (Dolan).

83. When shown a check dated April 30, 2008, made payable to "Kennedy & Dolan" with a description of "Referral Fee Income $5,000," Respondent Dolan testified that she had "no idea what that means," and she did not have any records to show what client matter the payment related to. DX J4 at 16; Tr. 1673 (Dolan).

84. Respondents could not identify, on any given day, whose funds were held in their trust account, or explain the purpose of each disbursement. Tr. 1587, 1653 (Dolan). Respondent Dolan testified that the "way our system works . . . [a]ll of the checks are client checks that go in, get cleared, and then go out. So, in essence, the balance in the IOLTA should always be zero." Tr. at 1588-89, 1654 (Dolan).

Contrary to Respondent Dolan's testimony, Respondents' trust account balance was never zero. DX J (Trust Account Bank Records); Tr. 1653 (Dolan).

H. Respondents Withdrew $15,000 for Inter-Con Fees Before Receiving Funds Relating to the Inter-Con Matter

85. In December 2008, before Respondents received any funds from Inter-Con, Respondents authorized two checks from their IOLTA account made payable to Kennedy & Dolan for a total of $15,000, which they described in the check memo line as payment of Inter-Con fees.

Date	Check	Payee	Memo	Amount
12/02/08	#4292	Kennedy & Dolan	"Fees Inter-Con"	$10,000
12/23/08	#4282	Kennedy & Dolan	"Inter-Con Fee"	$5,000

Answer at 22, ¶ 67; DX J12 at 27, 28.

86. Respondents knew in December 2008 that they had not received or deposited any funds relating to the Inter-Con case into their IOLTA account. Answer at 22, ¶ 67; FF 91, *infra* (Inter-Con checks deposited Jan. 5, 2009); Tr. 1557, 1560, 1568 (Dolan).

87. As of December 1, 2008, Respondents had a balance of $1,026.96 in their operating account. On December 2, 2008, Respondents deposited the $10,000 Inter-Con fees along with two other checks for a total deposit of $13,317.00 into their operating account. Respondents did not deposit any additional funds into their operating account until December 4, 2008. Answer at 22, ¶ 68. Between December 1 and 3, 2008, Respondents withdrew $10,168.30 from their operating account for various expenses, including a $4,495.79 payment for rent and parking, and $679.08

payment to Sprint. Answer at 22-23, ¶ 69; DX K12 at 37-45. Without the $10,000 deposit identified as "Inter-Con" fees, Respondents would have had insufficient funds in the account to pay those bills.

88. Respondent Dolan testified that the $15,000 total disbursement in December 2008 designated as Inter-Con fees was earned attorneys' fees from a settlement in the Louanne Andrews case that had been deposited January 3, 2008. *See* DX J1 at 10-14; Tr. 1581. However, taken as a whole Respondent Dolan's testimony on this point is inconsistent, speculative, reliant on a partial (if not selective) memory, and therefore not credible when compared to the clear and convincing evidence, including from the memo lines of the relevant checks themselves, that the December 2008 disbursements were intended to relate, and did relate, to Inter-Con fees. For example, when asked directly by the Committee chair what she did or said to her assistant that would have led the assistant to disburse funds in December 2008 for the Louanne Andrews, Respondent Dolan testified: "I don't remember in this case." Tr. 1566. Similarly, while acknowledging and confirming that her assistant at the time (whose name she could not remember) would not have generated the December 2008 checks in question without her direction, review, and approval *(see, e.g.*, Tr. at 1560 and Tr. at 1564), Respondent Dolan equivocated by adding the entirely speculative remark, "Unless she made a mistake." Further undermining Respondent Dolan's testimony as to a source relationship between the December 2008 checks in question and a settlement in the Andrews case is the fact that Bank records show that, within a few months of the

Andrews settlement, Respondents made at least two unidentified withdrawals from the trust account for a total of $15,000. DX J3 at 7 (March 7, 2008 check for $10,000, "Partnership Distribution"); DX J4 at 16 (April 30, 2008 check for $5,000, "Referral Fee Income"). Respondent Dolan testified that she had "no idea" what the description "referral fee income" meant on the April 30, 2008 check, and that Respondents did not have any records to show the client matter or purpose of the disbursement. DX J4 at 16; *see also* DX J5 at 12 (May 8, 2008 check for $5,000, "Referral Fee Income"); Tr. 1673 (Dolan).

89. Respondent Dolan testified that her assistant mistakenly designated on the checks that the fees related to Inter-Con. Tr. 1562-63, 1578-79 (Dolan). Respondent Dolan also testified, however, that the assistant created and executed the checks designated as Inter-Con fees at Respondent Dolan's direction and with her approval. DX J12 at 28 (December 2 check), 27 (December 23 check); Tr. 1559, 1567, 1560-61, 1626-28, 1650-51 (Dolan); *see also* DX A14 at 1-2 (March 18, 2001 letter from Respondents to Disciplinary Counsel); Tr. 1553-54 (Dolan).

90. Respondent Dolan could not explain why or how the secretary would describe the checks made payable to Respondents as "Inter-Con" fees absent Respondents' instructions. Tr. 1562-63, 1569, 1581 (Dolan). In general, to write checks from the trust account, Respondents created a disbursement or cost sheets and gave the disbursement sheet to Respondent Dolan and/or the assistant checked the math and generated checks using QuickBooks. DX A14 at 1-2; Tr. 1579-80, 1592-95, 1602-03, 1607, 1623-24 (Dolan). After printing the checks, the assistant

gave Respondents the printed checks for their review and signatures, along with the disbursement sheet in the client file. *Id.* At times, Respondents authorized their assistant to sign Respondents' names on checks paid from their trust account, or to endorse and deposit funds into the trust account. DX A8 at 1; DX A14 at 2; Tr. 1494, 1496 (Kennedy); Tr. 1552-53, 1559-60 (Dolan). The assistant would not sign trust account checks without Respondents' instructions, review, and approval.

91. On January 5, 2009, Respondents deposited the $209,913.32 check from Inter-Con into their IOLTA account, which held client funds. Answer at 23, ¶ 70; DX J13 at 1; Tr. 1493, 1498 (Kennedy); Tr. 1615-17 (Dolan).

92. Respondents did not promptly withdraw what they designated as earned attorneys' fees. Between January 5 and February 20, 2009, Respondents withdrew $72,000 that they identified as attorneys' fees relating to the Inter-Con case without notice to or authorization from their clients. Answer at 23, ¶ 70.

Date	**Check**	**Payee**	**Memo**	**Amount**
01/05/09	#4287	Kennedy & Dolan	"Fees Intercon"	$25,000
01/12/09	#4288	Kennedy & Dolan	"Fees Intercon"	$20,000
01/21/09	#4293	Kennedy & Dolan	"Fees Intercon"	$5,000
01/26/09	#4295	William Farley[5]	"Atty Fee in Intercom"	$12,000

[5] William Farley, Esquire, filed a notice of appearance as Respondents' co-counsel in the Inter-Con arbitration. DX D44 at 1; Tr. 1515 (Kennedy). Respondents paid Mr. Farley $12,000 for fees he earned in the arbitration from the $210,000 in settlement they deposited into their IOLTA account. DX D44 at 1; DX E49 at 1; DX G27 at 1; DX G35 at 1-2; DX J13 at 30; Tr. 1515-18 (Kennedy); Tr. 1619 (Dolan).

02/20/09 #4305 Kennedy & Dolan "Fees Intercon" $10,000

Answer at 23, ¶ 70; DX J13 at 17, 24, 25, 29, 31; Tr. 1624-26 (Dolan).

93. Respondents paid themselves the remaining $138,000 of the $210,000 over the next eight months. After the February 20, 2009 check, Respondents did not identify on the face of the check that the payments related to attorneys' fees in the Inter-Con matter. Answer at 23, ¶ 71; Stip. at 13, ¶ 58. Between February 21 and October 15, 2009, Respondents wrote themselves 15 checks for "fees" from their trust account for a total disbursement of $138,000:

Date	**Check**	**Payee**	**Memo**	**Amount**
03/09/09	#4313	Kennedy & Dolan	"Fees"	$10,000
03/24/09	#4314	Kennedy & Dolan	"Fees"	$15,000
04/16/09	#4315	Kennedy & Dolan	"Fees"	$20,000
05/01/09	#4319	Kennedy & Dolan	"Fees"	$10,000
05/14/09	#4320	Kennedy & Dolan	"Fees"	$10,000
05/26/09	#4321	Kennedy & Dolan	"Fees"	$10,000
06/05/09	#4323	Kennedy & Dolan	"Fees"	$10,000
06/12/09	#4332	Kennedy & Dolan	"Fees"	$10,000
06/30/09	#4336	Kennedy & Dolan	"Fees"	$10,000
08/11/09	#4363	Kennedy & Dolan	"Fees"	$5,000
08/27/09	#4368	Kennedy & Dolan	"Fees"	$10,000
09/04/09	#4354	Kennedy & Dolan	"Fees"	$5,000
09/11/09	#4355	Kennedy & Dolan	"Fees"	$5,000

09/30/09	#4357	Kennedy & Dolan "Fees"	$5,000
10/15/09	#4372	Kennedy & Dolan "Fees"	$3,000

Answer at 23-24, ¶ 73; Stip. at 13, ¶ 59; Tr. 1650-51 (Dolan).

Respondent Dolan testified:

> I know I kept some type of running tally as to what of our fees would be transferred into the business before the end of the year. I don't remember whether it was a written document or something I had in my computer, or whether it was little sheets of paper. I don't remember. I do know that I would instruct the secretary to transfer such and such more.

Tr. at 1624, 1651-52 (Dolan).

94. During the time Respondents held funds they designated as Inter-Con fees in their trust account, Respondents repeatedly failed to maintain sufficient funds in their operating account to cover transactions. Stip. at 13-14, ¶ 60; Tr. 1652 (Dolan). For example, the bank charged Respondents overdraft fees on the following dates: March 6 ($70), May 13 ($140), June 4 ($70), September 25 ($70), and September 28 ($70), and September 29 ($35), 2009. Stip. at 13-14, ¶60; Answer at 25, ¶ 76. On each occasion, within days after the overdraft charges, Respondents deposited their claimed Inter-Con fees from the trust account into the operating account. Answer at 25, ¶ 76; Stip. at 14, ¶ 60. When asked why Respondents did not transfer the full amount of the earned Inter-Con fees into the operating account, Respondent Dolan testified: "I don't know, that was stupid." Tr. 1652 (Dolan).

95. Respondent Dolan testified that they did not disburse the full amount of the Inter-Con funds because she thought that attorneys' fees could remain in the trust account (with client funds) if they were disbursed within the same tax year:

> I didn't think I had to. I thought we could – we were a small practice that never really had a steady paycheck. It was always until the next settlement and here was an opportunity, as long as I got it out within the same tax year, of actually kind of having a line of credit or a paycheck, and that's why I didn't put it in all at once.

Tr. at 1627, 1581, 1629 ("I didn't know I couldn't leave it in there and transfer it over, as long as it was in the same tax year."), 1666 (Dolan).

I. Tax Liens

96. In January 2008, when Respondent Kennedy initiated settlement negotiations with Inter-Con, Respondents owed the Internal Revenue Service (IRS) taxes for the 2003 and 2005 tax years, and they had entered installment payment plans with the IRS. *See* Answer at 25, ¶ 77; DX A23 at 11-12 (court docket); DX A39 at 9-10 (2005 tax year); DX A39 at 2-4 (2003 tax year); Tr. 1501, 1504 (Kennedy); Tr. 1633, 1648 (Dolan).

97. For the 2003 tax year, the IRS had filed a lien in the Circuit Court for Montgomery County in the amount of $66,827.04, and Respondents had entered an installment agreement to pay their obligation. DX A39 at 4; DX A23 at 11-12 (court docket).

98. After February 2008, Respondents stopped making any payments as agreed for either tax year, 2003 or 2005. DX A39 at 5, 10.

99. On January 5, 2009, Respondents had failed to make payments for tax years 2003 and 2005 and had not filed tax returns for 2006 or 2007. DX A39 at 5, 10, 12, 21.

100. On January 30, 2009, the IRS appointed a representative to handle Respondents tax obligations for 2005 and to oversee Respondents failure to file tax returns for the 2006 and 2007 tax years. DX A39 at 10, 12, 21; Tr. 1646 (Dolan).

101. In March and April 2009, Wachovia Bank notified Respondents that the IRS had filed levies on two of Respondents' personal accounts relating to the tax unpaid taxes for 2003. The IRS seized a total of $5,067.89 from Respondents' personal accounts. Answer at 25, ¶ 78; DX A28 at 4-6; *Id.* at 9-10; Tr. 1636-37 (Dolan). In April 2009, the IRS released the 2003 tax year levy from accounts at Wachovia bank, and in May 2009, released the lien. DX A28 at 11, DX A23 at 11-12.

102. No evidence was presented at the hearing in this matter, however, that the IRS ever placed a lien on Respondents' operating account or sought to place such a lien. The IRS would have known about the existence of Respondents' operating account, however, given that Respondents wrote checks to the IRS from that account in October 2006 ($2,500 & $2,999.50), on February 21, 2007 ($2,500), June 27, 2007 ($2,500), January 30, 2008 ($1,859), April 30, 2008 ($2,336.84), July 28, 2008 ($2,242.25), October 30, 2008 ($1,921.92), January 30, 2009 ($2,242.24 & $112), and April 29, 2009 ($1,921.92). DX A23 at 17-27. Respondents' operating account was held at the same bank as Respondents' personal accounts.

103. The IRS lien on Respondents' personal accounts was released in April 2009, well before many of the withdrawals by Respondents from their trust account of what they claim were earned Inter-Con attorneys' fees. *See* DX A23.

J. Credibility Findings

104. Mr. Ashton, Mr. Fitzgerald, and Mr. Quagliarello were credible witnesses. They testified in a forthright manner, and their testimony was corroborated by contemporaneous records. *See* DX L2, L3, and L8. None of the witnesses sought any financial remuneration or had an interest in the outcome of these proceedings.

105. Respondents' statements in their Answer (DX A4) and their testimony at the hearing were not credible. As to Respondent Kennedy's credibility specifically—with regard to such central subjects as the existence and terms of any written fee agreements, whether Respondents were acting as class counsel or as counsel for a collective of individual clients, and why Respondents failed to inform clients of key terms of the settlement agreement—as discussed throughout the Report above and as summarized below, the Hearing Committee found Respondent Kennedy's statements relating to disputed facts to be inconsistent, uncorroborated, and contradicted by both contemporaneous documentary evidence and the testimony of former clients. The Hearing Committee did not find Respondent Kennedy to be credible. As to Respondent Dolan's credibility on, for example, the subjects of the operation of Respondents' trust account generally and on the source and purpose of the two checks totaling $15,000 (for "Fees Inter-Con" and "Inter-Con Fee") drawn

on Respondents' IOLTA account in December 2008, as also discussed above the Hearing Committee found Respondent Dolan's testimony to be inconsistent, speculative, and reliant on a self-admittedly incomplete memory. The Hearing Committee did not find Respondent Dolan to be credible.

106. Although in the instant credibility analyses with regard to Respondents Kennedy and Dolan the Hearing Committee has cited, in effect, a pattern of internally inconsistent, contradictory, and unreliable testimony and although it is a close question for both Respondents, the Hearing Committee has not made a formal determination that either Respondent provided intentionally false testimony. Ultimately, the Hearing Committee did not find that the evidence clearly or sufficiently supported such a conclusion. Further, Disciplinary Counsel did not argue for such a determination, either as an aggravating factor in connection with proposed sanctions or in any other context.

(1) <u>Existence and Terms of Written Fee Agreements</u>

107. Respondent Kennedy offered several inconsistent reasons for the failure to execute written fee agreements with each individual client who joined the arbitration:

(a) Respondent Kennedy said they relied on the existing written attorney-client agreements with Mr. Fitzgerald and Ms. Perry to establish "lead plaintiffs." Answer at 4, ¶ 4; *see also* Answer at 12, ¶ 31. But, at the disciplinary hearing, Respondent Kennedy testified "the agreements don't really mean much, they get the

ball rolling." Tr. 277; *see also* Tr. 200, 202, 204-05, 206-09, 225-27, 285-86, 302, 1240-41, 1285 (Kennedy).

(b) Respondents said the signed opt-in forms were (or replaced) the written attorney-client agreements. Answer at 9 ¶ 20; Tr. 200, 204-05, 211, 275-76, 401 ("the opt-in along with the attached notice that would have supplemented this or superceded it"), 1105-07, 1157, 1092-93 (Kennedy). Respondent Kennedy testified, "The fee arrangement would be changed by the opt-in. The opt-in changes and sets the standard and the reasonableness and the understanding of the fee." Tr. 1074, 1090-91, 1228 ("It was the opt-in that governed.") (Kennedy). The signed opt-ins did not explain the basis of the Respondents' fee (contingent or hourly) or the rate of the fee (the percentage or hourly amount) or how costs would be paid. DX B41; DX B42; Tr. 1386 (Kennedy).

(c) Respondent Kennedy said they did not need a fee agreement at all because it was a collective action. Tr. 276, 286-87, 300, 302 (Kennedy). Respondent Kennedy testified that a written fee agreement is unnecessary because "it's a group appeal that are represented by class counsel through the Lead Plaintiff." Tr. 276. (Kennedy).

(2) <u>Respondents' Position that They Acted as "Class" Counsel</u>

108. Respondent Kennedy testified that they did not tell their clients the settlement details because they were acting as "class counsel" and that they satisfied their obligation as class counsel by disclosing settlement details and obtaining settlement authorization from the "lead" claimants. *See, e.g.*, Tr. 1219-20 (asserting

he was "class counsel and the settlement discussions were dealt with the lead plaintiff"). Respondent Kennedy's testimony was inconsistent with Respondents' statements and conduct throughout the Inter-Con proceeding and was not credible. As detailed above in this Report, Respondent Kennedy knew that Respondents represented the Inter-Con claimants as individuals, that they were not acting as class counsel, and that no class was certified in the Inter-Con matter. *See, e.g.*, FF 11-14, 17, and 20 of this Report, *supra*.

(3) Respondents' Failure to Tell the Clients the Arbitration Settled for $310,000

109. When trying to explain why Respondents did not tell their clients the total settlement amount, Respondent Kennedy testified that: If the claimants asked what the final settlement was, "I told them. They didn't care." Tr. 1287, 1379 (Kennedy: "If they asked, I would have told them, yes. . . . [B]ut it wasn't material."). In the volumes of correspondence and updates sent to their clients, there appears to be no writing to support Respondents' claims that they told any client the case settled for $320,000. None of Respondent Kennedy's email responses to clients asking about the settlement corroborate his testimony, and the clients who testified, Mr. Fitzgerald, Mr. Ashton, and Mr. Quagliarello, contradict his testimony. *See* FF 47. The Hearing Committee finds that Kennedy's testimony on this point is not credible.

III. CONCLUSIONS OF LAW

The Hearing Committee concludes that Disciplinary Counsel proved by clear and convincing evidence that both Respondents violated Rules 1.2(a), 1.4(a), 1.4(b), 1.4(c), 1.5(b), 1.8(f), in Count I, and that Respondent Kennedy violated Rule 8.4(c)

in Count I. Disciplinary Counsel also proved by clear and convincing evidence that both Respondents violated Rules 1.15(a) (misappropriation and recordkeeping), 1.15(c), and 1.5(a) in Count II. However, Disciplinary Counsel did not prove by clear and convincing evidence the violations of 1.15(a) (commingling), 1.5(c), or 8.4(c) as charged in Count II. Clear and convincing evidence means "more than a preponderance of the evidence; [it] mean[s] evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Cater*, 887 A.2d at 24. Before discussing these conclusions of law in more detail, however, the Hearing Committee first addresses Respondents' Motions to Dismiss.

Respondents' Motions to Dismiss

Respondents' initial counsel filed motions to dismiss on February 24, 2017, and July 24, 2017, and Respondents' second counsel clarified the arguments for dismissal during a post-hearing conference held on April 23, 2018. Disciplinary Counsel filed oppositions to the motions on March 1, 2017 and July 28, 2017, and opposed dismissal during the April 23, 2018 post-hearing conference.

The Hearing Committee is not authorized to rule on a motion to dismiss, but includes a recommended disposition of the motion in its report to the Board, after hearing all of the evidence. *See* Board Rule 7.16(a); *In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991). Once a Contact Member has approved a petition, "the underlying purposes of the Board require that we proceed directly to a hearing on the merits rather than being detoured into questions of pleading and form." *In re Stanton*, 470 A.2d 281, 285 (D.C. 1983) (per curiam) (appended Board Report). Pursuant to

Board Rule 7.16(a), we address Respondents' motions to dismiss. The Hearing Committee recommends that the Board deny each of the motions to dismiss for the reasons discussed herein:

Motion to Dismiss of February 24, 2017, on the grounds that pursuant to Board Rule 2.9(b)[6], Disciplinary Counsel was not permitted to contact Respondents' clients in connection with the undocketed investigation of the Inter-Con representation without either Respondent's consent or approval from a Board member. Respondents argued that Disciplinary Counsel's docketed investigation arose from a 2010 IOLTA overdraft notice that resulted from an employee's unauthorized fund transfer from the firm's IOLTA and operating accounts dating back to 2009. The IOLTA overdraft occurred more than a year after the Inter-Con case settled and did not involve any Inter-Con settlement funds. Disciplinary Counsel did not seek permission from Respondents to contact their Inter-Con clients and acknowledged that she never sought Board permission to contact the clients. None of the contacted clients had any knowledge of or involvement in the 2010 overdraft, the office manager's theft that caused the overdraft, or any aspect of the

---

[6] Board Rule 2.9(b) states:

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

docketed IOLTA overdraft matter. Respondents contend that because Disciplinary Counsel was not permitted to contact their clients in connection with the undocketed investigation without their consent or approval from a Board member, the investigation that gave rise to the Specification of Charges was tainted and any charges that are dependent upon or supported by the cooperation and/or testimony of their clients in the Inter-Con matter should be dismissed.

Disciplinary Counsel opposed the motion, arguing that (1) Disciplinary Counsel's broad authority under D.C. Bar Rule XI, § 6(a)(2)[7] and Board Rule 2.9(a)[8] allows contact with any person with knowledge of pertinent facts or information related to a matter under investigation; (2) Respondents limited their attorney-client relationship with the clients to their claims against Inter-Con which were resolved with the 2008 final settlement agreement, thus the Inter-Con clients were former, not current, clients at the time of the 2010 disciplinary investigation, and Board Rule 2.9(b) is not applicable to former clients; and (3) Respondents litigated the issue before another Ad Hoc Hearing Committee Chair in their October 19, 2014 hearing on their motion to quash subpoena, and the argument that the Inter-Con financial

---

[7] D.C. Bar Rule XI, § 6(a)(2) provides Disciplinary Counsel with the power and duty "[t]o investigate all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of this Court which may come to the attention of Disciplinary Counsel or the Board from any source whatsoever, where the apparent facts, if true, may warrant discipline."

[8] Board Rule 2.9(a) states that: "[i]n the course of the investigation, Disciplinary Counsel may request complainant, respondent, or any other person who may have knowledge of pertinent facts to provide information concerning the matters under investigation."

transactions exceeded the scope of the docketed investigation arising from the June 2010 overdraft notice was rejected.

The parties addressed their arguments regarding Board Rule 2.9 before the Hearing Committee Chair in the April 23, 2018 post-hearing conference.

The Hearing Committee recommends denial of Respondents' February 24, 2017 Motion to Dismiss on the grounds that: Disciplinary Counsel's broad authority under D.C. Bar Rule XI, § 6(a)(2) allowed investigation of the Inter-Con representation; and that, consistent with the requirements of Board Rule 2.9(b), it would have been reasonable for Disciplinary Counsel to believe that Inter-Con clients had knowledge relevant to the matter under investigation in the docketed case concerning irregularities in the transfer of funds from Respondents' IOLTA and operating accounts. More specifically in support of this recommendation, the Hearing Committee determines that it would have been reasonable for Disciplinary Counsel to believe (1) that Inter-Con-related financial transactions were relevant to the investigation of the Respondents' improper deposits into the IOLTA account and related tax liens and (2) that Respondents' Inter-Con clients had pertinent information related to the disbursement of Inter-Con settlement funds.

Motion to Dismiss of July 24, 2017, requesting dismissal of the misappropriation and dishonesty charges arising out of Respondents' use of $15,000 in funds designated on two checks as "Fees Inter-Con" or "Inter-Con Fee" that were withdrawn from Respondents' IOLTA account in December 2008, and precluding

Disciplinary Counsel from pursuing, arguing, or presenting testimony of its investigator for the purpose of proving the misappropriation or dishonesty charges. Respondents assert that Disciplinary Counsel's theory of misappropriation is contradicted by exculpatory evidence. Respondents assert specifically that Disciplinary Counsel's investigator's March 2, 2017 memorandum (1) did in fact identify that funds belonging to Respondents from another representation in excess of $15,000, had been held in their trust account since April 2008, and (2) reported that those funds remained in that account in December 2008, when the two "Inter-Con fee" checks were drawn on it. Thus, Respondents argue, Disciplinary Counsel's assertions that it is unable to identify the source of funds for the two checks in question and that, therefore, the funds may be assumed to be funds belonging to a third party or a client (i.e., not to the Respondents) are inaccurate.

Disciplinary Counsel opposes the motion, arguing that "[e]vidence relating to these transactions must be presented and considered by the Hearing Committee and not litigated in pre-hearing motions." Opposition to July Motion to Dismiss, at 5. Disciplinary Counsel argues that Respondents took $15,000 from their trust account, designated as Inter-Con fees, before receiving the Inter-Con settlement funds. While Respondents deny the December 2008 $15,000 payment relates to Inter-Con fees, they did not explain the source of the funds during the investigation. The investigator's memorandum states that he was unable to reconstruct any of the thirteen clients' funds that were in the trust account during the relevant time period based solely on bank records and that Respondents kept inadequate records to track

the source of the funds. Thus, Disciplinary Counsel argues, there is no evidence that exculpates Respondents' taking $15,000 in Inter-Con fees from the trust account before they deposited the Inter-Con settlement check.

The Hearing Committee agrees with Disciplinary Counsel's argument that charges may not be dismissed through pre-litigation motions, and recommends denial of the Respondents' July 24, 2017 motion to dismiss.

Count I: The Record Before the Hearing Committee Establishes by Clear and Convincing Evidence that Both Respondents Violated Rules 1.2(a), 1.4(a), 1.4(b), 1.4(c), 1.5(b), 1.8(f), and Respondent Kennedy Also Violated Rule 8.4(c).

In Count I of the Specification of Charges in this matter, Respondents are both charged with violating the following Rules of Professional Conduct of the District of Columbia:

> a. Rule 1.2(a), in that Respondents failed to abide by their clients' decisions concerning the objectives of the representation, and/or failed to abide by their clients' decisions whether to accept an offer of settlement of a matter;
>
> b. Rule 1.4(a), in that Respondents failed to keep their clients reasonably informed about the status of the Inter-Con matter;
>
> c. Rule 1.4(b), in that Respondents failed to explain a matter to their clients to the extent reasonably necessary to permit the clients to make informed decisions regarding the representation;
>
> d. Rule l.4(c), in that Respondents failed to inform their clients of the substance of Inter-Con's settlement offer;
>
> e. Rule 1.5(b), in that Respondents failed to communicate in writing the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client would be responsible before or within a reasonable time after commencing the representation;

f. Rule 1.8(f), in that Respondents, while representing two or more clients, participated in making an aggregate settlement of claims for their clients without the informed, written consent from each client; and

g. Rule 8.4(c), in that Respondents engaged in conduct involving dishonesty.

Based on the foregoing factual determinations and as discussed below, the Hearing Committee has determined that each of the violations alleged in Count I of the Specification of Charges has been proven by clear and convincing evidence with respect to Respondents Kennedy and Dolan, except for the dishonesty charge pertaining to Respondent Dolan.

Respondents Violated Rule 1.5(b)

Rule 1.5(b) provides:

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

The Rule requires the lawyer to explain in writing the basis for the fees and the scope of the representation, so as to prevent misunderstandings and unnecessary disputes. *See, e.g.*, *In re Elgin*, 918 A.2d 362, 374 (D.C. 2007) (Respondent failed to enter into a formal fee agreement and instead had an informal oral agreement that caused confusion about the scope of the fee); Rule 1.5, cmt. [2] ("A written statement concerning the fee . . . reduces the possibility of misunderstanding"). Comment [1] to Rule 1.5 explains that "[i]n a new client-lawyer relationship . . . an understanding as to the fee should be promptly established, together with the scope of the lawyer's representation and the expenses for which the client will be responsible." The Rule

does not require a lengthy agreement, but it does require explaining the basis of the fee. Comment [1] to Rule 1.5 explains that "It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee." If "developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client." *Id.* While a writing is required, "[u]nless there are unique aspects of the fee arrangement, the lawyer may utilize a standardized letter, memorandum, or pamphlet explaining the lawyer's fee practices, and indicating those practices applicable to the specific representation." Rule 1.5, cmt. [2].

It is important to emphasize initially that the Inter-Con matter was a collective action, not a class action. Respondents clearly understood the Inter-Con matter to be a collective action. As such—as Respondents also understood and stated, during the pendency of the matter, to the Arbitrator and to the claimants—the Respondents had an attorney-client relationship with, and commensurate ethical obligations towards, each individual claimant who opted-in to the arbitration and chose Respondents as their counsel. FF 17.

In disregard and violation of the requirements of Rule 1.5(b), Respondents failed to provide all but three of their clients with any written statement about their fees until after they made an initial settlement offer to Inter-Con. Early in the case, between 2000 and 2004, Respondents executed contingency fee agreements with Mr. Fitzgerald, Ms. Perry, and Mr. Ashton, who became the named claimants in

litigation and arbitration. FF 8, *supra*. These agreements described the scope of the representation and provided for a 40% contingency fee. When over 100 additional clients opted-in to the arbitration in 2004, however, Respondents provided no explanation, written or otherwise, about the rate or basis of the fee. FF 15-16.

Similarly, when a new opt-in form was sent to potential claimants in July 2007 after Arbitrator von Kann replaced Arbitrator Harris, Respondents did not at that time provide the claimants who chose Respondent Kennedy to represent them in July and August 2017 with a written fee agreement. FF 25. Contrary to one of the explanations provided by Respondents at the hearing as to why they did not provide written fee agreements to their clients in the Inter-Con matter, these opt-in forms did not say anything about the rate or basis of Respondents' fee. FF 25. Not until January 26, 2008, about three days after they offered to settle the case with Inter-Con, did Respondents send fee agreements to their clients. FF 31. The timing of this communication was neither prompt nor reasonable, as required by the Rule.

Respondents have contended, through counsel, that a statement in the 2004 opt-in form that "attorneys will receive a part of any money judgment entered in favor of the class" constituted a written communication about the rate or basis of the fee. Although this brief statement may have suggested *where* the attorneys' fees would come from, nothing in this statement addressed or even hinted at the actual rate or basis upon which any such fee would be determined.

Respondents Violated Rules 1.2(a), and 1.4(a), (b), and (c)

Rule 1.2(a) obligates a lawyer to "abide by a client's decisions concerning the objectives of the representation . . . and . . . consult with the client as to the means by which they are to be pursued." It specifically requires that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." *See In re Hager*, Bar Docket No. 031-98, at 32 (BPR July 31, 2001) (quoting HC Rpt. at 11), *recommendation adopted in relevant part*, 812 A.2d at 904; *see also id.* at 33-34 ("Rule 1.2(a) requires that, at some point before the interests of clients are compromised in an agreement, they must be given the opportunity to make the decision."). Comment [1] to Rule 1.2 states that "[t]he client has ultimate authority to determine the purposes to be served by legal representation . . . ." "[Rule 1.2(a)] . . . is designed to preserve the client's right to accept or reject a settlement offer, and it requires that a client be able to exercise his or her judgment at the time a settlement offer is communicated." D.C. Bar Legal Ethics Op. 289 (1999); *see Elgin*, 918 A.2d at 375 (attorney settled client's action on terms which he negotiated and did not disclose to his client); *In re Wright*, 885 A.2d 315 (D.C. 2005) (per curiam) (attorney settled clients' personal injury cases without their knowledge or consent); *Hager*, 812 A.2d at 917-19 (attorney withheld material terms of a settlement offer from his clients).

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 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].

Rule 1.4(b) states than an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This Rule provides that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." Rule 1.4, cmt. [2]. The Rule mandates the attorney to "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." *Id*. In determining whether Disciplinary Counsel has established a violation of Rules 1.4(a) and (b), the question is whether Respondents fulfilled their client's reasonable expectations for information. *See In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001). In addition to responding to client inquiries, a lawyer must initiate communications when necessary. *See In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003).

Rule 1.4(c) requires that "[a] lawyer who receives an offer of settlement in a civil case . . . inform the client promptly of the substance of the communication." A communication triggers obligations under Rule 1.4(c) if it is "an offer to negotiate and arrive at terms upon which a matter in dispute may be resolved, rather than continuing the dispute." *In re Thyden*, Bar Docket No. 257-92, at 16 (BPR Feb. 7,

2002), *recommendation adopted*, 877 A.2d 129 (D.C. 2005). "It need not include a specific set of settlement terms." *Id*. A respondent may violate Rule 1.4(c) by failing to promptly inform their client of the substance of the settlement offer. *See In re Kline*, Bar Docket No. 407-05 at 20 (HC Rpt. Nov. 25, 2008), *recommendation adopted in relevant part* (BPR Dec. 22, 2009), *recommendation adopted in relevant part*, 11 A.3d 261 (D.C. 2011); *Thyden*, 877 A.2d at, 143-44 (D.C. 2005) (failed to communicate with client regarding settlement offer in a bankruptcy proceeding); *In re Steele*, 868 A.2d 146, 149 (D.C. 2005) (failure to inform client of a settlement offer in an employment discrimination case); *In re Corizzi*, 803 A.2d 438, 440 (D.C. 2002) (attorney failed to advise his client of two settlement offers until after he had rejected them).

With respect to settlement negotiations with Inter-Con, Respondents did not keep their clients reasonably informed about the status of—or, for some period, even about the *fact* of—those negotiations, as required by Rules 1.4(a) and 1.4(c). Respondents did not explain key aspects of those negotiations, as required by Rule 1.4(b). Respondents initiated settlement discussions with Inter-Con on January 23, 2008 and on that date made an initial settlement offer to Inter-Con of $700,000. On January 29, 2008, Inter-Con countered with a settlement offer of $150,000, including attorneys' fees. Respondents and Inter-Con continued to exchange counter offers, including a settlement offer of $310,000 made by Inter-Con on January 31, 2008, and countered on that same day by Respondents with an offer of $330,000. During this entire time, however—from January 23, when Respondents first made a

settlement offer, through January 31, and after—Respondents did not inform their clients that they were involved in settlement negotiations, let alone inform their clients as to any specifics on the offers and counter-offers that had been exchanged.

Despite having communicated with their clients several times during the relevant period, it was not until February 2, 2008, that Respondent Kennedy informed the clients that Respondents were engaged in settlement discussions with Inter-Con; even at that point, as supported by Respondent Kennedy's contemporaneous notes of and outline for his communications with clients, Respondents did not provide clients with any information on proposed settlement amounts or structure. Indeed, even after Respondent Kennedy and Inter-Con signed a Memorandum of Understanding (MOU) on February 5, 2008 to settle the matter for $320,000, Respondents never provided a copy of the MOU to their clients, never informed their clients of the total settlement amount or of the amount they would takes as their fee, and never informed their clients that they, the Respondents, were responsible for determining the amount to be disbursed to each client. By keeping each of their clients essentially in the dark throughout the settlement process—except, eventually, as to only a small subset of the totality of relevant information—Respondents violated Rule 1.4(a), (b), and (c).

The same conduct by the Respondents throughout the settlement negotiation process through which they violated their obligations to their clients under Rule 1.4 also violated their obligations under Rule 1.2(a) to abide by their clients' decisions as to whether to accept the offer of settlement. Throughout most of the settlement

negotiation process commencing January 23, 2008—during which process multiple offers and counter-offers were exchanged between Respondent Kennedy and Inter-Con—Respondents did not, and could not, abide by any client's decision as to whether to accept offers made by Inter-Con because Respondents simply did not tell their clients about the ongoing process until February 2, 2008. Even then, as noted above, Respondents did not inform their clients as to any proposed settlement offer amount. In an apparent attempt to justify this failure to abide by clients' decisions as to whether to accept a settlement offer, or to inform clients of material information about the settlement process and attorneys' fees, Respondent Kennedy, at the hearing, repeatedly relied on the assertion that these were matters about which the clients "didn't care." *See* FF 48, *supra*. This assertion of client indifference is itself a telling admission of indifference by Respondent Kennedy to the input and interests of his and Respondent Dolan's clients in the Inter-Con matter.

The clients in the Inter-Con matter were clients of both Respondent Kennedy and of Respondent Dolan. Respondent Dolan's misconduct involved significant communication failures, in violation of D.C. Bar Rules. Respondent Kennedy's misconduct, however, went beyond arguably passive communication failures, significant and violative as those failures are. Respondent Kennedy, as set forth above, deliberately concealed settlement information from their clients—and thereby deliberately violated Rules 1.2(a), and 1.4(a), (b), and (c)—because Respondent Kennedy believed that disclosing such information would put the settlement, and their receipt of fees, at risk. *See* FF 49, *supra*.

Respondents Violated Rule 1.8(f)

Rule 1.8(f) provides that a "lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients . . . unless each client gives informed consent in a writing signed by the client after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement." Comment [12] to Rule 1.8(f) explains that "this rule is a corollary of both Rules 1.7 and 1.2(a), and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted."

As clearly and convincingly established in this matter, and as discussed above, Respondents did not obtain informed consent—written or otherwise—from their multiple clients with regard to entering into settlement of the claims in the Inter-Con matter and, more specifically, did not advise each client as to what other clients would receive if the settlement offer was accepted. As but one example, Jermaine Fitzgerald—the lead claimant at the time of the Inter-Con settlement—testified at the hearing in this matter that, at the time the settlement was entered into, he was not informed by Respondents of the total amount of the settlement or how the money was distributed. FF 47, 48, *supra*.

The strict requirements of Rule 1.8(f) to obtain informed written consent from individual clients with respect to the specific nature and terms of an aggregate

settlement may be relaxed, or modified, somewhat in connection with class action settlements. In this regard, comment 12 to the Rule allows that, "[l]awyers representing a class of plaintiffs or defendants, or those proceeding derivatively, must comply with applicable rules regulating notification of class members, compensation of class counsel, and other procedural requirements designed to ensure adequate protection of the entire class." But, as established through the record in this matter and as discussed above, the Inter-Con matter was a *collective* action, not a *class* action. As specifically acknowledged by Respondent Kennedy in a June 2006 letter to the Arbitrator, the Inter-Con matter was "not a Rule 23 class action" and Respondent Kennedy, and his partner Respondent Dolan, "represent[ed] each individual who opt[ed] into the case." FF 17. Therefore, under Rule 1.8(f), Respondents were obligated to obtain informed written consent from each Inter-Con client before participating in the aggregate settlement of the Inter-Con claims; Respondents did not do so; Respondents violated Rule 1.8(f).

Respondent Kennedy Violated Rule 8.4(c)

Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

With respect to the misconduct charged in Count One of the Specification of Charges in this matter, Disciplinary Counsel established by clear and convincing evidence that Respondent Kennedy engaged in dishonesty, deceit, and misrepresentation in that he intentionally concealed the terms of the Inter-Con settlement from clients in order to assure Respondents' own receipt of

substantial attorneys' fees. After negotiating a $310,000 settlement on behalf of their clients, Respondents took $210,000 for themselves without telling their clients. FF 46-49, 71, 73-74. However, Disciplinary Counsel failed to establish by clear and convincing evidence that Respondent Dolan engaged in any deliberate or intentional dishonesty during the settlement calculations and disbursements; the evidence does establish by clear and convincing evidence, however, that Respondent Dolan engaged in the dishonest conduct in a negligent manner. Because Disciplinary Counsel established only that Respondent Dolan's dishonesty was no more than negligent, it failed to prove by clear and convincing evidence that Respondent Dolan violated Rule 8.4(c).

To each client, Respondent Kennedy disclosed only the amount the client could expect to receive and obtained permission to settle on that basis alone. FF 49-50. Respondent Kennedy testified that he understood that client objections to the settlement terms, including the amounts received by other claimants or the amount of the attorneys' fees, would put the settlement at risk. FF 49. So, Disciplinary Counsel proved that Respondent Kennedy deliberately suppressed that information to ensure that the settlement would be accepted—and the $210,000 fee would be paid—without objection. *Id.* (When asked by the Committee Chair why he did not inform his clients, Respondent Kennedy explained "disclosing to them the amounts of what everybody else got, what they got, the attorney's fees probably would have put [the settlement] at risk"). Disciplinary Counsel did not establish sufficiently or

specifically, however, that Respondent Dolan was an active participant during this time. *See* FF 68-75.

Disciplinary Counsel also proved that Respondent Kennedy violated Rule 8.4(c) by fraudulently and deceitfully obtaining the clients' authorization to settle the Inter-Con matter. Respondent Kennedy sent the clients authorization forms that allowed Respondent Kennedy to settle for what he believed was reasonable, and Respondent Kennedy told the clients that, if they did not sign, they would be ineligible for any money and "risk being excluded from the case." FF 40 (emphasis omitted). But this representation was false. Each individual client, in fact, had the ability to reject the proposed settlement and go to hearing on their claims. *See* Sections C, D, *supra*. Respondent Kennedy misled the clients to believe they had no option but to give him unchecked settlement authority. Then, after receiving this authority, Respondent Kennedy used it to take two-thirds of the settlement fund without the clients' knowledge. Again, however, Disciplinary Counsel did not establish sufficiently or specifically that Respondent Dolan was an active participant during this time. *See* Sections C, D, *supra* (citing only to Kennedy's testimony and to agreements signed only by Kennedy).

Count II: The Record Before the Hearing Committee Establishes by Clear and Convincing Evidence that Respondents Violated Rules 1.15(a), 1.15(c), and 1.5(a).

Respondents Violated Rule 1.15(a) Through Misappropriation

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.

Rule 1.15 does not use the word "misappropriation"; rather, it proscribes the conduct that constitutes misappropriation, that is, an "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 Anderson*, 778 A.2d 330, 335 (D.C. 2001) (alteration in original) (citations and quotations omitted); *see also In re Midlen*, 885 A.2d 1280, 1286 (D.C. 2005).

Misappropriation requires proof of two distinct elements. First, the unauthorized use of client funds. *See Anderson*, 778 A.2d at 335; *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) (citation and quotation marks omitted) (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."). Misappropriation is essentially a *per se* offense and does not require proof of improper intent. *See Anderson*, 778 A.2d at 335. Further, the performance of compensable legal services does not excuse taking a fee from funds that are not properly available for that purpose. *See, e.g.*, *In re Bach*, Bar Docket No. 071-05, at 16 (BPR Dec. 20, 2007), *recommendation adopted*, 966 A.2d

350, 350-52 (D.C. 2009) (unauthorized use element satisfied where the respondent took estate funds to pay his fee without prior court approval, even though the probate court later approved the amounts); *In re Berryman*, 764 A.2d 760, 766-67, 773-74 (D.C. 2000) (unauthorized use element satisfied even though the probate court ruled that the respondent had earned the fee she had taken without prior court approval).

The second element that must be proven to establish misappropriation under Rule 1.15(a) is the element of *mens rea*, that is, 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. *Id.* at 339 (citations omitted) (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"). 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. *Negligent* misappropriation occurs where "the unauthorized use was inadvertent or the result of simple negligence." *Id.* at 339 (citations omitted). 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)).

Disciplinary Counsel argues that Respondents were entrusted with the entire $310,000 settlement amount, and that Respondents engaged in the unauthorized use of entrusted funds when they withdrew those funds to pay personal expenses in January 2009, without obtaining client consent to do so. Respondents argue that Disciplinary Counsel failed to prove that the funds paid as legal fees were "entrusted" client funds because all of the clients knew that Inter-Con would pay Respondents' legal fees, and Respondents could not have misappropriated those funds because "[t]here is no client claim, no third-party claim, no claim from anyone who asserts a right to that money." R. Br. at 64-65. As discussed above, Rule 1.15(a) applies only to the "property of clients or third persons that is in the lawyer's possession in connection with a representation." As there is no question that Respondents received the fee payment "in connection with" their representation of the Claimants, we must determine whether Disciplinary Counsel proved that funds that Inter-Con paid to Respondents as legal fees were actually client property.

Respondents argue that Disciplinary Counsel's misappropriation analysis "rests on its faulty assumption that Kennedy and Dolan were not entitled to the attorney's fees they earned from successful resolution of the Inter-Con arbitration." R. Br. at 60. Respondents incorrectly characterize Disciplinary Counsel's argument, which recognizes that "Respondents may have had an interest in their clients' recovery (based on their fee agreements or based on a *quantum meruit* claim)" but argues that Respondents could not take settlement funds "without their clients' consent." Disciplinary Counsel's Brief (DC Br.) at 49. Disciplinary Counsel argues

that the settlement funds were "client funds" because the settlement agreement was between the Claimants and Inter-Con only, and it provided that "each side agrees to separately bear all of its own costs and attorneys' fees." *Id.* Disciplinary Counsel's quotation is incomplete. The settlement agreement provides that "each side agrees to separately bear all its own costs and attorneys fees . . . *except as set forth in Paragraph 4 below*." DX F83-9 (emphasis added). Paragraph 4 set forth the settlement payment terms, and provides, *inter alia*, that

- Inter-Con will pay $320,000 to "the Claimants and the law firm of Kennedy & Dolan."
- "Kennedy & Dolan agrees to provide counsel for Inter-Con with a listing enumerating the specific settlement amounts to be paid to each Claimant."
- "Kennedy & Dolan will also provide counsel for Inter-Con with the specific amount of the settlement proceeds that is payable to Kennedy & Dolan as attorneys' fees and costs."
- "The checks for each claimant will be made payable [to] the individual claimant."
- "The check to Kennedy & Dolan will be made payable to Kennedy & Dolan."
- "All the checks will be delivered to the law offices of Kennedy & Dolan."

Id. at 9-10. Thus, the settlement agreement contemplated that Kennedy & Dolan would provide Inter-Con with the specific amounts payable to each Claimant in settlement, and to Kennedy & Dolan as legal fees. However, the settlement agreement does not specifically identify the amount due to each Claimant individually, or all Claimants generally, nor does it identify the amount due to

Kennedy & Dolan as legal fees. Neither of the parties cited a case that has addressed the precise facts found here, i.e., a situation where the settlement agreement provides that the defendant will pay out the entire settlement amount to the clients and the clients' lawyers, in amounts to be determined by the clients' lawyers at a later date.

In the absence of direct precedent analyzing these settlement terms, we consider that the economic substance of the settlement agreement here is the equivalent of a settlement check jointly payable to a lawyer and client. There, each party on the check has an interest in the settlement proceeds, and the funds must be treated as client property until there has been an accounting and a severance of interest in the funds. *See In re Lee*, 95 A.3d 66, 75 (D.C. 2014). We see no reason to treat these settlement funds differently than other settlement funds received by a lawyer from which legal fees will be paid: the entire settlement amount is client property, and the lawyer cannot take his or her fee without client consent. *See* Rule 1.15(c) (requiring that clients be notified when a lawyer receives funds in which the clients have an interest). In reaching this conclusion, we rely on *In re Haar*, where the Court distinguished between a lawyer's right to be paid for services rendered from a lawyer's entitlement to particular funds:

> it is important to keep clearly in mind the distinction between a right to payment and a right to particular property. When a lawyer performs legal work for another, the client of course has an obligation to pay the lawyer's fee. But absent agreement or a statutory lien, the lawyer has no right to any particular property of the debtor-client, including the proceeds of litigation. The lawyer as an unsecured creditor has no intrinsic right of self-help, and even where a specific property interest

> — a charging lien — is created, the right to self-help is strictly limited by law and, in the lawyer's case, by the rules of professional conduct.

698 A.2d 412, 424 (D.C. 1997). Thus, the $210,000 Respondents took for themselves from the overall settlement and deposited in their IOLTA account on January 5, 2009, were "client funds" under Rule 1.15(a). While Respondents may have had an interest in their clients' recovery (based on fee agreements—to the extent they existed—or based on a *quantum meruit* claim) those funds were nonetheless *client* funds. *See id.* (a lawyer is an unsecured creditor who has no right to self-help). Without their clients' consent, Respondents could not use these funds as fees. And, as Respondents knew, they did not have their clients' consent.

Respondents did not have their clients' consent or authorization to take the funds as fees because, as discussed above, Disciplinary Counsel proved by clear and convincing evidence that Respondent Kennedy deliberately withheld the material terms of the settlement with Inter-Con from their clients, including the fact that they were arrogating to themselves two-thirds of the settlement as their legal fees. Disciplinary Counsel also proved by clear and convincing evidence that Respondent Kennedy deliberately withheld this information to avoid putting the settlement, and their receipt of attorneys' fees, at risk. Disciplinary Counsel did not establish by clear and convincing evidence, however, that Respondent Dolan was an active participant in the deliberately dishonest withholding of the material terms of the settlement. *See* FF 68-75, *supra*.

Respondents have asserted that they obtained authorization from Jacqueline Perry, an initial lead plaintiff, to take their fees. At the time of the actual settlement,

however, Jermaine Fitzgerald had been substituted for Ms. Perry as lead plaintiff and Mr. Fitzgerald testified that Respondents shared *none* of the settlement details with him. Moreover, even if Respondents had obtained a named plaintiff client's consent to take their fees, Respondents failed to gain authorization from all the individual clients, as they were required to do.

In addition to knowing that the $210,000 in question were not appropriately client-authorized and consented-to attorneys' fees, Respondents treated these funds as their own. As noted, on January 5, 2009, Respondents deposited the $209,913.32 check from Inter-Con into their IOLTA account, which held client funds. Answer at 23, ¶ 70; DX J13 at 1; Tr. 1493, 1498 (Kennedy); Tr. 1615-17 (Dolan). Between January 5 and February 20, 2009, Respondents withdrew from the IOLTA account $72,000 that they identified as attorneys' fees relating to the Inter-Con case, without notice to or authorization from their clients. Answer at 23, ¶ 70. Between February 21, and October 15, 2009, Respondents wrote themselves an additional 15 checks for "fees," totaling $138,000, from their IOLTA account. FF 93. Disciplinary Counsel clearly established that, through his dishonest conduct, Respondent Kennedy knew that the firm was taking unauthorized fees, and that he intentionally misappropriated the $210,000 in fees.

Disciplinary Counsel offered minimal evidence, however, regarding Respondent Dolan's role in the misappropriation or her intent level. Respondent Dolan testified that she knew about the final settlement and that she instructed her assistant to transfer the funds from the firm's IOLTA to the business account.

Respondent Dolan also testified that she believed the $210,000 were attorney fees, based on her review of the documents that Respondent Kennedy crafted. Tr. 1614-15 (Dolan). Respondent Dolan assumed primary responsibility for oversight of the firm's trust account and she testified that her procedure was to review checks written by her assistant that were issued from the IOLTA to ensure the math was correct (Tr. 1552-54, 1593-95, 1620-24 (Dolan)), but Respondent Kennedy handled the client communications.

Where Disciplinary Counsel establishes the first element of misappropriation (unauthorized use), but fails to establish that the misappropriation was intentional or reckless, "'then [Disciplinary] Counsel proved no more than simple negligence.'" *Anderson*, 778 A.2d at 338 (quoting *In re Ray*, 675 A.2d 1381, 1388 (D.C. 1996)). "Negligent misappropriation is an attorney's non-intentional, non-deliberate, non-reckless misuse of entrusted funds or an attorney's non-intentional, non-deliberate, non-reckless failure to retain the proper balance of entrusted funds. Its hallmarks include a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded." *In re Abbey*, 169 A.3d 865 (D.C. 2017) (citations omitted). Negligent misappropriation generally occurs where a respondent is mistaken as to a question of law or fact or where the misappropriation occurred as a consequence of the respondent's disorganization or sloppy bookkeeping.

Here, Disciplinary Counsel's theory of intentional misappropriation is premised on both Respondents' dishonesty. But Disciplinary Counsel failed to establish by clear and convincing evidence that Respondent Dolan participated in the dishonest misconduct. As we explain, *infra*, Disciplinary Counsel did prove by clear and convincing evidence that Respondent Dolan engaged in improper recordkeeping, but failed to prove that her recordkeeping resulted in commingling of entrusted funds. The Hearing Committee is aware of the potential for criticism that, with respect to the Hearing Committee's findings on this charge, Respondent Dolan is benefiting from the confused state of both her recordkeeping and of her testimony in this matter. Based on the above findings, however, the Hearing Committee concludes that as to Respondent Dolan, Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent Dolan intentionally misappropriated funds or acted with reckless disregard with respect to the clients' entrusted funds. Disciplinary Counsel established only that Respondent Dolan had a good-faith, mistaken belief that she was authorized to take attorney fees out of the trust account and that she had poor record-keeping. Disciplinary Counsel's clear and convincing evidence established only that Respondent Dolan engaged in no more than simple negligence.

The Hearing Committee finds that both Respondents Kennedy and Dolan misappropriated the total of $210,000 in client funds, and that Disciplinary Counsel proved by clear and convincing evidence that Respondent Kennedy engaged in

intentional misappropriation, while proving Respondent Dolan's misappropriation was negligent.

Separate from the misappropriative conduct by Respondents proven by clear and convincing evidence as discussed immediately above, Disciplinary Counsel has also argued in this matter that Respondents "may have engaged in other misappropriations" of client funds when, in December 2008, before they received any funds from the Inter-Con settlement, they authorized two checks from their IOLTA account made payable to Kennedy & Dolan for a total of $15,000 and described in the check memo line as "Fees Inter-Con" and "Inter-Con Fee.". DC Br. at 55. When these checks were written, Respondents knew that they had not received or deposited any funds relating to the Inter-Con case into their IOLTA account. Respondents deposited one of these checks, for an amount of $10,000, into their operating account on December 2, 2008. Without this $10,000 of falsely designated "Fees Inter-Con," Respondents could not have withdrawn enough money from their operating account to meet the over $10,000 in expenses, which they paid from the operating account between December 1 and December 3, 2008. Respondent Dolan's testimony that the two checks totaling $15,000 disbursed from the IOLTA account in December 2008 and designated as Inter-Con fees were actually earned attorneys' fees from a settlement in another case, deposited in January 2008, was simply not credible in light of the totality of the evidence on this issue. Although Disciplinary Counsel's second theory of misappropriative conduct by Respondents has some apparent merit, Disciplinary Counsel did not prove at the hearing that the $15,000

withdrawn by Respondents from their IOLTA account in December 20008 actually were funds of some other (i.e., non-Inter-Con) client or clients. Perhaps ironically, Disciplinary Counsel's failure of proof on this point is likely attributable to Respondents' very poor record-keeping practices. Nonetheless, Disciplinary Counsel did not meet its burden of proof on this second theory of misappropriation.

Commingling Violation of Rule 1.15(a) Not Proven

As noted, Respondent Dolan testified that the two "Inter-Con fees" checks drawn on their IOLTA account in December 2008 actually represented earned attorneys' fees from another case deposited in January 2008. If believed, this explanation would raise significant concerns that, by keeping earned attorneys' fees in a client trust account for nearly a year, Respondents had engaged in conduct constituting commingling under Rule 1.15(a). But, as also noted and as detailed in the findings of fact, Dolan's testimony on this point was not credible. As further noted, however, the record does not establish that, during the time period relevant to the commingling charge, Respondents' funds and client funds were in the IOLTA account at the same time. Because Disciplinary Counsel failed to establish by clear and convincing documentary evidence the specific dates and amounts of the alleged intermingling of the Respondents' funds with client funds in the IOLTA, the commingling charge has not been proven. Disciplinary Counsel failed to establish by clear and convincing evidence that Respondents violated Rule 1.15(a) (commingling).

Respondents violated Rule 1.15(a) by failing to keep and maintain complete records of entrusted funds

Rule 1.15(a) also requires that lawyers keep "complete records of . . . account funds and other property" and preserve them "for a period of five years after termination of the representation." *See In re Edwards*, 990 A.2d 501, 522 (D.C. 2010) (appended Board Report).

The *Edwards* decision explained that "Financial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" 990 A.2d at 522 (quoting *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (per curiam) (finding Rule 1.15(a) and R. XI, § 19(f) violations)). "The purpose of the requirement of "complete records is so that 'the documentary record itself tells the full story of how the attorney handled client or third-party funds' and whether, for example, the attorney misappropriated or commingled a client's funds." *Edwards*, 990 A.2d at 522; *see also In re Pels*, 653 A.2d 388, 396 (D.C. 1995) (finding Rule 1.15(a) violation when attorney showed a "pervasive failure" to maintain contemporaneous records accounting for the flow of client funds within various bank accounts). Thus, "[t]he records themselves should allow for a complete audit even if the attorney or client is not available." *Edwards*, 990 A.2d at 522.

Rule 1.15(a) does not include a description of the types of documents that should be maintained to meet the recordkeeping requirements. The Court in *Clower*, however, cited the Model Rule on Financial Recordkeeping, adopted by the

American Bar Association in 1993, as "list[ing] in detail the records a lawyer should keep." *Clower*, 831 A.2d at 1035. This list includes:

> (1) receipt and disbursement journals containing a record of deposits to and withdrawals that identifies the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;
> (2) subsidiary client ledgers that show for each separate client the source of funds deposited, the names of all persons for whom funds are held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed;
> (3) retainer and compensation agreements;
> (4) accountings to clients or third persons showing the disbursement of funds to them or on their behalf;
> (5) bills for legal fees and expenses rendered to clients;
> (6) records showing disbursements on behalf of clients;
> (7) checkbook registers or check stubs, bank statements, records of deposit, and prenumbered canceled checks or their equivalent;
> (8) reconciliations of the accounts; and
> (9) copies of portions of client files necessary for a complete understanding of the financial transactions.

ABA Model Rule on Financial Recordkeeping (adopted by ABA House of Delegates Feb. 9, 1993).

Respondents did not comply with the *Clower* record requirements in that they failed to maintain a general ledger for the funds deposited in and withdrawn from their trust account and failed to maintain client-specific ledgers for funds received from or on behalf of clients. Although Respondent Dolan generally dealt with the administration of the trust accounts (FF 4), Respondent Kennedy shared signatory authority on the firms' trust and operating accounts and both Respondents disbursed funds from the trust account and both authorized their secretary to sign their names

on checks deposited into the account as well as endorse checks deposited into it. (FF 77). Thus, the Hearing Committee concludes both Respondents were required to comply with the recordkeeping requirements of Rule 1.15(a). Respondent Dolan testified that the only relevant records the firm had were the bank's statements she accessed from the computer copies of the checks, and the individual disbursement sheets Respondents kept in the individual client files. Respondents did not track or keep independent records of the source or purpose of specific deposits and withdrawals from the trust account. Disciplinary Counsel established by clear and convincing evidence that Respondents violated Rule 1.15(a) by failing to keep and maintain sufficient records of entrusted funds.

Respondents violated Rule 1.15(c) by Failing to Promptly Notify Clients that They Had Received Funds in Which the Clients Had an Interest

Rule 1.15(c) provides in part that

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

As discussed above with respect to the Rule 1.15(a) misappropriation charge, and as is the case with other settlement funds received by a lawyer from which legal fees will be paid, the entire amount of the settlement check received by Respondents from Inter-Con and deposited by Respondents in their IOLTA account was client property, from which Respondents could not take their fee without client consent. As also discussed above, however, Respondents did not receive client consent; they kept each of their clients in the Inter-Con matter in the dark as to the amounts to be received by each of their other Inter-Con clients through the settlement, as to the

total settlement amount, and as to the amount Respondents had determined to appropriate as "attorneys' fees." Respondents violated Rule 1.15(c) when they failed to notify their clients of the entire amount of $320,000 received in settlement from Inter-Con, including the $210,000 subsequently misappropriated by Respondents as "attorneys fees."

Respondents Violated Rule 1.5(a) by Charging an Unauthorized, and Therefore Unreasonable Fee in the Inter-Con matter

Rule 1.5(a) provides that

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

Generally, under Rule 1.5(a), "an attorney should not acquire 'a greater interest in the outcome of the litigation than his clients.'" *In re Martin*, 67 A.3d 1032, 1041 (D.C. 2013) (quoting *Attorney Grievance Comm'n of Maryland v. Korotki,* 318 Md. 646, 569 A.2d 1224, 1233 (1990)). Thus, a fee arrangement that

gives a respondent over a 50% interest in the outcome of litigation violates Rule 1.5(a). *Id.* at 1042. Even the client's agreement "to the [amount of the fee] does not relieve the attorney from the burden of showing that the amount agreed upon was fair and reasonable.'" *Id.* (quoting *Korotki*, 569 A.2d at 1234).

Although the Court did not decide whether an *ex post facto* fee reduction can transform an otherwise unreasonable fee into a reasonable one, the Court found that even after *Martin* applied a discount, the resulting fee equal to 47% of the recovery "exceeds the outer limits of reasonableness." *Id.* The Court also found that the reasonableness of a respondent's fee must be considered in light of fees paid to additional counsel in the litigation. Thus, even if *Martin*'s fee had been reasonable on an individual basis, it became unreasonable when considered with the fees charged by local counsel. *Id.* at 1042-43 (the fees collectively totaled 67% of the recovery, which "borders on the unconscionable" and also violates the principle of Rule 1.5(e) (fee division between lawyers must be reasonable)).

Whether Respondents might have been entitled to a reasonable fee in the Inter-Con matter for work done prior to any unethical conduct is entirely moot here. Respondents were not entitled to exact *any* fees from their clients' settlement—let alone 67% of the settlement ($210,000 out of $310,00—without their clients' knowledge and authorization). *See Hager*, 812 A.2d at 923 ("where an attorney violates his or her ethical duties to the client, the attorney is not entitled to a fee for his or her services") (citation omitted); *In re Waller*, 524 A.2d 748 (D.C. 1987) (lawyer terminated by client collected an excessive fee when he negotiated a

settlement offer without the authority or knowledge of the client, and then claimed one-third of the proceeds based on the parties' earlier one-third contingency fee agreement). Under the circumstances proven in this matter, Respondents collection of 67% of their clients' settlement in attorneys' fees crossed the border from unethical to unconscionable behavior.

Respondents argued "that the $210,000 paid by Inter-Con in a global settlement to 'Kennedy & Dolan as attorneys' fees and costs,'" was reasonable because the amount was less than 1/3 of the lodestar hourly rate that Respondents earned and were entitled to under the FLSA fee-shifting statute. R. Br. at 64 & n.47 (citing *Anderson*, 578 F.3d at 542 ("it is absolutely permissible to spend $100,000 litigating what is known to be a $10,000 claim if that is a reasonable method of achieving the result"); *McGuffey v. Brink's, Inc.*, 598 F. Supp. 2d 659, 674, 676 (E.D. Pa. 2009) (awarding $389k in attorney's fees and $28k in costs for case with $170k recovery). Even if Respondents' fees were reasonable under the lodestar hourly rate, the Hearing Committee agrees with Disciplinary Counsel that the FLSA fee-shifting statute did not apply to this settlement. First, there was no judgment entered under FLSA from which attorneys' fees could be independently reviewed and awarded. 29 U.S.C. § 216(b) ("The court in such action shall, *in addition to any judgment awarded* to the plaintiff or plaintiffs, allow a reasonable attorney's fee") (emphasis added). Additionally, Respondents waived attorneys' fees, and confirmed to the arbitrator that the parties had privately settled, with each party to "bear[] its own attorneys' fees and costs." DX F63 at 2; *See* DX E75 at 4-5 (Final Agreement).

Because Respondents did not seek a separate fee award from the arbitrator and waived attorneys' fees, they effectively paid themselves from the clients' settlement funds without oversight or authorization from either the arbitrator or the clients.

By taking $210,000 for attorneys' fees from the $310,000 settlement in the Inter-Con matter without the knowledge or authorization of their clients, and absent approval or oversight of the arbitrator, Respondents charged an unreasonable fee in violation of Rule 1.5(a).

Violation of Rule 1.5(c) Not Proven

Disciplinary Counsel did not brief this violation. Therefore, the Hearing Committee will not engage in surmising what specific conduct by Respondents is alleged to have violated this rule. Under these circumstances, the Hearing Committee determines that no violation of Rule 1.5(c) has been proven in this matter.

Violation of Rule 8.4(c) Not Proven

Regarding the charge of violation of Rule 8.4(c) in Count II of the Specification of Charges in this matter, Disciplinary Counsel's theory of violation is that the Respondents engaged in "serious dishonesty" by using their trust account to hide funds from the IRS. Disciplinary Counsel argues that the evidence introduced at the hearing establishes that Respondents dishonestly kept earned Inter-Con fees in the trust account to prevent these fees from being subject to IRS tax liens. This is a serious and significant charge. However, although the theory propounded by Disciplinary Counsel may, more likely than not, reflect Respondents' motive and

reason for maintaining what they viewed as Inter-Con fees in their trust account, the Hearing Committee finds that Disciplinary Counsel has not marshaled clear and convincing evidence to prove this theory. The Hearing Committee's determination on this count is not based on crediting any testimony by Respondents at the hearing. Rather, although Disciplinary Counsel may have shown correlation between Respondents' IRS obligations and Respondents' handling of what they viewed as earned Inter-Con fees, Disciplinary Counsel has not shown—by clear and convincing evidence—causation between Respondents' IRS obligations and their handling of the Inter-Con fees. Some further measure of evidence—whether, as Respondents' counsel suggest in their Brief, through Respondents' accountants, through an IRS witness, through an expert, or otherwise—was necessary for Disciplinary Counsel to meet its burden of proof on this count.

IV. RECOMMENDED SANCTION

In this case, Disciplinary Counsel contends that Respondents engaged in multiple acts of serious misconduct, including intentional misappropriation and dishonesty for pecuniary gain for which they should be disbarred. Disciplinary Counsel argues in the alternative, that Respondents receive a three-year suspension with a fitness requirement. Disciplinary Counsel also contends that Respondents should be required to disgorge $85,913.32 of fees with interest, representing the amount of fees collected in excess of the 40% contingency fee originally agreed to by the named claimants, Mr. Fitzgerald, Ms. Perry, and Mr. Ashton, but that the

funds should be paid to the D.C. Bar's Client Security Fund rather than reimbursed to the individual clients.

Respondents contend that, in the event the Hearing Committee accepts Disciplinary Counsel's theory of misappropriation, it should conclude it was the result of simple negligence. If any other Rule violations are found, Respondents assert that the appropriate sanction is reprimand or informal admonition.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or otherwise [ ] be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the

conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

B. Presumptive Sanction of Disbarment for Intentional Misappropriation

The law regarding misappropriation is clear and consistent: absent "extraordinary circumstances," disbarment is the presumptive sanction for intentional or reckless misappropriation. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc); *In re Hewett*, 11 A.3d 279, 286 (D.C. 2011); *see also In re Mayers*, 114 A.3d 1274, 1279 (D.C. 2015) ("'In virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence.'") (quoting *Addams*, 579 A.2d at 191). The Court further held that "it is appropriate . . . to consider the surrounding circumstances regarding the misconduct and to evaluate whether the mitigating factors are highly significant and [whether] they substantially outweigh any aggravating factors such that the presumption of disbarment is rebutted." *Addams*, 579 A.2d at 195. The Court recognized that extraordinary circumstances are present when a respondent is entitled to mitigation under *In re*

Kersey, 520 A.2d 321, 326 (D.C. 1987), but the Court warned that "mitigating factors of the usual sort" are not sufficient to rebut the presumptive sanction of disbarment, and "[o]nly the most stringent of extenuating circumstances would justify a lesser disciplinary sanction." *Addams*, 579 A.2d at 191, 193. Accordingly, once misappropriation involving more than simple negligence has been established, the inquiry turns to whether sufficient mitigating factors rebut the presumption of disbarment. *Anderson I*, 778 A.2d at 337-38 (citing *Addams*, 579 A.2d at 191).

The Hearing Committee finds that while both Respondents Kennedy and Dolan misappropriated the total of $210,000 in client funds, Disciplinary Counsel only proved that Respondent Kennedy engaged in intentional misappropriation; the Hearing Committee finds that Disciplinary Counsel established Respondent Dolan's misconduct in connection with this misappropriation charge resulted from negligence. Disciplinary Counsel established by clear and convincing evidence that Respondent Kennedy engaged in dishonest conduct and by knowingly taking unauthorized fees, and that he intentionally misappropriated the $210,000 in fees. Respondent offered no mitigating factors to rebut the presumption of disbarment. We recommend that Respondent Kennedy be disbarred for intentional misappropriation.

In addition to the dishonest misappropriation in violation of Rules 1.15(a) and 8.4(c), the Hearing Committee concludes that Respondent Kennedy also violated Rules 1.2(a), 1.4(a), (b) and (c), 1.5(a) and (b), 1.15(a) (recordkeeping), 1.15(c), and 1.8(f). In the event the Court ultimately determines that Respondent Kennedy's

misappropriation was negligent, rather than reckless or intentional, the Hearing Committee recommends a three-year suspension with fitness based on the deliberate nature of Respondent's dishonesty in connection with the communication and collection of the Inter-Con fees, in addition to these additional Rule violations.

Disciplinary Counsel argues for an alternative sanction of a three-year suspension with a fitness requirement. DC Br. 59-61, 63; DC Reply Br. 14. The range of sanctions for comparable misconduct is an eighteen-month suspension to a three-year suspension. *See In re Midlen*, 885 A.2d 1280, 1291-92 (D.C. 2005) (eighteen-month suspension for negligent misappropriation, failure to render a timely accounting, dishonesty toward the client, and failure to follow the client's direction); *In re Boykins*, 999 A.2d 166, 177-78 (D.C. 2010) (two-year suspension with fitness for negligent misappropriation, false statements to Disciplinary Counsel during its investigation, failing to keep records of the handling of entrusted funds, and failing to promptly pay third parties); *In re Kline*, 11 A.3d 261, 267-68 (D.C. 2011) (appended Board Report) (three-year suspension for failing to abide by the client's decision not to settle the case and forgery of the client's signature to a settlement agreement without his client's knowledge or consent, and contrary to his client's directions, with failure to keep adequate records, commingling, and negligent misappropriation).

Here, if Respondent Kennedy's misappropriation is determined to negligent rather than intentional or reckless, then his misconduct would be comparable to that in *Kline*. Respondent Kennedy engaged in dishonest conduct by settling the Inter-

Con matter without informing the clients of the total settlement amount or that a substantial portion of the settlement would be allocated to attorney fees, thereby failing to abide by the clients' decisions, as well as failing to keep adequate records.

Although Respondent Kennedy's misconduct involved significantly more clients than *In re Kline*, his misconduct occurred in only one representation. The Court has "recognize[d] that cases involving a pattern of [misconduct] and instances of dishonesty do not invariably result in a suspension for the maximum period of three years." *In re Samad*, 51 A.3d 486, 500 (D.C. 2012). In *Samad*, the respondent neglected six cases—appearing in court unprepared, failing to notify a judge that he would be late, failing to timely file motions, failing to issue refunds, failing to withdraw from cases after representation ceased, and failing to communicate plea offers to his client—and misrepresented his availability for trial in two instances. *Id.* at 496, 499. The Court also noted the respondent's "cavalier attitude," and his "misguided view of his obligations toward his clients and his responsibilities under the Rules." *Id.* The Court found that the Board's recommended sanction of a three-year suspension with fitness fell "within the wide range of acceptable outcomes." *Id.* Respondent Kennedy's pattern of misconduct occurred over the course of one multi-year representation, and his testimony during the hearing reflected his "misguided view of his obligations toward his clients and his responsibilities under the Rules."

Based on these comparable cases, the Hearing Committee agrees with Disciplinary Counsel that the appropriate alternative sanction for Respondent

Kennedy's negligent misappropriation, dishonesty, and additional Rule violations is a three-year suspension.

C. Sanction for Negligent Misappropriation

The typical sanction for negligent misappropriation with failure to keep adequate records is a six-month suspension. *In re Bailey*, 883 A.2d 106, 123 (D.C. 2005) ("'A six-month suspension without a fitness requirement is the norm for attorneys who have committed negligent misappropriation of entrusted funds together with related violations (commingling, deficient recordkeeping)'") (quoting *In re Edwards*, 870 A.2d 90, 94 (D.C. 2005)). A slightly longer suspension is imposed due to aggravating factors, other than a finding of dishonesty, such as multiple instances of negligent misappropriation or the serious nature of all a respondent's violations when considered together. *See Bailey*, 883 A.2d at 112, 123; *In re Fair*, 780 A.2d 1106, 1115-1116 (D.C. 2001) (imposing suspension of one year and sixty days for two negligent misappropriations—each warranting a six-month suspension—with additional neglect); *In re Robinson*, Board Docket No. 10-BD-032, at 16-17, 37-40 (BPR July 31, 2012) (recommending a seven-month suspension when respondent negligently misappropriated entrusted funds for a second time after being put on notice by an overdraft alert), *recommendation adopted*, 74 A.3d 688 (D.C. 2013). Absent aggravating factors, the standard six-month suspension has

been imposed in numerous cases where there was no additional finding of dishonesty.

In *Bailey*, the Court imposed a nine-month suspension where respondent failed to notify a third party upon receipt of entrusted funds in which that party had an interest, entered a transaction with a client without advising the client to seek independent counsel or withdrawing from the representation, and engaged in negligent misappropriation with commingling and failure to keep adequate records. 883 A.2d at 112, 123. Similarly, in *In re Herbst*, the respondent received a longer period of suspension and probation where he failed to provide his client with competent representation, failed to abide by his client's decision and consult with his client, failed to communicate adequately with his client, and failed to adequately supervise his non-lawyer employee, in addition to negligent misappropriation and failure to keep adequate records. 931 A.2d 1016 (D.C. 2007) (per curiam). The Court adopted the Board's recommendation of a nine-month suspension with three months stayed followed by two years of probation with conditions including supervision by a practice monitor. *In re Herbst*, Bar Docket No. 290-01, at 17-18 (BPR Dec. 4, 2006) *recommendation adopted where no exceptions filed*, 931 A.2d at 1017.

Disciplinary Counsel proved by clear and convincing evidence that Respondent Dolan engaged in misappropriation of Inter-Con fees, but failed to establish, by clear and convincing evidence, that Respondent Dolan participated in the dishonest misconduct, either intentionally or recklessly. Disciplinary Counsel

proved that Respondent Dolan's misappropriation was negligent, but not intentional or reckless. Disciplinary Counsel also proved that Respondent engaged in improper recordkeeping, but failed to establish by clear and convincing evidence that the improper recordkeeping resulted in commingling. The comparable sanction for the negligent misappropriation of Inter-Con fees and failure to maintain records in violation of Rule 1.15(a), without a finding of dishonesty, is a six-month suspension. But in addition to these Rule 1.15(a) violations, the Hearing Committee concludes that Disciplinary Counsel established by clear and convincing evidence that Respondent Dolan also violated Rules 1.2(a), 1.4(a), (b) and (c), 1.5(a) and (b), 1.15(c), and 1.8(f).

The sanctions imposed for similar cases involving failure to communicate with clients and abide by their decisions range from a six-month suspension with restitution to a one-year suspension with restitution. In *In re Elgin*, 918 A.2d 362 (D.C. 2007), the Court imposed a six-month suspension with restitution where the respondent settled a suit against his client with a credit card company without disclosing the negotiation or settlement terms with the client, violation Rules 1.2(a) (failure to abide by a client's decision/to consult with client); 1.3(b)(2) (intentional prejudice); 1.4(a) and (b) (failure to communicate); 1.5(b) (written fee agreement); 1.7(b)(4)(conflict of interest); 1.8(a) (knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client); Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation); and 8.4(d) (seriously interfere with the administration of justice). In *In re Herbst*, 931 A.2d 1016 (D.C. 2007) (per curiam),

the Court imposed a nine-month suspension, with three months stayed and two years of probation with conditions where the respondent violated Rule 1.15(a) by engaging in negligent misappropriation and failing to maintain records when allowing a non-lawyer employee to negotiate the settlement of a client family's claims without consulting the clients, additionally violating Rules 1.1 (failure to provide competent representation), 1.2(a) (failure to abide by client's decision/to consult with client), 1.4(a)-(b) (failure to communicate adequately with client), and 5.3(b) (failure to adequately supervise non-lawyer employees). In *In re Wright*, 885 A.2d 315 (D.C. 2005) (per curiam), the Court imposed a one-year suspension with proof of fitness and restitution where the respondent violated Rule 1.15(a) by failing to maintain adequate records and to notify third parties when he dishonestly settled his clients' personal injury claims without their knowledge or consent without properly informing them or abide by their decisions, also violating Rules 1.2(a) (failure to abide by a client's decision/to consult with client); 1.3(b)(2) (intentional prejudice); 1.4 (failure to communicate adequately with client); 1.5(c) (contingent fee); and 8.4(c) (dishonesty, fraud, deceit, or misrepresentation). In *Hager*, 812 A.2d at 904, the Court imposed a one-year suspension with reinstatement with proof of fitness, and disgorgement of fees where the respondent dishonestly settled a lawsuit on behalf of class representative on secret terms without consulting client, violating Rules 1.2(a) (abiding by client's decisions), 1.4(a) (communication), 1.4(c) (failure to inform clients of settlement offer), 1.6(a)(2) (knowingly using client confidence or secret to their disadvantage), 1.7(b)(4) (representing clients in matter where

attorney's professional judgment affected by own interests), 1.8(e) (accepting compensation from someone other than client without client consent), 1.16(a) (failure to withdraw from representation involving violation of Rules), 1.16(d) (failure to protect clients' interests upon withdrawal), 5.6(b) (agreement on restriction on right to practice), 8.4(c) (dishonesty, fraud, deceit and/or misrepresentation), and 8.4(d) (seriously interfere with administration of justice).

The Hearing Committee concludes that Respondent Dolan's misconduct is comparable to that of *In re Herbst*, and recommends that Respondent Dolan be suspended for a period of nine months.

D. Fitness

A fitness showing is a substantial undertaking. *In re Cater*, 887 A.2d 1, 20 (D.C. 2005). Thus, in *Cater*, the Court held that "to justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Id*. at 6. Proof of a "serious doubt" involves "more than 'no confidence that a Respondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009). It connotes "real skepticism, not just a lack of certainty." *Id.* (quoting *Cater*, 887 A.2d at 24).

In articulating this standard, the Court observed that the reason for conditioning reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. As the Court explained:

> The fixed period of suspension is intended to serve as the commensurate response to the attorney's past ethical misconduct. In contrast, the open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run. . . . [P]roof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement . . . .

Cater, 887 A.2d at 22.

In addition, the Court found that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), should be used in applying the *Cater* fitness standard. They include:

> (a) the nature and circumstances of the misconduct for which the attorney was disciplined;
>
> (b) whether the attorney recognizes the seriousness of the misconduct;
>
> (c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;
>
> (d) the attorney's present character; and
>
> (e) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21, 25.

In circumstances where the respondent's conduct during the disciplinary hearing raises "a serious doubt whether Respondent will act ethically and competently in the future," the Board has "conclude[d] that a fitness requirement

should be imposed." *In re Yelverton*, Board Docket No. 11-BD-069 at 24 (BPR July 30, 2013) (citing *In re White*, 11 A.3d 1226, 1252 (D.C. 2011) (per curiam) (appending Board Report) ("conduct in this matter does not demonstrate the ethical sensitivity required for practice, and [Respondent] is a prime candidate for future problems if the Bar does not intervene at this juncture"); *In re Lea*, 969 A.2d 881, 893 (D.C. 2009) (Respondent's "testimony, tone, and behavior [during the disciplinary proceedings] demonstrated a lack of contrition or appreciation for the seriousness of her conduct")), *recommendation adopted*, 105 A.3d 413, 430-31 (D.C. 2014).

Fitness Requirement for Respondent Kennedy

In addition to the dishonest misappropriation in violation of Rules 1.15(a) and 8.4(c), the Hearing Committee concludes that Respondent Kennedy also violated Rules 1.2(a), 1.4(a), (b) and (c), 1.5(a) and (b), 1.15(a) (recordkeeping), 1.15(c), and 1.8(f). In the event Respondent Kennedy's misappropriation is not found to be intentional or reckless, and thus not subject to the presumption of disbarment under *In re Addams*, the Hearing Committee recommends that any imposed discipline include a fitness requirement.

The Hearing Committee finds clear and convincing evidence that raises a "serious doubt" of Respondent Kennedy's fitness based on the following:

(1) Dishonesty to his clients in order to conceal his own interest in the attorney fees;

(2) Failure to recognize his fiduciary duties and responsibility for management of the firm's trust account, including the duty to maintain appropriate financial records;

(3) Failure to recognize his responsibility to provide written fee agreements to his clients that explained the scope of the representation;

(4) Failure to recognize that the clients had the right to decide whether to settle the Inter-Con litigation and participate in the determination of the settlement amount; and

(5) Failure to recognize that conflict of interests arose among the clients as a result of the Inter-Con settlement agreement and failure to consult the D.C. Rules of Professional Conduct in order to comply with his ethical requirements.

The Hearing Committee recommends that as a part of Respondent Kennedy's proof establishing his fitness to be reinstated to the practice of law Respondent should show that he has (1) established sufficient accounting mechanisms to comply with the Rules and fiduciary standards, (2) completed a continuing legal education course on law practice management and accounting, and (3) completed a continuing legal education course on client communications and written fee agreements.

Fitness Requirement for Respondent Dolan

Respondent Dolan admitted during the disciplinary hearing that she purposefully left earned fees in the trust account and that it was permissible to do so, as long as the earned fees were withdrawn by the close of the tax year. FF 79. She acknowledged that the firm lacked a proper system for tracking entrusted funds over

a several year period. FF 81. Despite an overdraft notice in 2010 (FF 80), Respondent did not establish a system to comply with the recordkeeping requirements of Rule 1.15(a) and only maintained disbursement sheets in individual client files. FF 81-82. Respondent Dolan acknowledged that "[e]ven . . . through the conclusion of the hearing in this matter," the firm "did not maintain client ledgers for each individual matter, nor did they maintain *any* record for their trust account that chronologically shows deposits and disbursements." FF 82 (*see* Tr. 1589 (Dolan)). Respondent Dolan also testified as to her failure to exercise proper supervision over her non-lawyer employee's access to the trust account, and could not explain the cause of the assistant's mistake on the Inter-Con fees check (FF 89-90). Additionally, Respondent Dolan failed to acknowledge the wrongfulness of this misconduct, and her testimony during the hearing reflects a failure to appreciate her fiduciary responsibilities for clients' entrusted funds. Thus, Respondent Dolan's conduct during the disciplinary hearing raises a serious doubt that she will act ethically and competently in the future when handling entrusted funds. The Hearing Committee recommends that as a part of Respondent Dolan's proof establishing her fitness to be reinstated to the practice of law following her suspension, Respondent should show that she has (1) established sufficient accounting mechanisms to comply with the Rules and fiduciary standards, and (2) taken a continuing legal education course on law practice management and accounting.

V. CONCLUSION

For the foregoing reasons, the Hearing Committee finds that both Respondents violated Rules 1.2(a), 1.4(a), 1.4(b), 1.4(c), 1.5(b), 1.8(f), in Count I and Respondent Kennedy also violated Rule 8.4(c) in Count I. Respondents also violated Rules 1.15(a) (misappropriation and recordkeeping), 1.15(c), and 1.5(a) in Count II, but Disciplinary Counsel failed to establish violations of 1.15(a) (commingling), 1.5(c), or 8.4(c) as charged in Count II.

The Hearing Committee concludes that Respondent Kennedy's dishonest and intentional misappropriation warrants disbarment under *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc). In the event Respondent Kennedy's misappropriation is determined to be negligent rather than intentional or reckless, the Hearing Committee recommends a three-year suspension with a fitness requirement.

The Hearing Committee concludes that Respondent Dolan's negligent misappropriation and additional Rule violations warrant a nine-month suspension with a fitness requirement.

The Hearing Committee also recommends that the Court direct that the issue of disgorgement of the $85,913.32 in excess fees be addressed during reinstatement proceedings. *See In re Hager*, 812 A.2d 923.

We further recommend that Respondents' attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

AD HOC HEARING COMMITTEE

Robert L. Walker, Chair

William Hindle, Public Member

Tonya Love, Attorney Member