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

In the Matter of:	:	
	:	
TAKISHA BROWN,	:	
	:	
Respondent.	:	Board Docket No. 10-BD-128
	:	Bar Docket No. 2010-D099
An Administratively Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 472664)	:	

REPORT AND RECOMMENDATION
OF AD HOC HEARING COMMITTEE

Respondent, Takisha Brown, is charged with violating Rules 1.4(a), 1.4(b), 1.5(c), 1.15(a), 1.15(b),[1] and 8.4(c) of the District of Columbia Rules of Professional Conduct (the "Rules"), as well as § 19(f) of the District of Columbia Court of Appeals Rules Governing the Bar ("D.C. Bar R. XI"), arising from her representation of a client in a personal injury matter. The Hearing Committee finds clear and convincing evidence that Respondent violated each of these rules, including that Respondent engaged in intentional misappropriation. The Hearing Committee recommends that Respondent be disbarred.

I. INTRODUCTION AND SUMMARY

This disciplinary proceeding arises out of Respondent's representation of a client in a personal injury matter and Respondent's failure to pay promptly two of her client's

[1] When Rule 1.15 was amended, effective August 1, 2010, Rule 1.15(b) was renumbered as Rule 1.15(c). *See* D.C. Court of Appeals Order No. M-235-07 (Mar. 22, 2010). The substance of Rule 1.15(b) as it existed at the time of the alleged misconduct is identical to the current Rule 1.15(c).

medical providers after the matter settled. On August 31, 2010, Bar Counsel filed a Specification of Charges alleging that Respondent violated the following D.C. Rules of Professional Conduct: 1.4(a), 1.4(b), 1.5(c), 1.15(a) (both misappropriation and failure to maintain complete records of entrusted funds), 1.15(b) (failure to promptly pay third parties funds to which they were entitled), and 8.4 (c), as well as D.C. Bar R. XI, § 19(f) (failure to maintain and preserve complete records of entrusted funds). Bar Exhibit ("BX") B. On April 6, 2011, the Ad Hoc Hearing Committee Chair *sua sponte* ordered Bar Counsel to file an Amended Specification of Charges that specifically alleged whether Bar Counsel charged intentional, reckless, or negligent misappropriation. On May 12, 2011, Bar Counsel amended the Specification to charge intentional and/or reckless misappropriation. BX B. Respondent filed an answer to the amended Specification on June 7, 2011.

A hearing was held on August 15 and 16, and October 11, 2011, before an Ad Hoc Hearing Committee ("Hearing Committee") of Justin Castillo, Esquire, Chair; Ms. Ria Fletcher; and Elissa Preheim, Esquire. Deputy Assistant Bar Counsel Elizabeth Herman, Esquire, represented Bar Counsel during the hearing. Elizabeth A. Francis, Esquire, represented Respondent. Respondent was present throughout the hearing.

Bar Counsel's exhibits, BX A-D and BX 1-11 were admitted into evidence. Tr. 100, 334-35. Although the hearing transcript is not clear on this point, all of Respondent's exhibits, RX 1-7 and 8A-C were admitted into evidence and considered by the Hearing Committee. *See* Tr. 400-01.[2] Bar Counsel called four witnesses: Karen Mills, Rue Gordon, Charles Anderson, and Kevin O'Connell. Respondent testified on

[2] References to the hearing transcript are cited as "Tr. ___."

her own behalf and called Renea McGee-Smalls, as well as two mitigation witnesses, Denise Davis and Timothy Minor.

After the close of the hearing, Bar Counsel filed Proposed Findings of Fact, Conclusions of Law and Recommendation as to Sanction ("B.C. Br."), as did Respondent ("Resp't Br."). Bar Counsel then filed a Reply to Respondent's Proposed Findings of Fact, Conclusions of Law and Recommendation as to Sanction ("B.C. Reply Br.").

On the basis of the record as a whole, the Hearing Committee makes the following findings of fact and conclusions of law set forth below, which are supported by clear and convincing evidence.

II. STANDARD OF REVIEW

Bar Counsel bears the burden of establishing by clear and convincing evidence that Respondent violated the Rules of Professional Conduct. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) ("*Anderson I*"); *see also In re Anderson*, 979 A.2d 1206, 1213 (D.C. 2009) (applying clear and convincing evidence standard to charge of misappropriation of funds) ("*Anderson II*"). As the Court has explained, "[t]his more stringent standard expresses a preference for the attorney's interests by allocating more of the risk of error to Bar Counsel, who bears the burden of proof." *In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011) (citation and internal quotations omitted). Clear and convincing evidence is more than a preponderance of the evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (citation omitted).

III. FINDINGS OF FACT

A. Respondent's Bar Admission

1. Respondent is an administratively suspended member of the Bar of the District of Columbia Court of Appeals, having been admitted on April 4, 2005, and subsequently assigned Bar number 472664. BX A.

B. Respondent's Representation of Rue Gordon

2. On October 25, 2007, Rue Gordon was involved in an automobile accident. Tr. 46. Maxine Greene, Ms. Gordon's cousin, told her that Respondent was an attorney who might be able to help her. Tr. 46-47. At that time, Respondent was dating Ms. Greene's son, Lenwood McGee, Jr., whom Respondent later married. *Id.* Mr. McGee approached Respondent about possibly representing Ms. Gordon. Tr. 118-19. Respondent agreed to represent Ms. Gordon on or about November 11, 2007. BX 1 at 4; Tr. 47, 51.

3. Respondent had not previously handled a personal injury matter. Tr. 119, 238. When Respondent agreed to represent Ms. Gordon, Respondent was a Presidential Management Fellow working on ERISA issues at the Department of Labor. Tr. 117-18. Respondent left the Department of Labor in January 2008. Tr. 118. She then worked as a contract attorney and at a tax controversy firm before joining the IRS in November, 2008. Tr. 237-38.

4. Respondent met with Ms. Gordon after the accident. Tr. 119. Respondent provided Ms. Gordon with "a whole packet" of documents for Ms. Gordon to sign, including an engagement letter entitled "Personal Injury Power of Attorney," and authorizations to release medical records. Tr. 120. Although Ms. Gordon testified that

she was confused about the documents Respondent showed her (*see* Tr. 87), we find that Ms. Gordon signed the Personal Injury Power of Attorney on or about the date it bears, November 15, 2007. RX 8B. We also find that Ms. Gordon agreed that Respondent would receive 33 1/3% of the funds collected in settlement of Ms. Gordon's claim. Tr. 51; RX 8B at 2.

5. In July 2008, Respondent sent the insurance company a settlement package that included medical records and proof of representation. BX 8 at 116. On or about July 19, 2008, Ms. Gordon agreed to settle her insurance claim for $8,900. BX 5.

6. On July 21, 2008, Respondent received an $8,900 settlement check from the insurance company. BX 9 at 182. On July 23, 2008, she deposited $7,900 into her IOLTA account, and kept $1,000 for herself. Tr. 126; BX 9 at 176, 180-82.

7. On or about August 12, 2008, Respondent disbursed nearly $5,000 in cash to Ms. Gordon, although the precise amount is unknown. *See* Tr. 58 (Ms. Gordon testified that she received $4,500); BX 8 at 87 (stating in Respondent's May 10, 2010 response to Bar Counsel that Ms. Gordon received $4,700); BX D at ¶ 6 (stating in Respondent's Answer that Ms. Gordon received $4,900); BX 9 at187 (August 12, 2008 withdrawal of $5,000 from IOLTA account); Tr. 128, 135, 137 (Respondent's testimony that she gave Ms. Brown "almost $5,000"). Respondent concedes that she did not provide Ms. Gordon with a settlement sheet or otherwise record the disposition of the settlement proceeds. Tr. 133, 248.

C. Payments Owed to Ms. Gordon's Medical Providers

8. Respondent testified that she understood that she had a fiduciary responsibility to pay Ms. Gordon's two medical providers (Dr. Easton Manderson and

Dr. Nathaniel Randolph) from the settlement proceeds. Tr. 211. She also had a contractual obligation to pay Dr. Manderson's bill. *See* FF 9.

1. Funds Owed to Dr. Manderson

9. On November 4, 2007, Respondent signed an "Authorization to Pay Unpaid Medical Bills," in which she agreed to pay Dr. Manderson's bill from Ms. Gordon's recovery. BX 10 at 192. Although there was initially some uncertainty as to the amount due to Dr. Manderson, in September 2008, Ms. Gordon received a final bill from Dr. Manderson in the amount of $1,182.46. Tr. 55-56; BX 4 at 41-44.

10. Although she had not yet received the final bill, Respondent testified that she expected Dr. Manderson's final bill to be between $1,000 and $1,500, and that in July 2008 she gave her husband, Mr. McGee, $1,650 in cash to pay Dr. Manderson's final bill when it arrived. Tr. 219-20. Respondent did not give Mr. McGee a receipt for Dr. Manderson to sign when Mr. McGee paid the bill or a cover letter to accompany the payment. Tr. 213-14. Mr. McGee is not a lawyer. Tr. 213.

11. Respondent's bank records show that she made two cash withdrawals on July 25, 2008 in the amounts of $150 and $1,000, and that she withdrew $650 in cash on July 31, 2008. BX 9 at 177.

12. Respondent testified that her husband told her that he had paid Dr. Manderson's bill, although it is not clear when this conversation occurred. Tr. 136. He never provided her with proof that (or how) the bill was paid. *Id*. at 147.

13. Respondent did not call Mr. McGee as a witness because she was unable to serve him with a subpoena. Tr. 397. However, on August 4, 2011, Respondent submitted an affidavit purportedly from Mr. McGee in which he represents that

Respondent entrusted him with an unspecified amount of funds "to pay the Dr. bills involved" in Ms. Gordon's case, that he failed to do so, and that he failed to tell Respondent that he did not pay the bill.[3] RX 5. In addition, Mr. McGee appears to concede in his Affidavit that he lied to Respondent about paying Dr. Manderson's bill: "[Respondent] was unaware that my statements to her were untrue in reference to the settlement of this matter." *Id.*

14. Other evidence, however, contradicts this affidavit and Respondent's testimony that she provided her husband with $1,650 in cash to pay Dr. Manderson's bill. Karen Mills, an employee at Physicians Medical Billing ("PMB"), which handled Dr. Manderson's billing, testified that Respondent called her on June 9, 2009, and told her that Respondent had already paid Dr. Manderson's bill, and would send Ms. Mills a copy of the cancelled check. Tr. 22-24; BX 10 at 195. Ms. Mills did not receive a copy of a cancelled check from Respondent (Tr. 24), and Respondent did not present one to the Hearing Committee. This is not surprising, as bank records show that Respondent had withdrawn the settlement funds from her account in cash. *See* FF 7, 11.

15. In Respondent's April 5, 2010 written response to Ms. Gordon's complaint to Bar Counsel, Respondent did not mention that she had given the funds to her husband to pay Dr. Manderson's bill. BX 2 at 15. Rather, Respondent represented that Dr. Manderson's bill remained outstanding because Dr. Manderson's billing agency did not send a final notice bill until February 2010. BX 2 at 15. However, Ms. Mills testified that Dr. Manderson's ($1,182.46) bill was finalized in September 2008, Tr. 10, and it is undisputed that Respondent and Ms. Mills discussed the outstanding bill by

[3] The affidavit does not indicate when Respondent gave Mr. McGee these funds. RX 5.

telephone on June 9, 2009. Tr. 22-23, 146-47; BX 10 at 195. Ms. Gordon testified that she was aware of the finalized bill and that Respondent never told her that Respondent did not know the amount of Dr. Manderson's bill. Tr. 55-56, 59.

16. Based on (i) the evidence presented during the hearing, including Respondent's prior inconsistent statements to Ms. Mills and Bar Counsel, and (ii) our opportunity to hear testimony from Respondent (who we find was not credible when testifying regarding her handling of the settlement proceeds), Ms. Mills (who was a credible witness who offered detailed and consistent testimony regarding her efforts to resolve Dr. Manderson's outstanding bill) and Ms. Gordon (who was a credible witness on this subject), we reject as not credible Respondent's hearing testimony that she gave her husband $1,650 in cash to pay Dr. Manderson. Although Respondent offered an Affidavit from Mr. McGee that appears generally to support her version of events, we give no weight to the hearsay presented in this Affidavit because Mr. McGee did not testify in person and thus was not subject to cross-examination on these important issues.

2. Funds Owed to Dr. Randolph

17. Regarding Dr. Randolph's bill, although Respondent did not sign an "Authorization to Pay Unpaid Medical Bills," Respondent conceded that she had an obligation to pay Dr. Randolph's bill. Tr. 211. Ms. Gordon also testified that Respondent told her that Respondent would pay Dr. Randolph's $1,500 bill from the settlement proceeds. Tr. 51, 59-61; BX 1 at 3.

18. Respondent testified that when she received the settlement check, she knew that Dr. Randolph was owed $1,500. Tr. 134. While there was no uncertainty as to the amount of Dr. Randolph's bill, Respondent had unanticipated difficulty in paying the

bill because Dr. Randolph died before Ms. Gordon's case settled. Tr. 60; BX at 89. Respondent initially advised Ms. Gordon that Respondent would inform Dr. Randolph's office of the settlement, and claimed that if the office did not respond within thirty days, Ms. Gordon could keep the money due to Dr. Randolph. Tr. 61-62; BX 2 at 14 (Respondent's response to Ms. Gordon's disciplinary complaint).

19. On October 6, 2008, Respondent sent a letter to Dr. Randolph's office stating that "this [law] office has the payment of $1500.00 which represents the bill for [Ms. Gordon's] injuries," and requesting the name of the individual to whom to send payment of the claim. BX 5 at 64.

20. In April 2009, nine months after Respondent received the settlement check and six months after Respondent sent the letter to Dr. Randolph's office, Ms. Gordon emailed Respondent to inquire about "the money ($1,500) that I am do [sic]." BX 2 at 17. Respondent did not respond to this email until October 2009. In her response, Respondent informed Ms. Gordon that she could not disburse the funds to Ms. Gordon "until I get a release from the Dr.'s office that they are not going to pursue the claim." *Id.* Respondent has produced no evidence indicating that she sought or received such a release. Respondent also explained to Ms. Gordon that Dr. Randolph's office had three years to file a claim for the outstanding balance. *Id.*

21. On April 5, 2010, in response to Ms. Gordon's complaint to Bar Counsel, Respondent represented to Bar Counsel that she "felt uncomfortable providing Ms. Gordon with the funds, like she suggested, and then I would be liable if the doctor later requested payment. I informed Ms. Gordon that I wanted to do what was right and that I could not follow her suggestion without getting the proper guidance" from Dr.

Randolph's office. BX 2 at 14. Respondent also represented to Bar Counsel that she "truly did not feel comfortable giving Ms. Gordon the funds that were due to Dr. Randolph," and that "Ms. Gordon was fully aware as to why I did not immediately release the funds directly to her." *Id.* Finally, Respondent represented to Bar Counsel that "[t]he funds for Dr. Randolph are still waiting to get paid to either Ms. Gordon or [Dr. Randolph's] estate." BX 2 at 14.

22. Respondent testified to a different version of events during the hearing. She testified that she gave Ms. Gordon the $1,500 owed to Dr. Randolph in August 2008, because she "hadn't heard back from Dr. Randolph." Tr. 132, 136, 211, 251-53. She testified that she thought that if Dr. Randolph's estate asked for the funds, she "would just handle that myself." Tr. 211. We cannot reconcile this testimony with 1) Respondent's October 2009 email to Ms. Gordon telling her that Respondent needed a release from Dr. Randolph before she could disburse the $1,500 to Ms. Gordon, or 2) Respondent's initial response to Bar Counsel, that she "felt uncomfortable" giving the money owed Dr. Randolph to Ms. Gordon, and that Respondent was holding the funds due to Dr. Randolph.

23. In addition, Respondent's hearing testimony conflicts with Ms. Gordon's testimony that Respondent told her in August 2008 that Respondent would "take care" of the amounts owed to the doctors (Tr. 54) and that, after Ms. Gordon complained to Bar Counsel, Respondent gave her $500 to pay Dr. Randolph's bill and said that she would pay the remaining balance in installments. Tr. 66-69.

24. Based on (i) the evidence presented during the hearing, including Respondent's inconsistent contemporaneous written statements to Ms. Gordon and her

other prior inconsistent statements to Ms. Gordon and Bar Counsel, and (ii) our opportunity to hear testimony from Respondent (who we find was not a credible witness when testifying regarding her handling of the settlement proceeds) and Ms. Gordon (who was a credible witness on this subject), we reject as not credible Respondent's hearing testimony that she gave Ms. Gordon the $1,500 owed to Dr. Randolph in August 2008.

D. The Balance in Respondent's IOLTA Account

25. As we have found that Respondent agreed to pay Dr. Manderson's $1,182.46 bill and Dr. Randolph's $1,500 bill from the settlement proceeds, Respondent was required to maintain the sum of these two amounts ($2,682.46) in her IOLTA account from on or about July 23, 2008 until the bills were paid. However, by August 12, 2008, the balance in Respondent's IOLTA account was only $927.83. *See* BX 9 at 174. The August closing balance was only $77.83. *Id.* at 173. After depositing $7,900 into the IOLTA account on July 23, 2008 (*id.* at 176), Respondent withdrew $7,850 through a series of "counter withdrawals" between July 25 and August 26, 2008. *Id.* at 174-77. Other than the $5,000 withdrawal on August 12, 2008 to pay Ms. Gordon, it is not clear where these funds went, although the evidence is clear that they were not used to pay Dr. Randolph or Dr. Manderson. Respondent ultimately paid Dr. Manderson by sending two cashier's checks in April 2010. Tr. 29; BX 2 at 18. Respondent also testified that after receiving notice of the Bar complaint in April 2010, she paid Dr. Randolph by sending a $1,500 undated certified check to the address she had on file. Tr. 167-70; BX 2 at 18.

E. Communications with Client

26. Ms. Gordon testified that, after receiving her portion of the settlement in August 2008, she attempted to communicate with Respondent through email and telephone regarding Dr. Manderson's bill. Tr. 59. Ms. Gordon further testified that she attempted to communicate with Respondent "multiple times" and that Respondent "failed to communicate with me by phone and email." Tr. 63.

27. Respondent testified that she "shut down" her fax and cell phone in August 2008, approximately one month after she received Ms. Gordon' settlement funds. Tr. 138-140. Respondent claimed that she turned off her fax and cell phone because she received a tentative offer to work at the IRS and that, per IRS policy, "you can't work outside the IRS." Tr. 140. The IRS policy that Respondent produced, however, did not have such a categorical prohibition against outside employment and only indicated that Respondent would be required to obtain permission to conduct certain activities outside of her employment at the IRS. RX 3.

28. Respondent also claimed that she had turned off her phone after discovering in July 2009 that she was pregnant, Tr. at 148, and that she did so and stopped checking all email in order to reduce stress. Tr. 151-54.

29. Respondent claimed that she turned off her office fax and one of her phone numbers around August 2008, that she turned off her other cell phone in June or July 2009, and that she did not turn these numbers back on until October 2009. Tr. 139-40; 151; 226-27. Respondent also testified that she was not checking her email or her P.O. Box during this time, and that she would not receive any email when her cell phone was turned off. Tr. 153, 167-68. Respondent further testified that she believed that Mr.

McGee may have deleted some of her email and phone messages, Tr. 148-149. Respondent claims that, after speaking with Ms. Mills of PMB in June 2009, she did not hear from either Ms. Mills or Ms. Gordon. Tr. 151.

30. However, both Ms. Gordon and Ms. Mills testified that they attempted to contact Respondent regarding Ms. Gordon's bills from March 2009 to March 2010, but without success. Tr. 25-27; BX 10 at 195-96; Tr. 59; BX 1 at 7, 8. Ms. Gordon further testified that she called and left voice messages at a phone number that Respondent had provided her, stating that Dr. Manderson's office was sending her statements regarding her bill and asking for information as to why the bill had not been paid. Tr. 65-66. Ms. Gordon testified that the phone calls went through to voice mail stating "You have reached the law office of Takisha Brown." Tr. 66. Although she testified that certain fax numbers provided by Respondent did not work, Ms. Mills also testified that she mailed bills to Respondent "every 28 days." Tr. 26. Respondent admitted that she had not changed her physical mailing address. Tr. 227.

31. Respondent testified that she began checking her email again in October 2009. Tr. 154. At this time, a full six months after the email was sent, Respondent replied to an April 2009 email from Ms. Gordon inquiring about Dr. Manderson's bill and the funds due to Dr. Randolph. Tr. 154; BX 1 at 12-13.[4] Ms. Gordon responded to Respondent with additional questions, but Respondent did not reply. BX 1 at 10. 11.

[4] Even assuming, as Respondent claims, that Mr. McGee had deleted some of Respondent's emails, the record is clear that this April 2009 email from Ms. Gordon inquiring about the outstanding doctor bills had not been deleted. *See* BX 1 at 11-12.

F. Failure to Produce Records

32. On April 19, 2010, Bar Counsel sent a subpoena to Respondent requiring that she produce a copy of Ms. Gordon's file. BX 3. The materials that Respondent produced, (BX 5; BX 8) do not contain certain information. For example, Respondent did not provide Ms. Gordon with a settlement sheet or written statement describing the outcome of her matter, the amount due to Ms. Gordon, or Respondent's fee. Tr. 53. Respondent admits that she did not provide this information to Ms. Gordon. Tr. 133.

G. Ms. Gordon's February 1, 2011 Letter to Bar Counsel

33. Ms. Gordon filed a complaint with Bar Counsel on March 8, 2010. BX 1. On February 1, 2011, Ms. Gordon sent a letter to Bar Counsel requesting that "any complaints or petitions against [Respondent] be dismissed." RX 7. Ms. Gordon also states in the letter that "I do not believe that [Respondent] intentionally mishandled or mis-lead [sic] me in representing my case." *Id.* During the hearing, Ms. Gordon testified that she wrote the letter because "[Respondent] had asked me to drop the case, and also that she had also said that she was going to subpoena my cousin, which is her mother in-law, and my goddaughter . . . . And I didn't want to bring them into this case because I felt they did not have anything to do with it." Tr. 70. Ms. Renea Smalls testified that it was she who asked Mr. Gordon to write a letter requesting that the complaint against Respondent be dropped, and that Ms. Gordon told Ms. Smalls that she wrote the letter. Tr. at 268.

IV. CONCLUSIONS OF LAW

A. Violation of Rule 1.15(a) and (b)

Rule 1.15(a) prohibits misappropriation of entrusted funds. Rule 1.15(b)[5] requires an attorney, "upon receiving funds or other property in which a client or third person has an interest," to "promptly deliver" to the third person "any funds or other property that the . . . third person is entitled to receive."

Misappropriation is defined as "any unauthorized use of client[] funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) (citation and quotation marks omitted). Unauthorized use occurs where "the balance in the attorney's . . . account falls below the amount due to the client regardless of whether the attorney acted with an improper intent." *In re Edwards*, 990 A.2d 501, 518 (D.C. 2010).

Because Rule 1.15 refers to "property of clients or third persons," a misappropriation may occur where the balance in an attorney's trust account drops below the amount owed by a client to a third party. *See, e.g.*, *In re Gregory*, 790 A.2d 573, 577-78 (D.C. 2002) (per curiam) (appended Board report) (respondent committed misappropriation when he allowed the funds in his account to fall below the amount required to pay his client's medical providers). Unlike clients, however, third parties must have a "just claim" to property in the lawyer's possession. *Id.* In other words, applicable law outside the ethics rules must impose on the lawyer a duty to distribute the property to the third party or to withhold distribution. *See* Cmt. [4] to Rule 1.15; *In re*

[5] Rule 1.15(b) as it existed at the time of the alleged misconduct is identical in substance to current Rule 1.15(c). *See supra* note 1.

Bailey, 883 A.2d 106, 120-21 (D.C. 2005) (citing D.C. Legal Ethics Opinion No. 293 at 164) (internal citation omitted).

Essentially, a just claim must be legally enforceable against the lawyer by operation of law, court order, or agreement, including a contractual agreement between the client and a third party regarding the disposition of the funds, which the lawyer has voluntarily assumed or ratified. *Bailey,* 883 A.2d at 117 (such agreement may include an "authorization and assignment" by which a lawyer agrees to pay medical providers out of any recovery in a personal injury case). Mere knowledge of a client's contractual obligation is not sufficient; rather, the lawyer must agree to be bound by it. *See generally Bailey*, 883 A.2d 106; D.C. Ethics Op. 293 at n.4 (citing cases). While the agreement need not be in writing, the conduct of the parties must show a tacit understanding that the attorney agreed to pay the third party. *See* D.C. Ethics Op. 293 at n.4 (citing *Travelers Ins. Co. v. Haden*, 418 A.2d 1078, 1085 (D.C. 1980) (finding no implied obligation of attorney to pay third party lien where the conduct merely evinced attorney's knowledge of the obligation but not an agreement to be obligated to pay)).

1. Just Claim of Dr. Manderson

Dr. Manderson had a just claim to funds in Ms. Gordon's settlement. Respondent signed an "Authorization to Pay Unpaid Medical Bills," in which she agreed to pay Dr. Manderson's bill from Ms. Gordon's recovery. FF 9; BX 10 at 192. Accordingly, Respondent misappropriated funds owed to Dr. Manderson as of August 12, 2008, when the balance in Respondent's IOLTA account dropped below the $1,182.46 owed to Dr. Manderson. *Edwards*, 990 A.2d at 518 (unauthorized use occurs where "the balance in

the attorney's . . . account falls below the amount due to the client [or third party], regardless of whether the attorney acted with an improper intent.")

2. Just Claim of Dr. Randolph

Although there is not a signed "authorization and assignment" with respect to Dr. Randolph, Respondent conceded that she was obligated to pay Dr. Randolph's bill. FF 17. Respondent's own contemporaneous communications also establish that she understood that she held the funds due to Dr. Randolph and that she owed a duty to Dr. Randolph with respect to those funds. For example, Respondent wrote Dr. Randolph's office advising that "this [law] office has the payment of $1500.00 which represents the bill for [Ms. Gordon's] injuries," and requesting the individual to whom to send payment of the claim. *See* BX 5 at 64 (October 6, 2008 letter from Respondent to Dr. Nathaniel Randolph). Moreover, a year later Respondent declined her client's request for access to the $1,500 due Dr. Randolph advising Ms. Gordon that she could not turn over to Ms. Gordon those funds until Respondent "g[o]t a release from the Dr.'s office that they are not going to pursue the claim." BX 2 at 17 (October 21, 2009 email from Respondent to Ms. Gordon). The Hearing Committee finds that there is clear and convincing evidence that Dr. Randolph had a just claim to settlement funds in Respondent's possession. *See In re Lee*, Bar Docket No. 451-07, at 10-11 (BPR May 11, 2012) (respondent's conduct showed that he owed a duty to a third party with respect to the funds at issue), *review pending*, D.C. App. No. 12-BG-630; *see also* D.C. Ethics Op. 293 at n.4; *Travelers Ins. Co.*, 418 A.2d at 1084 (distinguishing between conduct that merely evinced attorney's knowledge of client's receipt of worker's compensation payments and conduct that

evidenced a tacit understanding that the attorney was obligated to pay third party lien, the latter of which was required to impose liability on attorney).

We further find that Respondent misappropriated funds owed to Dr. Randolph as of August 12, 2008, when the balance in Respondent's IOLTA account dropped below $1,500, the undisputed amount owed to Dr. Randolph. *Edwards*, 990 A.2d at 518.

3. Reckless or Intentional Misappropriation

Bar Counsel contends that Respondent committed either intentional or reckless misappropriation with respect to the funds owed to Dr. Manderson and Dr. Randolph. B.C. Br. at 21. Respondent argues that, should the Committee determine that Respondent misappropriated any funds, her conduct was negligent. Resp't Br. at 27.

Intentional misappropriation occurs where an attorney takes a client's or third party's funds for the attorney's personal use. *See Anderson I*, 778 A.2d at 339 (D.C. 2001) (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 re Mooers*, 910 A.2d 1046, 1046 (D.C. 2009) (per curiam) (finding intentional misappropriation where the respondent "allowed the amount in his trust account to fall below the amount owed to his client's medical providers [and] . . . acknowledge[d] having used funds in the account for personal and business expenses."). Evidence of how a respondent used the funds is not necessary; intentional misappropriation need only be established through evidence that the respondent removed the funds and did not pay the appropriate party. *See In re Omwenga*, 49 A.3d 1235, 1238 (D.C. 2012) (finding intentional misappropriation where respondent withdrew funds without client's permission and did not deposit it in another one of respondent's trust accounts); *In re*

Cappell, 866 A.2d 784, 784-85 (D.C. 2004) (finding intentional misappropriation where the respondent used funds in his trust account "for personal and business expenses" and where the balance in the account had fallen below amounts due to third party medical providers).

An attorney's unauthorized use of funds is reckless if her act "reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds . . . . " *Anderson I*, 778 A.2d at 338. The District of Columbia Court of Appeals has further explained that reckless misappropriation occurs where an attorney handles entrusted funds "in a way that reveals . . . a conscious indifference to the consequences of his [or her] behavior for the security of the funds." *Id.* at 339 (citations omitted).

Notably, reckless misappropriation has been found in cases where an attorney acted in disregard of notices to pay funds. *Gregory*, 790 A.2d at 579 (reckless misappropriation where the respondent failed to properly supervise his assistant and to independently verify the records and case files after medical provider contacted him and informed him that the bill had not been paid); *In re Utley*, 698 A.2d 446, 449 (D.C. 1997) (respondent failed to repay duplicate fee until twenty-one months after she had been formally notified of the error).

4. Clear and Convincing Evidence of Intentional Misappropriation

We find clear and convincing evidence that Respondent committed intentional misappropriation with respect to funds owed both to Dr. Manderson and Dr. Randolph. Respondent received and deposited Ms. Gordon's settlement from her insurance company in July 2008. Six weeks later, by August 12, 2008, the balance in Respondent's IOLTA account had dropped well below the amounts owed to the two doctors. FF 25.

Although Dr. Manderson's bill was finalized as of September 2008 and although the amount of Dr. Randolph's bill was always clear, Respondent did not pay either of these bills until approximately a year and a half later, in April 2010, after this Bar Complaint was filed. *See* BX 2 at 18; BX 10 at 196 (Dr. Manderson's receipt records showing receipt of two checks from Respondent on April 7, 2010, totaling $1,182.42). Respondent testified that she paid those bills out of her own funds. Tr. 244-45.

Other than the $5,000 withdrawal to pay Ms. Gordon, and $1,000 to pay herself, Respondent has not provided any plausible explanation for the withdrawals she made of the remaining settlement funds. As discussed in more detail below, Respondent therefore misappropriated third-party funds, in violation of Rule 1.15(a), and failed to promptly pay third parties funds to which they were entitled, in violation of Rule 1.15(b).

a. Dr. Manderson

We find clear and convincing evidence that Respondent intentionally misappropriated third party funds owed to Dr. Manderson. Respondent claims that she withdrew in cash the funds owed to Dr. Manderson in July 2009. She further claims to have given that cash to her husband and asked him to "take care" of the bill. As noted above, we do not find that Respondent's testimony was credible on this issue. We find also that Mr. McGee's affidavit claiming the same was not credible either. Even after her June 2009 conversation with Ms. Mills during which Ms. Mills informed her that the bill had not been paid, Respondent did nothing to confirm that the bill was paid other than to ask her husband if he had resolved the matter. Tr. 229. Despite repeated efforts by both her client and PMB to ascertain the status of the bill, Respondent did not pay the bill until after the Bar Complaint was filed, which was more than a year and a half after

Respondent had withdrawn these funds from her IOLTA account. This conduct evinces "an intent to treat the funds as the attorney's own." *Anderson I,* 778 A.2d at 339.

Without a credible explanation of how these funds were distributed after Respondent withdrew them from her IOLTA account, coupled with Respondent's failure to respond to repeated efforts by both PMB and Ms. Gordon over the course of almost thirty-six months, we conclude that Respondent intentionally misappropriated these funds.

Even if we were to credit Respondent's testimony that she gave her husband $1,650 in cash to pay Dr. Manderson, we find that this conduct would evince an "unacceptable disregard for the safety and welfare of entrusted funds" and therefore would constitute, at the very least, reckless misappropriation. *Id.* at 338. As the Court held in *Gregory*, Respondent simply cannot transfer her ethical obligation to safeguard client funds. 790 A.2d at 578-79.

In *Gregory*, the Court approved the Board's determination that the respondent had committed reckless misappropriation, despite a lack of proof that the respondent knew that his non-lawyer assistant had failed to pay medical providers. *Id.* at 574. The Court adopted the Board's finding that the respondent's failure to supervise his non-lawyer assistant was reckless and "demonstrate[d] an unacceptable disregard for the safety and welfare of entrusted funds." *Id.* at 579. The Board emphasized that safeguarding funds is:

> a nondelegable, fiduciary responsibility that cannot be transferred and is not excused by ignorance, inattention, incompetence, or dishonesty. Although lawyers may employ nonlawyers to assist in fulfilling this fiduciary duty, lawyers must provide adequate training and supervision to

> ensure that ethical and legal obligations to account for clients' monies are being met.

Id. (quoting Ann. Model Rules of Prof'l Conduct R. 5.3 cmt (1983) (Supervision of Trust Account Management)).

The respondent in *Gregory* hired his girlfriend as his assistant and entrusted her with handling financial aspects of his personal injury matters. The respondent believed that this assistant had paid medical providers in a particular case, when in fact she had written unauthorized checks out of the account and failed to make the required payments. *Id.* at 576-77. The respondent failed to check the account balance even after he was notified that the assistant had written unauthorized checks on the account, and he ignored requests for payment from the medical providers. *Id.* The respondent continued to write checks on the account, which caused it to fall below the amount owed to the medical providers. *Id.* at 578 n.1, 579. The Board found that the respondent had recklessly misappropriated the funds, observing that "[w]e do not believe that his personal relationship can excuse his failure to take the responsibility he was ethically obligated to take to ensure the safety of the entrusted funds." *Id.* at 579.

Here, as with the attorney in *Gregory*, Respondent claims that she entrusted the funds to a non-lawyer, Mr. McGee, and purportedly delegated to him her duty to pay her client's medical provider. This case is even more egregious than *Gregory* in that Mr. McGee, a nonlawyer, was not Respondent's assistant, and there is no evidence that she trained or supervised him. Indeed, when she purportedly gave the $1,650 in cash to Mr. McGee, Respondent provided him no instructions as to how to pay the final bill, and no cover letter or receipt to accompany the payment. Tr. at 213-214. There also is no

evidence of any instruction or understanding regarding what Mr. McGee would do with the funds while awaiting the final bill from Dr. Manderson. Tr. at 240-41.

In addition, even after learning from Dr. Manderson's office in June 2009 that the bill remained outstanding, Respondent asserted that she did nothing to confirm payment beyond asking Mr. McGee whether he had paid the bill. Tr. at 147. Yet, Respondent testified that by this time she had concerns that her husband "was inconsistent" and unreliable. Tr. 150.[6] Respondent's relationship with Mr. McGee cannot excuse her failure to meet her ethical obligation to ensure the safety of her client's funds. Even if we were to credit Respondent's claim that she entrusted Mr. McGee with the funds to pay Dr. Manderson's bill, as in *Gregory*, clear and convincing evidence establishes that Respondent at least recklessly misappropriated the funds owed to Dr. Manderson.

b. Dr. Randolph

We also find clear and convincing evidence that Respondent intentionally misappropriated funds owed to Dr. Randolph. Despite knowing that Dr. Randolph was owed $1,500, Respondent withdrew $7,850 from the IOLTA account through a series of "counter withdrawals" between July 25 and August 26, 2008. FF 25. As discussed above, we do not credit Respondent's claim that she provided Dr. Randolph's funds to Ms. Gordon. FF 24. The balance in Respondent's IOLTA account had fallen below the amount owed Dr. Randolph even before October 6, 2008, when Respondent notified Dr. Randolph's office that she had received the settlement proceeds. *Compare* FF 25 *with* FF

[6] As the Court of Appeals has underscored in the context of Rule 5.3 (supervision), "reasonable efforts to ensure" that even an employee's conduct comports with the lawyer's professional obligation is a proactive standard, even where the lawyer has reason to believe that the employee is honest and capable. *See Cater*, 887 A.3d at 14.

19 *and* BX 5 at 64. We find that Respondent's unexplained withdrawal of funds from her IOLTA account, causing the balance to fall below the $1,500 amount of Dr. Randolph's bill, and her unexcused and unexplained delay in paying the bill reveals an "intent to treat the funds as the attorney's own" and, as such, is intentional misappropriation. *Anderson I*, 778 A.2d at 339.[7]

B. Additional Alleged Violations of Rule 1.15(b) Have Not Been Proved

Bar Counsel also alleged that Respondent failed promptly to notify a third person who had an interest in the funds which Respondent received, and failed promptly to render a full accounting regarding such funds, both in violation of Rule 1.15(b). *See* Am. Specification of Charges, ¶ D. We find that Bar Counsel did not prove these alleged violations by clear and convincing evidence.

With respect to prompt notification of third parties, the evidence is undisputed that Respondent notified Dr. Randolph's office by early October 2008 that her office had the payment of $1,500 for Ms. Gordon's medical services. *See* BX 5 at 64. In addition, there is evidence that Respondent called Dr. Manderson's office in July 2008, and that Dr. Manderson's office was aware of Ms. Gordon's settlement. BX 10 at 194, 197; Tr. at 41.

[7] Both Respondent and Bar Counsel contend that the D.C. Unclaimed Property Act (D.C. Code § 41-101 *et. seq.*) is not applicable to this case. Resp't Br. at 33; B.C. Br. at 24-25. The Hearing Committee agrees and concludes that the Unclaimed Property Act does not govern the circumstances here. The Act is meant "to mandate the report and delivery by holders and to authorize the receipt for safekeeping and fiscal growth by the District of Columbia of any and all personal property which is abandoned . . . ." D.C. Code § 41-4111. The Act provides that property held by a fiduciary is not presumed to be abandoned unless it is unclaimed for three years. *Id.* In this case, Respondent received Ms. Gordon's settlement funds in July 2008, and she sent a certified check as payment to Dr. Randolph's office less than two years later, in April 2010. FF 6, 24. Therefore, the Unclaimed Property Act's provisions were never triggered.

Regarding a full accounting of third-party funds, Rule 1.15(b) requires a lawyer to promptly render a full accounting of third party funds "upon request" by the third person. Because there is not clear and convincing evidence that either Dr. Manderson or Dr. Randolph ever requested such an accounting, no violation of this Rule 1.15(b) requirement has been proved.

C. Violation of Rule 1.5(c)

Rule 1.5(c) states in relevant part that "[u]pon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and if there is a recovery, showing the remittance to the client and the method of its determination."

Respondent concedes that she failed to provide such a written statement to Ms. Gordon. Accordingly, we find clear and convincing evidence that Respondent violated Rule 1.5(c).

D. Violation of Rules 1.15(a) and D.C. Bar R. XI, § 19(f) (Recordkeeping)

Rule 1.15(a) and D.C. Bar R. XI, § 19(f) relate to an attorney's duty to maintain complete records with respect to client property in his or her possession. Rule 1.15(a) states in relevant part that "[c]omplete 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." D.C. Bar R. XI, § 19(f) also requires that an attorney must "maintain complete records of the handling, maintenance, and disposition of all funds . . . from the time of receipt to the time of final distribution, and shall preserve such records for a period of five years after final distribution of such funds . . . ."

"Complete records" is defined as the following:

> Financial records are complete only when an attorney's documents are sufficient to demonstrate [the attorney's] compliance with his ethical duties. The purpose of the rule requiring 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. Our Court has instructed that a lawyer needs a "system" which permits him to treat funds held in trust . . . . The records themselves should allow for a complete audit even if the attorney or client is not available.

Edwards, 990 A.2d at 522 (internal quotations and citation omitted).

We find clear and convincing evidence that Respondent did not maintain complete records of the handling, maintenance, and disposition of Ms. Gordon's settlement funds in violation of Rule 1.15(a) and D.C. Bar R. XI, § 19(f). From July 25, 2008 to August 26, 2008, Respondent withdrew virtually all of the funds she had deposited from Ms. Gordon's insurance claim. There is no documentation as to how these funds were distributed, including any records regarding the amount of the cash payment to Ms. Gordon. There is simply no way to trace the flow of these funds once they left the IOLTA account. Furthermore, in her Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction, Respondent herself concedes that "she did not maintain proper records for this matter for the required amount of time." Resp't Br. at 32. Accordingly, we conclude that Respondent violated the recordkeeping requirements Rule 1.15(a) and D.C. Bar R. XI, § 19(f).

E. Violation of Rules 1.4(a) and 1.4(b) (Adequate Communication with Client)

Rule 1.4(a) states that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Rule 1.4(b) states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Comment 2 to Rule 1.4 explains that "[a] client is entitled to whatever information the client wishes about all aspects of the subject matter of the representation unless the client expressly consents not to have certain information passed on." As the Court has explained:

> The guiding principle for evaluating conduct under Rule 1.4(a) is whether the lawyer fulfilled the client's reasonable . . . expectations for information. To meet that expectation, *a lawyer not only must respond to client inquiries but also must initiate communications to provide information when needed*.

In re Mitrano, 952 A.2d 901, 927 (D.C. 2008) (emphasis added).

We find clear and convincing evidence that Respondent failed adequately to communicate with her client, Ms. Gordon, in violation of Rule 1.4. It is uncontested that Respondent did not respond to Ms. Gordon's April 2009 email inquiring as to the status of Dr. Manderson's bill and the funds owed to Dr. Randolph, until October 2009, six months after the email was sent. Ms. Gordon's April 2009 email stated that she had left several voicemail messages and emails without response, BX 1 at 11, and other evidence indicates that Respondent failed to respond to her follow up inquiries in the summer of 2009 and after October 2009. *See, e.g.*, BX 10 at 195; BX 2 at 10. During that time, Dr. Manderson's office continued to contact Ms. Gordon and Respondent regarding the outstanding bill due to Dr. Manderson. Ms. Gordon's expectation for information from Respondent as to the status of bills owed to her medical providers was reasonable, and Respondent's failure to timely reply to Ms. Gordon's inquiries violated Rule 1.4.

Respondent claims that she was not aware that Ms. Gordon was attempting to contact her because Respondent had shut off her phone and was not checking email from approximately July 2009 through October 2009. FF 29. Therefore, Respondent

contends, her failure to communicate with Ms. Gordon was inadvertent. We do not find this to be an adequate excuse.

Respondent's failure to promptly reply to Ms. Gordon's inquiries in violation of Rule 1.4 cannot be excused by Respondent having affirmatively avoided receiving her client's communications. This is especially true where, as here, Ms. Gordon's repeated communications were the direct result of Respondent's failure promptly to pay the third party medical providers the funds owed to them, in violation of Rule 1.15(b). Even if we were to credit Respondent's testimony that she entrusted her husband with the funds to pay Dr. Manderson, when Respondent shut off her phone and stopped checking emails, there is no evidence that she had provided Ms. Gordon with information regarding that purported payment, and the status of the bill from Dr. Randolph had not been resolved. We therefore find unavailing Respondent's assertion that when she shut down her phone and stopped checking email, she had no reason to believe that anyone was trying to contact her. RFF at 10 n.4.[8]

Furthermore, Rule 1.4 requires not only responses to client inquiries, but initiation of communication to provide necessary information. *See Mitrano*, 952 A.2d at 927. Despite the uncertain status of at least Dr. Manderson's bill at the time Respondent shut off communication, Respondent did not advise Ms. Gordon that she would not be reachable by phone or email, she did not provide Ms. Gordon with alternate contact information, and she did not initiate communication with Ms. Gordon regarding the status

[8] In addition, Respondent does not claim that she changed her physical mailing address, and Ms. Mills testified that PMB mailed bills to Respondent every 28 days. FF 30.

of Dr. Randolph's outstanding bill. The evidence of Respondent's Rule 1.4 violation is clear and convincing.

F. Violation of Rule 8.4(c)

Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit, or misrepresentation." The Court has held that "Rule 8.4(c) is not to be accorded a hyper-technical or unduly restrictive construction." *In re Ukwu*, 926 A.2d 1106, 1113 (D.C. 2007); *see also In re Hager*, 812 A.2d 904, 916 (D.C. 2002) (citing *In re Arneja*, 790 A.2d 552, 557 (D.C. 2002)) (noting that the Court has "given a broad interpretation to Rule 8.4(c) . . . . "). Nonetheless, each of the four terms encompassed within Rule 8.4(c) "should be understood as separate categories, denoting differences in meaning or degree." *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990) (per curiam). Each category of Rule 8.4(c) requires proof of different elements. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003).

In this case, Bar Counsel has alleged that Respondent misrepresented to her client and to Dr. Manderson's office in June and October 2009 that she had paid Dr. Manderson's bill when, in fact, she had not. BC Br. at 29. Specifically, Bar Counsel points to Respondent's phone call with Ms. Mills in June of 2009, during which Respondent claimed that she had paid the bill and that she would send a cancelled check as proof of payment. BX 10 at 195; Tr. at 22-24; 221-22. Respondent also emailed Ms. Gordon in October 2009, representing that Dr. Manderson's bill had been "settled and was settled awhile ago," when in fact it had not. BX 1 at 11-12.

A misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *Shorter*, 570 A.2d at 767 n.12 (citation omitted); *see also In re*

Schneider, 553 A.2d 206, 209 n.8 (D.C. 1989) (misrepresentation is element of deceit). Misrepresentation requires active deception or a positive falsehood. *See Shorter*, 570 A.2d at 767. However, the Court has held that Bar Counsel does not need to establish that a respondent acted with "deliberateness" in making a misrepresentation in order to prove a violation of Rule 8.4(c). *In re Rosen*, 570 A.2d 728, 728-30 (D.C. 1989) (per curiam). Rather, establishing a violation of Rule 8.4(c) based on a misrepresentation only requires proof that the respondent "acted in reckless disregard of the truth." *Id.* at 729 (finding material misrepresentation in bar application where the respondent acted in reckless disregard of the truth); *see also Romansky*, 825 A.3d at 317 (holding that Rule 8.4(c) violation may be established by reckless conduct, including "consciously disregarding the risk" of falsity).

We find that Respondent acted in reckless disregard of the truth in representing to Dr. Manderson's office that the bill had been paid and that she would send a cancelled check as proof of payment. Respondent testified that she had withdrawn and provided cash to her husband to pay Dr. Manderson's bill. FF 10. When asked why she represented to Ms. Mills on June 9, 2009 that she had a cancelled check, Respondent stated that she was going to send proof in any form that Mr. McGee had paid. Tr. 222. Respondent then testified that when she asked her husband about the bill, he stated that he would "send the proof on." Tr. 222. Respondent admits that she took no steps after this conversation, other than asking her husband, to see if matters were resolved with Dr. Manderson's office. Tr. 229.

We find no credible evidence that Respondent understood or had any reason to believe that Dr. Manderson's bill had been paid. She does not claim to have made the

payment herself. Even if we were to credit Respondent's testimony that she entrusted her husband with Dr. Manderson's funds, given her testimony (i) that she provided him with cash and gave him no instructions on how to make the payment, (ii) that she did not know how that payment was made, and (iii) that by this time her husband was "inconsistent," Respondent's representation to Ms. Mills that the bill had been paid and she would send a cancelled check was, at minimum, baseless and made with a reckless disregard of the truth.

We also find clear and convincing evidence that Respondent violated Rule 8.4(c) with respect to her written representation to Ms. Gordon in October 2009 that Dr. Manderson's bill had been paid. Respondent knew from her June 2009 conversation with Ms. Mills that Dr. Manderson's office had not yet received payment. Furthermore, Respondent admitted that she took no steps between this conversation and April 2010 to confirm that Dr. Manderson's bill was paid, other than talking to Mr. McGee. Mr. McGee never provided proof of payment, and Respondent herself testified that Mr. McGee was not reliable. Accordingly, her representation to Ms. Gordon in October 2009 that Dr. Manderson's bill "has been settled and was settled awhile ago" was made in reckless disregard of the truth, in violation of Rule 8.4(c). *Rosen*, 570 A.2d at 729.

G. No Due Process Violation or Prejudice

Respondent alleges prejudice and due process violations during the course of this disciplinary process. Resp't Br. at 20-21. For the reasons stated below, we conclude that Respondent has not been prejudiced and that her due process rights have not been violated.

The fundamental requirements of due process are notice and an adequate opportunity to appear and contest charges. *See In re Gallagher*, 886 A.2d 64, 68 (D.C. 2005) (citations omitted). Sixth Amendment rights may be implicated where the testimony of a witness is introduced without giving the respondent a right to cross-examine the witness. *Id.* (citation omitted). Notice violations typically occur where Bar Counsel amended the charges against the attorney at the disciplinary hearing, or at a time so late as to deny the attorney a meaningful opportunity to prepare to respond to the charges. *See In re Ruffalo*, 390 U.S. 544, 546 (1968) (due process violation where state bar representative amended charges after hearing); *In re Bielec*, 755 A.2d 1018, 1024 (D.C. 2000) ("[F]air notice of the charges" is necessary precisely "to afford the attorney an opportunity to explain or defend against allegations of misconduct.").

First, Respondent contends that she was not properly charged with violating Rule 1.15(c) and therefore was not provided with adequate notice of the misappropriation charge. Resp't Br. at 20-21, 28. Specifically, Respondent claims that Bar Counsel charged Respondent with violating Rule 1.15(b), but then quoted language from Rule 1.15(c), and that Respondent was thereby prejudiced by "having to defend against both Rule 1.15(b) and 1.15(c)." *Id.* at 19, 28. Respondent's contention lacks merit.

Bar Counsel properly cited to the Rules that were in effect at the time of the conduct at issue (November 2007 to March 2010). D.C. Rules of Prof'l Conduct R. 1.15(b) (2007); B.C. Br. at 2, n.1. Because Rule 1.15(b) was subsequently revised, effective August 1, 2010, it now appears as Rule 1.15(c). *See* D.C. Court of Appeals Order No. M-235-07 (Mar. 22, 2010).

Furthermore, we find that "the specification of charges ... fairly put [Respondent] on notice of the ... charges against [her]," *In re Austin*, 858 A.2d 969, 976 (D.C. 2004) (citing *In re Hager*, 812 A.2d 904, 917 n. 14 (D.C. 2002)), and that Respondent suffered no prejudice. Respondent concedes that both the Specification and Amended Specification of charges quoted the relevant substantive language of the Rule. Resp't Br. at 19. Respondent does not contend that she did not have a meaningful opportunity to prepare or respond to the charges in the Amended Specification of Charges. To the contrary, Respondent responded to the charge that she misappropriated funds with respect to Dr. Manderson and Dr. Randolph in violation of then-Rule 1.15(b) (currently Rule 1.15(c)), in her Answer, during the Hearing, and in her Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction. Accordingly, we conclude that Respondent had adequate notice with respect to this charge.

Second, Respondent claims that Bar Counsel told her she did not need counsel during an interview with Bar Counsel, and that Respondent was thereby prejudiced. Resp't Br. at 20. We conclude that Respondent's due process rights were not violated, and that she suffered no prejudice in any event. Charles M. Anderson, an investigator at the Office of Bar Counsel who attended the interview in question, testified during the Hearing that he did not remember Respondent's right to counsel being discussed during the interview. Tr. 337. We find that Mr. Anderson is a credible witness.

Under Rule 19.5 of the Board Rules, respondents "may be represented by counsel at all stages in Board proceedings." Respondent was an attorney capable of seeking legal counsel and capable of reviewing the Board Rules providing her right to do so. At the time of her June 2010 interview with Bar Counsel, Respondent was aware that she was

under investigation; Respondent had already been served with a Bar Counsel subpoena, *see* BC Ex. 3, and had responded to an initial letter of inquiry. *See* BC Ex. 2. We are not aware of any requirement that Bar Counsel give a *Miranda*-type warning to an attorney under investigation at the commencement of an interview.[9] And notably, the April 7, 2010 subpoena expressly advised Respondent that "[c]onsultation with an attorney" was permissible. BX 3 at 30 (stating that "[c]onsultation with an attorney does not constitute such a breach [of the investigation's confidentiality]").

Third, Respondent complains that she did not timely receive Ms. Gordon's February 1, 2011 letter to Bar Counsel, requesting the withdrawal of her disciplinary complaint. The Hearing Committee finds that Respondent received a copy of this letter from Bar Counsel prior to the Hearing, and that Respondent suffered no prejudice by any delay in receipt.

Evidence indicates that Respondent knew of Ms. Gordon's decision to withdraw her complaint and of this February 1 letter even prior to receiving a copy from Bar Counsel, as Respondent raised the issue of the letter during the March 24, 2011 pre-hearing conference. 3/24/11 Hr'g Tr. at 7. Ms. Gordon also testified that she told Respondent on the telephone that she was withdrawing the complaint and asked Respondent to witness her signing the letter requesting withdrawal. Tr. 73. If Respondent knew of the letter, she could have specifically requested a copy of it. *See* Board Rule 3.1 (a respondent is entitled to access to all non-privileged material in Bar

[9] To be clear, the Hearing Committee would not condone Bar Counsel advising or suggesting to the subject of a disciplinary complaint that he or she does not need (or should not secure) counsel. However, we do not find on this record that such a suggestion was made here.

Counsel's file). Even assuming that Respondent did not learn of the letter until shortly before the hearing, Respondent did not request a continuance so as to conduct further investigation or otherwise mitigate any alleged prejudice. Moreover, Respondent's counsel was also able to—and did—question Ms. Gordon about the letter during the hearing. Tr. 77-85.[10]

In short, the Hearing Committee finds that Respondent's due process rights were not violated and that Respondent suffered no prejudice from any of Bar Counsel's alleged actions in any event.

V. RECOMMENDATION AS TO SANCTION

Bar Counsel seeks the sanction of disbarment. Respondent submits that if the Hearing Committee finds violations of Rules 1.15, 1.5 and/or 8.4, it should recommend a "two year suspension of her license, with all but six-months minus a day stayed," that Respondent be placed on "two years' probation and ordered to take 12 Continuing Legal Education credits in practice management and ethics, including a course on trust accounts," and if she should begin practicing outside of the government, that she be required to work with the D.C. Bar's Practice Management Advisory Service. Resp't Br. at 35. For the reasons described below, we recommend the sanction of disbarment.

When attempting to determine "what discipline is appropriate under the circumstances, [the Hearing Committee must] review the respondent's violations in light of 'the nature of the violation, the mitigating and aggravating circumstances, [and] the

[10] The Hearing Committee notes that Ms. Gordon's request to withdraw her complaint does not preclude the prosecution of disciplinary proceedings against Respondent. D.C. Bar Rule XI § 19(c) ("Neither unwillingness nor neglect by the complainant to sign a disciplinary compliant or to prosecute a charge . . . shall in itself justify abatement of an investigation into the conduct of an attorney.").

need to protect the public, the courts, and the legal profession.'" *Austin*, 858 A.2d at 975 (quoting *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc)). As the Court has stated: "The purpose of imposing discipline is to serve the public and professional interests identified and to deter similar conduct in the future rather than to punish the attorney. . . . What is the appropriate sanction necessarily turns on the nature of the respondent's misconduct." *Austin*, 858 A.2d at 975.

A. Alleged Mitigating Factors

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). The Court has found extraordinary circumstances in only a few cases, including where the respondent's misconduct was shown to be caused by a disabling addiction, such as chronic alcoholism, *see In re Kersey*, 520 A.2d 321, 326-27 (D.C. 1987), or mental illness, *see In re Verra*, 932 A.2d 503, 505 (D.C. 2007); *Cappell*, 866 A.2d at 785.

This so-called *Kersey* mitigation is appropriate where the respondent demonstrates (1) by clear and convincing evidence that the respondent had a disability; (2) by a preponderance of the evidence that the disability substantially affected the respondent's misconduct; and (3) by clear and convincing evidence that the respondent has been substantially rehabilitated. *Verra*, 932 A.2d at 505 (quoting *In re Lopes*, 770 A.2d 561, 567 (D.C. 2001)). However, Respondent did not file a notice of intent to raise disability in mitigation of sanction pursuant to Board Rule 7.6, and thus has waived a *Kersey* mitigation argument. *See* Board Rule 7.6 (failure to provide notice "shall operate as a waiver of the right to raise an alleged disability in mitigation.").

Even if Respondent had not waived the argument, her mitigation evidence is not sufficient to warrant a departure from the presumptive sanction of disbarment. Respondent offers certain stresses in her life as mitigating factors. Specifically, Respondent states that she learned that she was pregnant in May 2009, and that she had a difficult, high risk pregnancy that required her to make several changes in her personal and professional life to reduce stress, such as modifying her work schedule, changing her eating habits, and undergoing periodic bed rest. *See* Tr. 148, 151-53. Respondent also explained that her marriage deteriorated during this time, and that she and her husband separated in October 2009. Tr. 158.

We conclude that these factors do not meet the requirements of *Kersey's* three-prong test. Even assuming that Respondent has presented clear and convincing evidence that she suffered from some sort of disability during her pregnancy, Respondent has not shown by a preponderance of evidence that the disability substantially affected her misconduct. Respondent first learned that she was pregnant in May 2009, approximately nine months after she received Ms. Gordon's settlement funds and seven months after Dr. Manderson's bill was finalized. Tr. 148. Because her subsequent pregnancy could not have caused her failure to pay Dr. Manderson and Dr. Randolph during this time, we do not find that her pregnancy constituted extraordinary circumstances under the *Kersey* test.

In the absence of misappropriation caused by a "disabling addiction" or depression not present here, the Court has deviated only once from the presumptive sanction for disbarment for non-negligent misappropriation. *See In re Hewett*, 11 A.3d 279 (D.C. 2011). In that single instance, the Court found that, in addition to mitigating factors of the "usual sort," the lawyer's single act of intentional misappropriation was

"motivated *solely* by a desire to protect his ward's interest[.]" *Id.* at 289 (emphasis added). No similar mitigating factor exists here. Accordingly, we find no extraordinary circumstances that mitigate the presumptive sanction.

The sanction of disbarment is therefore required unless the "mitigating factors of the usual sort" are "especially strong" and "substantially outweigh any aggravating factors as well." *Addams*, 579 A.2d at 191. In addition to the factors discussed above, Respondent presented two character witnesses, her aunt, Denise Davis, and a family friend, Timothy Minor. These witnesses testified as to Respondent's good character and active involvement in their community, including that Respondent provided *pro bono* services to them. Respondent acknowledged that she made mistakes, and she has sent full payment to Dr. Manderson's and Dr. Randolph's offices. We also note that Respondent has not been subject to any prior discipline. Nonetheless, we conclude that these mitigating factors are of the "usual sort" and are not "substantially strong" to rebut the presumption of disbarment. *See In re Pierson*, 690 A.2d 941, 950 (D.C. 1997) (en banc) (the "usual sort" of mitigating factors include admission of wrongdoing, prompt return of disputed funds, and an unblemished disciplinary record).

B. Alleged Aggravating Factors

Bar Counsel asserts two aggravating factors, one of which we find was established by clear and convincing evidence.

First, Bar Counsel contends that Respondent lied during an in-person interview with Bar Counsel by representing that she maintained trust funds in her personal account after she withdrew the entrusted funds in cash from her trust account. BC Br. at 10; Tr. 332. During the hearing, Respondent denied having made such an oral representation to

Bar Counsel that she placed trust funds in her personal account, and she stipulated during the hearing that the medical providers' funds had not been maintained in her personal account. Tr. 214-25, 346. Based on the record as a whole, we do not find clear and convincing evidence establishing that Respondent lied to Bar Counsel during the in-person interview on this issue.

Second, Bar Counsel asserts that Respondent provided "demonstrably false" testimony during the hearing, which is an aggravating factor. *See, e.g.*, *In re Cleaver-Bascombe,* 986 A.2d 1191, 1200 (D.C. 2010). Specifically, Bar Counsel alleged that Respondent falsely testified (1) that she gave Ms. Gordon the funds due to Dr. Randolph, (2) that she entrusted her husband with the funds due to Dr. Manderson, and (3) that she did not hear from Ms. Gordon or Dr. Manderson between June 2009 and March 2010. BC Br. at 37.

With respect to the first two allegations, we find clear and convincing evidence that Respondent provided false testimony during the hearing. As discussed above, we did not credit Respondent's testimony on either of these points.

With respect to the first, Respondent's contemporaneous written communications with Ms. Gordon contradict her subsequent hearing testimony that she gave Ms. Gordon the funds owed to Dr. Randolph. FF ¶ 20. In response to Ms. Gordon's inquiry, Respondent advised that she could not provide Ms. Gordon the $1500 due to Dr. Randolph, as Ms. Gordon requested, "until I get a release from the Dr.'s office." *Id*. Likewise, in her written submission to Bar Counsel, Respondent stated that she did not give Ms. Gordon the funds due to Dr. Randolph because Respondent "felt uncomfortable providing Ms. Gordon with the funds, like she suggested, and then I would be liable if the

doctor later requested payment." FF ¶ 21. We find that Respondent's hearing testimony to the contrary was false.

We also find that Respondent's hearing testimony that she entrusted to her husband, Mr. McGee, the funds owed to Dr. Manderson, was deliberately false. Respondent's testimony in this regard was not credible, and it has no credible support in the record. Specifically, we give no weight to the affidavit purportedly submitted by Respondent's ex-husband, Mr. McGee. FF ¶ 16. Furthermore, record evidence contradicts Respondent's hearing testimony on this point. FF ¶¶ 10-15.

With respect to Bar Counsel's third assertion -- that Respondent falsely testified that she did not hear from Ms. Gordon or Dr. Manderson between June 2009 and March 2010 -- we conclude that Bar Counsel has not proven by clear and convincing evidence that this hearing testimony was intentionally false. Bar Counsel argues that Respondent's testimony was false because both Ms. Gordon and Ms. Mills from PMB testified that they attempted several times to reach Respondent between June 2009 and March 2010. In other words, Bar Counsel's charge assumes the perspective of Ms. Gordon and Ms. Mills and that Respondent knew of their efforts to contact her. However, Respondent's testimony appears to reflect her own perspective -- namely that did not "hear" from Ms. Gordon and Dr. Manderson's office because she had turned off her phone and fax and did not check her email during the time that Ms. Mills and Ms. Gordon attempted to contact her. While we conclude that Respondent's failure to check her phone and email did not excuse the rule violations charged, certain evidence supports that she did, in fact, shut off her phone and fax and stop checking email. *See, e.g.*, BX 10 at 195 (indicating that certain of Ms. Mills' faxes to Respondent did not go through). Viewing the record as a

whole, we do not find clear and convincing evidence that Respondent's hearing testimony on this third point was false.

CONCLUSION

Rule XI, § 2(a), states that "[t]he license to practice law in the District of Columbia is a continuing proclamation by this Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and an officer of the Court." Respondent's misconduct has been established by evidence that is clear and convincing. There are no unique and compelling circumstances here that could justify reducing the recommended and presumptive sanction from disbarment to a lesser sanction. In addition to intentionally misappropriating third party funds, Respondent also violated a number of other ethics rules and gave false testimony during the hearing. Disbarment is appropriate in this case.

For these reasons, we recommend that the Court enter an order disbarring Respondent.

AD HOC HEARING COMMITTEE

By: /JGC/
Justin G. Castillo, Esq.
Chair

/RF/
Ria Fletcher
Public Member

/EJP/
Elissa J. Preheim, Esq.
Attorney Member

Dated: August 30, 2013

This report was prepared by Ms. Preheim.