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

In the Matter of:	:	
	:	
WENDELL C. ROBINSON,	:	
	:	
Respondent.	:	Board Docket No. 15-BD-053
	:	Bar Docket No. 2012-D293
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 377091)	:	

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

Respondent, Wendell C. Robinson, is charged in the sole count of the Specification of Charges filed by Disciplinary Counsel[1] with violating Rule 1.15(d) of the District of Columbia Rules of Professional Conduct (the "Rules"). The violation charged arises from incidents tangential to Respondent's successful representation of a client in the courts of the Commonwealth of Virginia. The alleged violation in no way involved Respondent's representation of the client and is solely concerned with the distribution among attorneys of fees generated in the successful litigation in Virginia.

The facts alleged in the Specification of Charges filed by Disciplinary Counsel charged that while in possession of funds in which interests were claimed by other persons, and about which there was a dispute concerning how much was owed those other persons, and how much belonged to him, Respondent failed to keep in his escrow account the amount in dispute. In a pre-hearing conference held several months prior to the taking of evidence in this matter, the Hearing Committee Chair noted for the parties that while Disciplinary Counsel had not charged

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

misappropriation, the facts alleged, if proven, amounted to an intentional or reckless misappropriation of funds. Over the objections of both parties, the Chair advised the parties that in addition to the Rule 1.15(d) charge contained in the Specification of Charges, the Hearing Committee would consider whether Respondent had engaged in misappropriation in violation of Rules 1.15(a) and 1.15(c) if, as alleged, he failed to keep disputed funds in trust.

Disciplinary Counsel contends that Respondent violated Rule 1.15(d) (failure to keep entrusted funds in a trust account) only, and should be disbarred. Respondent admits violating Rule 1.15(d), but argues that he should not be disbarred because, when the dispute arose over the distribution of the fees, he contacted the Office of Disciplinary Counsel and was advised to comply with Rule 1.5(e) (governing the division of legal fees), which he attempted to do in good faith.

As set forth below, the Hearing Committee finds clear and convincing evidence that Respondent violated Rule 1.15(d) as alleged in the Specification of Charges and, further, that Respondent engaged in misappropriation in violation of Rules 1.15(a) and (c), and that the misappropriation was intentional. The Hearing Committee recommends that Respondent be disbarred for his violation of Rule 1.15(d), and that he should be disbarred for his violation of Rules 1.15(a) and (c). The Hearing Committee further recommends that should Respondent be considered for reinstatement, such reinstatement be conditioned upon the successful completion of 24 hours of Disciplinary Counsel-approved, ethics-related Continuing Legal Education ("CLE") courses relating to the care and custody of entrusted funds and the management of a law office.

I. PROCEDURAL HISTORY

On May 20, 2015, Disciplinary Counsel filed a Petition Initiating Formal Disciplinary Proceedings against Respondent and a Specification of Charges ("Specification"). On June 24, 2015, an affidavit was filed reflecting that on June 11, 2015, Respondent was personally served

with the Petition and Specification. On September 17, 2015, this Hearing Committee ordered an initial hearing for September 25, 2015, at which hearing the Chair advised Respondent that no Answer had been filed to Disciplinary Counsel's Petition and Specification of Charges. At that initial hearing, at which Respondent represented himself, the Chair ordered that Respondent file his Answer and a motion for leave to file, time having expired, by the close of business that day, which he did. After considering Respondent's motions and Disciplinary Counsel's Motion for Default Judgment, the Hearing Committee granted Respondent's motion, and his Answer was filed. Disciplinary Counsel's Motion for Default Judgment was denied. Thereafter, over the objection of Disciplinary Counsel, Respondent was permitted to file an Amended Answer on October 7, 2015 and, upon entry of new counsel for Respondent, a Second Amended Answer on November 7, 2015.

The Specification of Charges alleges that following the conclusion of a successful suit in the courts of the Commonwealth of Virginia, Respondent, who was the sole custodian of the proceeds of that suit, undertook to distribute those proceeds. He made an appropriate and unchallenged distribution to the plaintiff/client, satisfying the client's claims pursuant to the retainer.[2] He also made an appropriate and unchallenged distribution to the Virginia attorney who served as local counsel in the litigation.[3] The problem which brought this matter to the attention

[2] Respondent's initial distribution to the client was $400,000, two-thirds of the total settlement of $600,000. During settlement negotiations, the plaintiff made clear that her agreement to any settlement required that she receive at least $400,000. Thus, on the mistaken belief that she would receive a two-thirds share, the defendant's offer satisfied her requirements. When Respondent spoke to the complainants in this matter, he learned that under the circumstances of this settlement, the retainer agreement provided for a 40% payment to the attorneys. Respondent then spoke to the plaintiff and arranged for the return of the initial two-thirds distribution. Respondent offered to reimburse one-third of the $40,000 difference to plaintiff from respondent's own share, but the plaintiff agreed to accept 60% of the total recovery, or $360,000.

[3] Local counsel was a party to the retainer agreement, but it made no provision for division of the

of Disciplinary Counsel arose in the course of making a distribution to the two District of Columbia attorneys who had first been engaged by the plaintiff and who were responsible for arranging for Respondent's participation in the matter. Respondent, the two complainants, and Virginia local counsel were parties to the retainer agreement, but that agreement made no provision for the division of attorneys' share among them. While local counsel was satisfied with his share, the three District of Columbia attorneys could not reach any agreement on the division of the remainder of the fee. Respondent made an initial offer to distribute $40,000 to the two complainants and advised the complainants that if they did not accept it, that amount would be held in his trust account. That offer was rejected. Respondent then consulted the Office of Disciplinary Counsel concerning the problem of division of fees. The Assistant Disciplinary Counsel consulted referred Respondent to Rule 1.5(e). Subsequently Respondent made an offer of $15,700 to each complainant.

Based on the facts alleged in the Specification of Charges, Disciplinary Counsel charged Respondent with violating Rule 1.15(d) for failing to keep in escrow funds in which other persons claim interest. At a motions hearing on December 1, 2015, the Chair placed the parties on notice that there appeared to the Chair to be a justiciable question as to whether the facts alleged in the Specification of Charges, if proven, would establish that Respondent engaged in reckless or intentional misappropriation, and thus, the presumptive sanction would be disbarment.[4]

earned fee among the attorneys. There was no prior agreement as to his reimbursement. He agreed to the $15,000 Respondent offered and paid.

[4] The Committee Chair had mentioned this issue at an earlier hearing, but due to the procedural status of this matter at that time, focused consideration of the question was delayed until the December 1, 2015 pre-hearing. Sept. 25 Pre-Hearing Tr. 23-24; Dec. 1 Pre-Hearing Tr. 61-64.

In an Order dated December 14, 2015, the Chair directed that the parties respond in writing to four questions the Chair believed were raised by the potential charge of reckless and intentional misappropriation nascent in the facts pled in the Specification of Charges. On February 22, 2016, a hearing was held on that issue and, over the objection of both parties, the Chair ruled that in the evidentiary hearing in this matter, the Hearing Committee would consider whether Respondent committed the Rule violation alleged in the Specification of Charges as well as whether the facts proven at the hearing established that Respondent had engaged in misappropriation.

A hearing was held on April 26, 2016, before this Ad Hoc Hearing Committee (the "Hearing Committee"), composed of William J. O'Malley, Jr., Esquire, Chair; Curtis D. Copeland, Jr., Public Member; and John R. Gerstein, Esquire, Attorney Member. Disciplinary Counsel was represented at the hearing by Hamilton P. Fox, III, Esquire. Respondent was represented by Abraham C. Blitzer, Esquire. Respondent was present throughout the hearing.

Prior to the hearing, Disciplinary Counsel submitted Disciplinary Counsel Exhibits ("DX") A through D and 1 through 16. Those exhibits were received into evidence without objection. Transcript of Proceedings ("Tr.") 119. Respondent moved the admission of his exhibits ("RX") 1 and 2, and they were admitted without objection. Tr. 202. During the hearing, Disciplinary Counsel called two witnesses: Leonard L. Long, Esquire, and W. Thomas Stovall, II, Esquire, the two complainants in this matter. Thereafter, Respondent testified on his own behalf.

At the conclusion of the initial phase of the hearing, the Hearing Committee made a preliminary, non-binding determination that Respondent violated at least one Rule of Professional Conduct. *See* Board Rule 11.11, Tr. 202. Disciplinary Counsel then presented DX 17 through 21 as evidence in aggravation of sanction, which consisted of opinions regarding Respondent's prior disbarment and his subsequent efforts to achieve reinstatement. On July 5, 2016, Disciplinary

Counsel formally moved to admit DX 17 through 21 into evidence. There being no objection, those exhibits are hereby admitted into evidence. Respondent presented no additional evidence in mitigation of sanction. Tr. 202-05.

After the close of the hearing, Disciplinary Counsel filed Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction. Respondent filed a Posthearing Brief. Disciplinary Counsel filed a Reply Brief.

II. STANDARD OF REVIEW

Disciplinary 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) ("*Anderson II*"); Board Rule 11.6. 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 [Disciplinary] 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).

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, each of which we find is supported by clear and convincing evidence.

III. FINDINGS OF FACT

1. Respondent Wendell C. Robinson was admitted to the Bar of the District of Columbia Court of Appeals ("D.C. Bar") on February 10, 1984. His Bar number is 377091. DX B, D; Tr. 120 (Robinson).

2. The District of Columbia Court of Appeals in *In re Robinson*, 583 A.2d 691 (D.C. 1990), ordered Respondent disbarred after he engaged in misappropriation when he cashed a settlement check, which he used for his own purposes, and failed to turn over the client's share to the client, despite the client's repeated requests that he do so. Respondent's actions therein were aggravated by repeated dishonest statements to his client, an attempt to bribe the client, and dishonest statements to Disciplinary Counsel investigating the matter. DX 17.

3. The District of Columbia Court of Appeals in *In re Robinson*, 705 A.2d 687 (D.C. 1998) ("*Robinson II*"), denied Respondent's first request for reinstatement, citing continued concerns about his fiscal responsibility. Respondent applied again for reinstatement 1999 ("*Robinson III*") and 2002 ("*Robinson IV*"), but withdrew both petitions after the hearing committees recommended against reinstatement. DX 18-20. Respondent renewed that application in 2004, and in 2007, the Court of Appeals reinstated him. *In re Robinson*, 915 A.2d 358 (D.C. 2007) ("*Robinson V*"). Mr. Long testified on Respondent's behalf in *Robinson V* and represented him in part. Respondent's reinstatement was conditioned on a requirement that Respondent meet with the Lawyer Practice Assistance Program of the D.C. Bar and follow its guidance on managing a law office. As part of that condition, respondent was placed under the supervision of a financial monitor for one year. DX 21.

4. In September 2009, Tonyette Bables approached Leonard L. Long, Esquire, a member of the D.C. Bar, about representing her in a medical malpractice case. By an attorney,

Ms. Bables had filed a case in Maryland, but her original lawyer could no longer represent her. Tr. 9-11 (Long).

5. After meeting with Ms. Bables, Mr. Long consulted another D.C. lawyer, W. Thomas Stovall, II, Esquire. Mr. Stovall and Mr. Long met with Ms. Bables. They concluded that her case should have been filed in Virginia, not Maryland. Tr. 11 (Long), 73 (Stovall).

6. Mr. Stovall and Mr. Long decided to associate with Respondent in the case, and the three lawyers determined that because they were not members of the Virginia Bar and thus could not file pleadings in the Virginia courts, to stave off any looming statute of limitations problems, Ms. Bables should file a *pro se* Complaint. Tr. 11-12 (Long); 126-27 (Robinson).[5] The original Maryland Complaint was reworked by Respondent to meet Virginia requirements, and Mr. Long escorted Ms. Bables to Fairfax County to assist her in filing the *pro se* Complaint there. Tr. 12 (Long), 124 (Robinson). Mr. Long, Mr. Stovall, and Respondent determined to approach a Virginia lawyer, William Thompson, Esquire, to serve as local counsel, and Mr. Thompson agreed to be local Virginia counsel in the *Bables* matter. Tr. 12-13 (Long), 73-75 (Stovall), 123-24 (Robinson). It is not clear whether one or more of the four attorneys were associated in the practice of law in the past, but on February 2, 2010 and thereafter, there was no such association among any of the four attorneys, and all practiced independently.

7. Respondent arranged with Mr. Thompson to be admitted *pro hac vice* to the Circuit Court of Fairfax County, Virginia, where Ms. Bables' suit was to be litigated. Mr. Thompson made a motion for Respondent's admission, and Respondent paid a $250 fee to the court for his

[5] Respondent explained that to meet procedural requirements in Virginia for medical malpractice cases Respondent determined that Ms. Bables' *pro se* Complaint would have to be non-suited and a new Complaint filed. The non-suit added an additional six months to the statute of limitations and permitted Respondent time to designate expert medical opinion. Tr. 123-29 (Robinson).

admission to permit him to litigate the *Bables* matter in Virginia. Tr. 126-27 (Robinson). Despite the fact that Respondent provided the necessary documents for *pro hac vice* admission, neither Mr. Long nor Mr. Stovall ever sought to be admitted to practice before the Virginia courts in the *Bables* matter. Tr. 36 (Long), 87 (Stovall), 129-30 (Robinson).

8. On February 2, 2010, Ms. Bables executed a "Retainer/Contingency Fee Agreement." Among the lawyers, only Mr. Long signed the Agreement, but it named Mr. Long, Mr. Stovall, Mr. Thompson, and Respondent as the attorneys for Ms. Bables. DX 1; Tr. 15-16 (Long), 74 (Stovall). It also provided, "Attorneys shall have the right to associate such other counsel as may be necessary to properly handle the claim." DX 1, ¶ 8. "Attorneys have the right to designate the counsel employed who shall perform the services necessary to prosecute the client's claim." *Id.* ¶ 12.

9. Although the Agreement specified the contingency fee arrangement as between the attorneys and the client, it did not address how the lawyers would divide the contingency fee among themselves, nor did it make any provision for a "referral" fee. DX 1, ¶ 4; Tr. 15-16 (Long), 74-75 (Stovall). It provided that the lawyers had a lien on any recovery for the payments of attorneys' fees. DX 1, ¶ 10.

10. Mr. Long and Mr. Stovall testified that they had an oral agreement to pay Mr. Thompson an unspecified amount for his services as local counsel and then divide the remainder evenly among Mr. Long, Mr. Stovall, and Respondent. Tr. 14-15 (Long), 74 (Stovall). Respondent testified that they did not discuss how to divide the fee, but that he assumed they would divide it based upon the work each lawyer performed. Tr. 142 (Robinson). We credit the testimony of Mr. Long and Mr. Stovall on this point; additionally, we note that Respondent later took actions that were consistent with the Stovall and Long account of the agreement. *See, e.g.*,

FF 17. Accordingly, we find that Mr. Long, Mr. Stovall, and Respondent orally agreed to share equally in any recovery.

11. After Ms. Bables filed a *pro se* action in Virginia state court to avoid the expiration of the statute of limitations, Respondent "non-suited" the Virginia case and filed an amended Complaint. Tr. 14-17 (Long), 75-76 (Stovall), 126-27 (Robinson).

12. Respondent conducted the litigation by himself. Mr. Long and Mr. Stovall testified that they volunteered to assist Respondent on several occasions, but that Respondent always told them that he needed no assistance because the case was a "slam dunk." Tr. 17 (Long), 76 (Stovall). Mr. Long wrote Respondent when it appeared the case would not settle and a trial was imminent. Mr. Long suggested that he and Respondent should try the case, with Respondent serving as lead counsel, despite four lawyers being involved in the matter. DX 2; Tr. 156-57 (Robinson).

13. The lawyers began to dispute how to divide the attorneys' fees, even before the case settled. Respondent had suggested that he was doing all the work and was entitled to more than one-third of the fees. Tr. 17-19. In response, by letter dated April 29, 2011, Mr. Long suggested they divide the fees 58% for Respondent and 42% for himself, with Respondent responsible for compensating Mr. Thompson and Mr. Long responsible for compensating Mr. Stovall. DX 2; Tr. 18-19 (Long).

14. Respondent rejected Mr. Long's suggestion in a letter dated May 9, 2011 and proposed a split based upon division of labor. DX 3; Tr. 19-20 (Long), 161-62 (Robinson). Mr. Long responded on May 16, 2011 and proposed that he, Mr. Stovall, and Respondent submit the attorneys' fees issue to arbitration. DX 4. With the receipt of this May 16 letter, Respondent was on notice that there was a dispute concerning the division of attorneys' fees that the lawyers would receive if there was a recovery at the end of the case. Tr. 21 (Long).

15. In June 2011, following mediation, the case settled for $600,000. Pursuant to the Retainer/Contingency Fee Agreement, the lawyers were entitled to 40% of this amount, or $240,000. Tr. 22 (Long), 76-77 (Stovall).

16. At the point the matter was settled, other than the conferences among the attorneys in which they determined to take the case and associate in its litigation and the time expended by Mr. Long in escorting Ms. Bables to Fairfax County to assist in filing the *pro se* Complaint, there is no evidence that anyone but Respondent and Mr. Thompson contributed anything to the litigation of the matter or its settlement. Tr. 56-59 (Long), Tr. 100-04 (Stovall).

17. In negotiating the settlement of the underlying case, and unaware that the contingency agreement provided for a 40% fee, Respondent acknowledges that in getting the client's consent to settlement, he told the client that she would receive $400,000 from the $600,000 settlement, with the remaining $200,000 being fees. When his co-counsel later told him that consistent with the retainer agreement the fees would be $240,000, and the client would receive $360,000, (DX 1), he relayed that information to the client, who became very upset. Respondent testified that he offered to return to Ms. Bables $13,333 or one-third of the $40,000 difference between $200,000 in fees and $240,000 in fees. Tr. 133-36, 147-48, 197-99. We find that this offer reflects Respondent's understanding that he, Mr. Stovall, and Mr. Long were each entitled to one-third of the fee. This understanding coincides with what his co-counsel believed then and believe now, but is inconsistent with Respondent's actions when he disbursed escrowed monies, and is not what Respondent now claims.

18. On June 20, 2011, the $600,000 settlement was credited to Respondent's trust account. DX 16 at 20; Tr. 167 (Robinson). On June 22, 2011 Respondent paid himself $5,000 from the *Bables* settlement. DX 16 at 1, 52, 83; Tr. 174 (Robinson). Other than the agreement to

equally share any fee earned, FF 10, Mr. Long and Mr. Stovall never agreed to any other proposal as to Respondent's share of the $240,000 in attorneys' fees, and they did not know Respondent had begun paying himself fees. Tr. 31-32 (Long), 84-85 (Stovall).

19. On June 29, 2011, Mr. Long met with Respondent, but they were unable to resolve how to divide the attorneys' fees. Tr. 23-25 (Long). On June 30, 2011, Respondent paid Ms. Bables $360,000, paid Mr. Thomson two checks totaling $15,000, and paid himself $95,000. DX 16 at 1-2, 47-50, 78-81. On July 1, 2011, Respondent paid himself an additional $70,000. DX 16 at 2, 48, 79. At this point, Respondent had paid himself $170,000 of the $240,000 in attorneys' fees, or just under 71%. Taking into consideration the payments to Mr. Thompson, 77% of the fees had been disbursed—leaving $55,000, or less than 23%, from which to compensate Mr. Long and Mr. Stovall.

20. In a letter dated July 1, 2011, Respondent sent Mr. Long a check for $40,000. Respondent represented to Mr. Long, "If you reject the $40,000, the money will remain in my trust account." DX 6 at 2. It appears that Respondent intended this amount as compensation for both Mr. Long and Mr. Stovall. Tr. 146. Mr. Long never negotiated this check. Tr. 23-24 (Long).

21. On July 5, 2011, Mr. Stovall telephoned Respondent and told him that all the fees were in dispute and that they should all be escrowed. Tr. 78 (Stovall). He subsequently memorialized this conversation in a letter to Respondent. DX 9.

22. On July 7, 2011, Mr. Long faxed a letter to Respondent proposing that they submit their fee dispute to mediation or arbitration. He also wrote, "[i]n as much as it was readily apparent after our meeting on June 29, 2011 that there was no agreement as to your intended disbursement of Attorneys' Fees, you were put on notice that the division of said fees was in dispute and could

not therefore be disbursed for any reason until such time as this dispute is resolved." DX 7; Tr. 24-25 (Long).

23. After the July 5 and 7 communications from Mr. Stovall and Mr. Long demanding that he escrow all the attorneys' fees until their dispute was resolved, Respondent did not return to escrow any funds he had paid himself. Tr. 178 (Robinson). Instead, on July 7, 2011, he paid himself $10,000, and on July 12, he paid himself another $5,000. DX 16 at 2, 44-45, 75-76. This left $40,000 of the attorneys' fees in his escrow account, the amount that he had promised in his July 1 letter would remain in escrow if Mr. Long did not cash the check Respondent had sent him. Tr. 179-80 (Robinson).

24. On July 14, 2011, Mr. Stovall faxed to Respondent a letter memorializing their July 5 telephone conversation. In that letter, Mr. Stovall wrote, "You sent Leonard [Long] a check for $40,000. At this point, the complete $240,000 is in dispute and you cannot disburse any of that money unless all of the disputing parties agree to it." He suggested that Mr. Thompson was entitled to a fee of $50,000 and said there was no reason to hold him hostage while the other three lawyers argued about their fees. DX 9. Respondent did not tell Mr. Stovall that he had already resolved the amount of Mr. Thompson's fee by paying him $15,000. Nor did he tell him that he had already paid himself the bulk of the attorneys' fees. Tr. 78-80 (Stovall).

25. On July 16, 2011, Respondent drew two $700 checks on the remaining escrowed funds, which he sent to Mr. Long and Mr. Stovall. DX 16 at 2, 25, 28, 54, 57; Tr. 27-28 (Long), 80 (Stovall). Just 15 days after he had promised to escrow $40,000, Respondent wrote himself a check on his escrow account for $38,350 and stopped payment on the $40,000 check he had previously sent Mr. Long. Then he used some of these funds to purchase four cashier's checks, two in the amount of $15,000 and two in the amount of $700. He sent one $15,000 check and one

$700 check each to Mr. Long and Mr. Stovall (or a total of $15,700 each). DX 10; DX 16 at 2, 43, 74; Tr. 150-51, 184-86 (Robinson). He explained what he had done in a letter to Mr. Stovall dated July 18, 2011, which he copied to Mr. Long by facsimile and mail. Respondent copied Mr. Long with the July 18 letter to Mr. Stovall, and included with the mailed copy of the letter two certified checks, one in the amount of $15,000 and a second in the amount of $700. DX 10. Some time later, after consulting with Respondent and agreeing that cashing the checks would not be interpreted as receipt of an offer in settlement, Mr. Long cashed the $15,000 and $700 checks. Tr. 29.

26. On July 22, 2011, Mr. Stovall faxed Respondent his objection to these payments: "Clearly, you do not have the right or authority to unilaterally make a decision on what or how much you will share with other counsel[s] under contract and when funds are in dispute. My understanding is 'Disputed Funds are not to be disbursed and should be kept in escrow.'" DX 11 at 2 (brackets original); Tr. 82 (Stovall). Respondent did not return any funds to escrow or tell Mr. Stovall that he had taken almost all the fees. Tr. 187-89 (Robinson).

27. Respondent had mistakenly sent the $700 and $15,000 checks made out to Mr. Stovall to Mr. Long's office. On July 25, 2011, he resent those checks to Mr. Stovall. He wrote, "Once again, if you believe you deserve more than the two checks I have sent you, as I told Leonard, if we go to arbitration, and/or mediation, based on the requirements of Bar Rule 1.5(e) and the arbitrator, [sic] finds that you should receive more than the $15,700 I have enclosed, in the letter you refuse to open, I'll write you a check for the difference." DX 12 at 2. The parties never went to mediation or arbitration, and the July 25 letter was the last communication between Mr. Stovall and Respondent on the subject of attorneys' fees. Tr. 83-84 (Stovall).

28. Mr. Long made unsuccessful attempts to resolve the attorneys' fees dispute in October and December 2011. DX 13, 15. The lawyers never negotiated a resolution, and Respondent did not inform them that, rather than escrowing the disputed funds, he had paid them to himself. Tr. 31-32 (Long), 84-85 (Stovall).

29. On August 11, 2011, Respondent paid himself $200 from the escrowed attorneys' fees. DX 16 at 2, 40, 71. This left only $50 in escrow, of the $240,000. Tr. 194 (Robinson). In summary, out of that $240,000, Respondent paid Mr. Thompson $15,000; Mr. Long $700; Mr. Stovall $700; and himself $223,550. DX 16 at 2. He funded the $30,000 cashier's checks to Mr. Long and Mr. Stovall out of the $223,550 that he paid himself. FF 25. Treating those payments as functionally the same as paying them from the escrowed funds, Respondent received $193,350, Mr. Long and Mr. Stovall $15,700 each, and Mr. Thompson $15,000.

30. Respondent repeatedly testified falsely that Mr. Long agreed that Respondent was entitled to all or almost all the fees, aside from what was owed Mr. Thompson, and that Mr. Long was not contending that he was entitled to fees, but rather was asking Respondent to make him a gift from those fees. *See, e.g.*, Tr. 154-56, 163-64. This testimony is completely belied by the written record. Mr. Long and Mr. Stovall repeatedly asserted their entitlement to a share of the fees. *See* DX 2, 4, 7, 9, 11, 13, 15. Respondent's own letters, clearly referring to a dispute about splitting the attorneys' fees and even the possibility of arbitrating that dispute, conflict with his testimony that the fee discussions were requests for a gift. *See* DX 3, 6, 8, 10, 12.

31. Respondent contends that he had formed a good faith belief that the fees generated in the *Bables* matter were to be divided among the three attorneys on the basis of the work each attorney performed. Tr. 142 (Robinson). The idea that the fee should be divided on this basis was further supported by a conversation Respondent had with an Assistant Disciplinary Counsel who

referred Respondent to Rule l.5(e). Respondent read Rule l.5(e) as requiring a fee division based on work performed. Tr. 151 (Robinson). Accordingly, when Respondent heard Mr. Long admit that Respondent did all the work in the case, Tr. 154-56 (Robinson), Respondent understood this to be a concession by Mr. Long that Respondent was entitled to all of the fee, despite language to the contrary in the letters Mr. Long sent to Respondent. Accordingly, Respondent did not testify falsely when he characterized Mr. Long as agreeing that Respondent was entitled to all or almost all the fees. Whether or not Respondent thought in good faith that he deserved the fees he claimed and that the distribution of escrowed funds suggested by his co-counsel was not fair or appropriate, there can be no question that he knew the funds were in dispute when he distributed them. *See, e.g.*, FF 21.

32. Because there is no complaint by Mr. Thompson addressed to the $15,000 distribution made to him and because Messrs. Long and Stovall have no standing to complain about the inadequacy of that distribution,[6] what is in dispute here is the remaining $225,000 after distributions to Mr. Thompson and Ms. Bables.

IV. CONCLUSIONS OF LAW

Based on the record in this matter and not considering the question of recommended sanction, we consider the following issues to be before us. First, did Disciplinary Counsel bear his burden of establishing by clear and convincing evidence that Respondent violated Rule 1.15(d) as alleged in the Specification of Charges. Second, should the Hearing Committee consider whether the facts established by clear and convincing evidence show that Respondent violated Rules 1.15(a) and (c). Finally, assuming that the Hearing Committee concludes that the answer to

[6] Messrs. Long and Stovall would have standing to complain if they alleged that Mr. Thompson's share was too large, but they do not. They indicated that they thought Mr. Thompson's share was too small, but that is Mr. Thompson's complaint to make, not Mr. Long's and Mr. Stovall's.

the second question is yes, does the record in this matter establish by clear and convincing evidence that Respondent recklessly or intentionally engaged in misappropriation. We shall address these questions *seriatim* before addressing our recommended sanctions, and, regardless of our answer to the second question, we will proceed to answer the third question.

A. *Respondent Violated Rule 1.15(d).*

We begin our consideration of Respondent's alleged violation of Rule 1.15(d) as set out in the Specification of Charges with certain findings in mind. Pursuant to the retainer agreement in this matter, after distributing $360,000 to Ms. Bables, the attorneys' portion of the recovery in Ms. Bables' matter was $240,000. One of Respondent's first distributions of that recovery was to pay Mr. Thompson, local Virginia counsel, $15,000. While Messrs. Long and Stovall have indicated they would have paid Mr. Thompson more, Mr. Thompson has never formally complained and thus is not a party to the fee dispute among the three District of Columbia lawyers which occasioned the instant proceeding. There was, as a result, a dispute over the division of the remaining $225,000. Disciplinary Counsel contends that Respondent violated Rule 1.15(d) when, despite the fact that he had been put on notice that there was a dispute concerning the division of fees between Respondent and co-counsel in the *Bables* matter, Leonard L. Long, Esquire, and W. Thomas Stovall, II, Esquire, over a period of months following his distribution to Ms. Bables and local counsel, Respondent distributed to himself virtually all of the remaining $225,000 of the settlement.

Rule 1.15(d) of the Rules of Professional Conduct states:

> When in the course of representation[,] a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be

> distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account . . . .

In *In re Bailey*, 883 A.2d 106 (D.C. 2005), our Court of Appeals explained that unlike the claims of a client, which do not need to be justified in order to bar the lawyer from making a distribution, claims of a third party require something more—a "just claim"—"as to which 'applicable law' imposes a duty on the lawyer to distribute the funds to a third party or withhold distribution." *Id.* at 116-17 (citations omitted). A "just claim," the Court explained:

> "[I]s one that relates to the particular funds in the lawyer's possession, as opposed to merely being (or alleged to be) a general unsecured obligation of the client." . . . Examples of "just claims" include: (1) "an attachment or garnishment arising out of a money judgment against the client"; (2) "a statutory lien"; (3) "a court order relating to the specific funds in the lawyer's possession"; and (4) "a contractual agreement.

Id. at 117 (quoting D.C. Ethics Op. No. 293, "Disposition of Property of Clients and Others Where Ownership is in Dispute" (adopted July 20, 1999, revised Nov. 16, 1999)).

Only the fourth example is relevant here. The Court has explained that, "the reference is to a contractual agreement made by the client and *joined in or ratified by the lawyer* to pay certain funds in the possession of the lawyer . . . to a third party." *Id.* (emphasis supplied). Here, through the retainer agreement, Ms. Bables entered into an agreement to pay the four lawyers, collectively, 40% of the gross recovery. DX 1 at ¶ 4.b. Thus, we must determine whether Respondent "joined in or ratified" that agreement.

Respondent, knowing that the retainer agreement called for the four lawyers to share in the settlement, took the entire amount and deposited into his own trust account, not in and of itself inappropriate since Ms. Bables and he were the payees on the settlement check. He then paid Mr. Thompson and offered to pay Messrs. Long and Stovall. Thus, we find that by his conduct, Respondent ratified Ms. Bables' agreement that the other lawyers would be paid from the

settlement funds he deposited into his account, and that he took upon himself the responsibility to see that those lawyers were paid. Respondent further acknowledged the agreement and the fact that he was bound by it when he reduced the distribution to Ms. Bables from $400,000 to $360,000 in conformity with that agreement. DX 1 at ¶ 10; FF 17. We find that Respondent clearly "joined in or ratified" the agreement.

Because Disciplinary Counsel argues that Respondent failed to hold enough funds in trust, we must determine how much Respondent was required to hold in trust to pay the other lawyers. There is no written agreement between the four lawyers regarding the division of the legal fee. None of the four objected to the amount paid to Mr. Thompson, and thus, we conclude that Respondent appropriately paid him.

That leaves us to determine the amount that Respondent should have held in trust to pay Messrs. Long and Stovall. Put another way, what was the value of Messrs. Long and Stovall's "just claim" to the settlement proceeds. The evidence suggests three different amounts: $150,000 (two-thirds of the funds remaining after Mr. Thompson was paid); $40,000 (the amount that Respondent sent to Mr. Long on July 1, 2011 and the amount Respondent promised to maintain if Messrs. Long and Stovall did not accept that offer); or $31,400 (the amount Respondent sent Messrs. Long and Stovall on July 16, 2011).

Respondent and Messrs. Long and Stovall did not reach a written agreement as to the division of the fees. However, we find that they agreed to split the fee evenly amongst themselves after Mr. Thompson was paid. That finding is consistent with Messrs. Long and Stovall's testimony, and with Respondent's conduct when he had overpaid Ms. Bables, giving her $400,000, two-thirds of the recovery, when she was entitled to only 60% of $600,000 (or $360,000).

Respondent offered to repay her one-third of the $40,000.[7] This is clear and convincing evidence that Respondent believed that he would share the fees equally with Messrs. Long and Stovall. Thus, we find that Messrs. Long and Stovall had a just claim to $150,000.

In the alternative, there is clear and convincing evidence that Respondent believed that Messrs. Long and Stovall were entitled to $40,000 (which he represented would remain in escrow even if rejected) and later $31,400. This reflects Respondent's understanding that Messrs. Long and Stovall were owed $40,000, and thus had a just claim to that amount, which should have been held in trust.

While the matter with regard to Rule 1.15(d) would seem to be resolved by Respondent's concessions, the circumstances require further discussion. While in principle Respondent can be fairly said to be in compliance with Rule 1.5(e) throughout his dispute with Messrs. Long and Stovall, in fact he never claimed reliance on the Rule until he consulted with the Office of Disciplinary Counsel long after the dispute had arisen, and after he had been advised that Messrs. Long and Stovall believed the entire sum of $225,000 was in dispute. Until he consulted with Disciplinary Counsel's office, Respondent's views on the fee split were apparently motivated by the principle of *quantum meruit* which underlies Rule 1.5(e), that is, he believed that because he was doing or did all the work, he was entitled to the lion's share of the fee. Equally of concern, while the position of Messrs. Long and Stovall exhibits a firm reliance of Rule 1.15(d), they seem

[7] During settlement negotiations, Ms. Bables advised Respondent that she required that she receive $400,000 from any settlement after the attorneys had been paid. When the defendant in *Bables* offered $600,000, Ms. Bables accepted the offer because she and Respondent believed she would receive two-thirds of the settlement offer. After the settlement was signed and after Respondent had distributed $400,000 to Ms. Bables, they learned from Mr. Long that the retainer provided that she receive 60% of the total settlement. Respondent offered to reimburse Ms. Bables one-third of the $40,000 she returned to Respondent. This despite the fact that, as among the attorneys, Respondent alone was responsible for not meeting Ms. Bables' requirement.

to have no knowledge or understanding of Rule 1.5(e), for if they did, they could not claim as they did that the entire $225,000 was in dispute. FF 24. Nor does there appear to be any fair reading of the facts in this matter which, on the basis of contributed effort, that is, on a *quantum meruit* basis, would support the share(s) of the fee in *Bables* that Messrs. Long and Stovall were apparently demanding.[8] Tr. 52-64, 100-04.

It is true that Mr. Long maintained some communication with Respondent regarding the *Bables* matter, offering to assist, but Mr. Stovall did not, although his communications with Mr. Long support a view that he was prepared to assist as necessary. Further, the record is confusing with regard to what role each of the three lawyers played with respect to the Complaint, but the Hearing Committee finds that the *pro se* Complaint intended to toll the statute of limitations in Virginia was in largest part the product of Respondent's efforts with some contribution by Mr. Stovall. Mr. Long then accompanied Ms. Bables to Fairfax County to file the *pro se* Complaint. However, the record discloses that thereafter, other than telephone calls to Mr. Long by Mr. Stovall and calls to Respondent from Mr. Long, there was no substantive contribution to the litigation by either Mr. Long or Mr. Stovall, save Mr. Long's correction of the attorneys' share of the recovery immediately following settlement.

Given this division of labor, Respondent was at least somewhat justified in believing that Messrs. Long and Stovall were taking advantage of Respondent.[9] What Respondent neglects to

[8] By demanding that the entire $240,000 (or $225,000) be held in trust pursuant to Rule 1.15(d), Messrs. Long and Stovall were effectively telling Respondent that they believed they were entitled to at least equal shares of the total. On further analysis, if their intent was to suggest that they were entitled to equal shares, they should have noticed Respondent that either $160,000 or $150,000 was in dispute. While neither notice reflects the principles underlying Rule 1.5(e), the second would have provided a stronger indication of some intention of fairness.

[9] The situation was intensified when Messrs. Long and Stovall threatened referral to the Disciplinary Counsel, given that at least Mr. Long was definitely aware of Respondent's previous

consider is the second part of Rule 1.5(e)(1), making equal division of the fees appropriate where "each lawyer assumes joint responsibility for the representation." Rule 1.5(e)(1). While not all the four attorneys in this matter signed the agreement, it is clear by their conduct that all four attorneys considered themselves bound by the retainer agreement. Nor did either Mr. Long, Mr. Stovall, or Respondent ever assert that they were not bound by the retainer. The point here is not that Messrs. Long and Stovall were justified in the share they demanded, but rather that the very rule upon which Respondent claimed to rely, rather than resolving any fee dispute, served to establish a basis for a claim.

It is hard to understand how Respondent could have believed he had no such obligation. Even a cursory review of the Rule 1.15(d) would disclose that:

> When in the course of representation[,] a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property.

Rule 1.15(d). This portion of the Rule clearly addresses Respondent's situation in this matter. He is a lawyer who in the course of his representation came into possession of property "claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation." The rule clearly and unequivocally directs that "the property *shall* be kept separate by the lawyer until there is an accounting and severance of interests in the property." *Id*. (emphasis supplied).

It is here that the problem arises for the Rule goes on to provide that:

> If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion

history and resultant tenuous status with the Bar. *See* DX 17.

> in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account . . . .

Rule 1.15(d). Given that the retainer never acknowledges the division of the attorneys' fee, the question arises as to whether, on the question of the fee division, the attorney parties had a meeting of the minds. This presented no problem in the relationship with the client since, with regard to that relationship, the retainer was sufficiently clear and represents a meeting of the minds between attorneys and client.

Messrs. Long and Stovall, even though they were not partners or associates in any legal practice, had an extended history of sharing their cases and the fees they generated.[10] As a consequence, while they may thus have been clear between themselves that the fee was to be shared equally among the three, we find Respondent had no prior "case sharing" experience with Messrs. Long and Stovall. The retainer itself provides no reliable evidence that the division of the fees was ever contemplated before the dispute arose. DX 1. This is in part due to the use of a form retainer that made no provision for division or the client's role in that question and the absence of any other document in which co-counsel agreed on the division of any fees generated. In terms of the labor expended by each counsel, given that Mr. Long had spoken to Respondent and offered his assistance, *see, e.g.*, Tr. 17, and Mr. Stovall made repeated queries of Mr. Long concerning the status of the matter, Tr. 76, Messrs. Long and Stovall have some justification for their belief that Respondent had manipulated the litigation to support his claim for an unfair portion of the fee. More importantly, Respondent's actions once the dispute arose make clear that in fact

[10] Mr. Stovall testified that Mr. Long had an abiding interest in criminal matters and was not interested in civil cases, while he, Mr. Stovall, enjoyed civil practice but not criminal. They would refer to each other cases not in their area of interest and share the fees generated by those cases. Tr. 99.

the fee division was discussed and Messrs. Long and Stovall accurately reported that the agreement was for an equal split.

As a matter of fact, we find that there was indeed a meeting of the minds on the question of the division of the fee. At least two things indicate that Messrs. Long and Stovall were correct when they testified that the understanding between the three counsel when the association began was that the fee would be divided among them in equal parts. First, when discussions of the split came up during settlement negotiations, Respondent advanced that it was not fair that complainants should receive a large share when Respondent did all the work. The protest indicates that there had been a discussion of the "split" when the association was begun. FF 13. Second, when Ms. Bables share was diminished by $40,000, Respondent offered to reimburse her for *one-third* of that loss. FF 17. The Hearing Committee finds Respondent incredible in his claim that there was no agreement on the split at the beginning of the case, and Messrs. Long and Stovall testified truthfully when they said the original agreement was that the fee would be divided equally among the three. We find that Robinson's protestations of unfairness not to the contrary, he well knew that he had an oral agreement with Messrs. Long and Stovall to split the fee evenly, and he was thus obligated to maintain $150,000 in his account as being in dispute. He clearly did not.

While we find that Robinson was obligated to maintain $150,000 in his account as being in dispute, and he clearly did not, in the alternative, the facts here also clearly establish that when he knew that Messrs. Long and Stovall were still not satisfied with his proposed distribution and he guaranteed he would maintain $40,000 in trust, FF 20, Respondent established as a fact that at a minimum that amount was in dispute. Nonetheless, within 15 days of that promise, Respondent

had written himself a check distributing all but $150 of that amount.[11] That too was a violation of Rule 1.15(d).

On December 7, 2016, the American Bar Association's Standing Committee On Ethics And Professional Responsibility "(Standing Committee)" issued its Formal Opinion 475, "Safeguarding Fees That Are Subject to Division With Other Counsel," which interpreted Model Rule 1.15(d). As Disciplinary Counsel pointed out in his December 13, 2016 filing[12] the Model Rules are the basis for the disciplinary rules in every jurisdiction save California and, while there are some differences in wording, there are no substantive differences between Model Rule 1.15(d) and Rule 1.15(d) of the D.C. Rules of Professional Conduct. Disciplinary Counsel acknowledges that the Standing Committee's decision is not binding but suggests that it should be persuasive. He urges that we adopt the Standing Committee's interpretation.

In its opinion, the Standing Committee addressed the requirements of Model Rule 1.15(d) on circumstances similar to those in the instant matter. The Standing Committee said:

> A lawyer may divide a fee with another lawyer who is not in the same firm if the arrangement meets the requirements of Model Rule l.5(e). When one lawyer receives an earned fee that is subject to such an arrangement and both lawyers have an interest in that earned fee, Model Rules 1.15(a) and 1.15(d) require that the receiving lawyer hold the funds in an account separate from the lawyer's own property, appropriately safeguard the funds, promptly notify the other lawyer who holds an interest in the fee of receipt of the funds, promptly deliver to the other

[11] Respondent sent $31,400 to Messrs. Long and Stovall on July 16, 2011.

[12] On December 9, 2016, Disciplinary Counsel filed a Memorandum with Respect To Supplemental Authority to which it attached a copy of the Standing Committee's Formal Opinion 475. On December 12, 2016 this Committee issued an order permitting the parties to file by December 16, 2016 memoranda regarding Opinion 475 and permitting either party to respond to the other party's memorandum by December 23, 2016. The ODC filed a brief memorandum on December 13, 2016. Respondent filed a response on December 19, 2016, agreeing with Disciplinary Counsel that Opinion 475 is persuasive, but arguing that it does not apply to the facts of this matter, and should have no effect on Respondent's culpability because it had not been issued at the time of the events at issue.

> lawyer the agreed upon portion of the fee, and, if requested by the other lawyer, provide a full accounting.

Standing Committee, Formal Opinion 475, p. 1. We have no doubt that Opinion 475 supports the ODC's position that Respondent has violated Rule 1.15(d). However, it is equally clear that the opinion supports the proposition that Respondent is in violation of Rule 1.15(a) and consequently supports this Committee's view that given our Court of Appeals' position with regard to intentional and reckless misappropriation, this matter cannot be resolved without consideration of intentional and reckless misappropriation

Given Respondent's admissions and the facts in this matter, there can be no doubt that Respondent has violated Rule 1.15(d) and is subject to sanction for his violation.

B. *The Hearing Committee Can and Should Consider Respondent's Liability for Misappropriation Not Charged in the Specification of Charges But Supported by the Facts Alleged Therein.*

Our Court of Appeals has made clear the seriousness with which it views allegations of misappropriation by members of this Bar, particularly such allegations which might fairly be described as intentional or reckless. In its opinion in *In re Harris-Lindsey*, 19 A.3d 784 (D.C. 2011) (per curiam), the Court reviewed a recommendation from the Board of Professional Responsibility to reject a joint petition in that matter from Disciplinary Counsel and the respondent for approval of a negotiated discipline in which the respondent admitted to three instances of negligent misappropriation of funds and additional violations in connection with her services as attorney for the guardian of an estate. The parties agreed to a sanction of a one-year suspension from the practice of law, with six months stayed in favor of one year of probation with conditions. An Ad Hoc Hearing Committee had recommended approval of the proposed resolution.

The Court of Appeals said:

> Notwithstanding the deference that Rule 12.1 requires be given to the judgment of [Disciplinary] Counsel in these matters, especially when supported by the judgment of a Hearing Committee after review, a serious question exists on the face of the record whether respondent acted negligently, or instead recklessly, when she continued to take funds from the estate after having been advised by court officials that she needed approval from the Court and after the Probate Court admonished her not to expend any funds without prior approval. *We do not believe that question, which may be critical to deciding the proper sanction for respondent's conduct, can be answered without the presentation of evidence in a contested proceeding.*

Harris-Lindsey, *supra*, 19 A.3d at 784-85 (emphasis supplied) (citations omitted). The ruling in *Harris-Lindsey* only serves to underscore the Court's view of misappropriation as expressed in *In re Addams*, 579 A.2d 190 (D.C. 1990) (en banc).

In determining whether we should take the admittedly extraordinary step of considering charges not levied by Disciplinary Counsel, we think it is important to consider the Court's strongly stated view of misappropriation. In *Addams*, before the *en banc* Court even began to discuss its determination to impose a presumptive sanction for intentional misappropriation, the Court referenced the District of Columbia's long standing view on misappropriation.

> The administration of justice under the adversary system rests on the premise that clients and the court must be able to rely without question on the integrity of attorneys. An act against a client evidencing moral turpitude, even though attributable to some aberration or stress that would warrant the prosecutor in abstaining from criminal prosecution, may nevertheless warrant severe disciplinary action concerning an officer of the court.

Addams, *supra*, 579 A.2d at 193 (quoting *In re Quimby*, 359 F.2d 257, 258 (D.C. Cir. 1966)). The Court went on in *Addams* to set the penalty for intentional misappropriation as presumptive disbarment but, recognizing that a "*per se* rule would be inequitable since there may be circumstances in which disbarment will not be the appropriate discipline for intentional misappropriation," *id.* at 195, the Court noted that a lesser sanction than disbarment for intentional misappropriation may be appropriate in "extraordinary circumstances." *Id.* at 191 (internal citation

omitted). Having allowed for exceptions to the *per se* rule, the Court made clear its view as to the seriousness of the violation when it held that the extraordinary circumstances exception should be construed narrowly, emphasizing that "[o]nly the most stringent of extenuating circumstances would justify a lesser disciplinary action . . . ." *Id*. at 193. Further, the Court has noted that "the exceptional case envisioned in *Addams* [is] where, notwithstanding intentional misappropriation, 'giving effect to mitigating circumstances is consistent with protection of the public and preservation of public confidence in the legal profession.'" *In re Hewett*, 11 A.3d 279, 287-88 (D.C. 2011) (quoting *Addams*, 579 A.2d at 195).

In short, *Addams*, *Harris-Lindsey*, and all cases which have addressed misappropriation by attorneys make it clear beyond peradventure that our Court of Appeals requires us to treat misappropriation in the most serious and critical way. It is instructive to note that in *Harris-Lindsey*, it was Disciplinary Counsel's belief that he could not convincingly present a reckless/negligent misappropriation charge to the Hearing Committee and therefore he elected to negotiate a resolution he deemed fair and equitable. In rejecting the negotiated discipline, the Court said that:

> [A] serious question exists on the face of the record whether respondent acted negligently, or instead recklessly, when she continued to take funds from the estate after having been advised by court officials that she needed approval from the Court and after the Probate court admonished her not to expend any funds without prior approval. *We do not believe that question, which may be critical to deciding the proper sanction for respondent's conduct, can be answered without the presentation of evidence in a contested proceeding.*

Harris-Lindsey, *supra*, 19 A.3d at 784-85 (emphasis supplied) (citations omitted).

Disciplinary Counsel makes clear in his Proposed Findings Of Fact, Conclusions Of Law, And Recommendation As To Sanction (hereinafter "DC Final Brief") that it was always his intention to seek disbarment in this matter and, indeed, he does. *See* DC Final Brief, pp. 14-17. There can be no dispute that given Respondent's disciplinary history, the intentional nature of his

violation in the instant matter, and the other facts and circumstances presented here, it would be appropriate if this Hearing Committee and the Board recommended disbarment as the sanction for Respondent's violation of Rule 1.15(d).

What was significant in *Harris-Lindsey*, and is significant here as well, is that the negotiated sanction there, like the sanction available here based solely on the Specification of Charges, insulates Respondent from the *presumptive* sanction of disbarment for intentional or reckless misappropriation. Moreover, while the available sanction for a violation of Rule 1.15(d) includes disbarment, a respondent's burden in an argument to avoid that sanction is significantly lower than his burden when disbarment is presumptive for a reckless or intentional misappropriation.[13]

It seems clear to us that *Harris-Lindsey* and *Addams* taken together express the Court's serious view of misappropriation by members of its Bar. The Board on Professional Responsibility, in recommending to the Court in *Harris-Lindsey* that the negotiated discipline be rejected, noted "[i]n short, a closer examination of recklessness and a more fully developed record are essential in order to determine whether the agreed-upon sanction is justified." *In re Harris-Lindsey*, Bar Docket No. 384-02, at 11 (BPR July 1, 2010). That is precisely what the Court of Appeals elected to do when it rejected the negotiated discipline. We can see no reason why, in a matter where the facts and circumstances pled and verified by Disciplinary Counsel in his

[13] This Respondent was susceptible to multiple charges for the same action, yet Disciplinary Counsel elected to ignore the most serious charge carrying the most significant sanction and lodged only one charge. This is somewhat puzzling because it is this Committee's experience that in almost all other cases where multiple charges might lie for the same activity, Disciplinary Counsel lodges most, if not all of the available charges. Indeed, in misappropriation cases, Disciplinary Counsel regularly charges in the alternative. And it must be remembered, the facts which were pled in support of the 1.15(d) charge were more than adequate to prove a reckless/intentional misappropriation charge.

Specification of Charges clearly make a *prima facie* case for intentional or reckless misappropriation, we should be bound by Disciplinary Counsel's charging decision, when the Court did not afford such deference to Disciplinary Counsel's negotiated discipline agreement in *Harris-Lindsey*.

We take this view notwithstanding Disciplinary Counsel's suggestion that we are bound by the Contact Member's determination. There is nothing in the record available to us to suggest that the Contact Member did indeed consider the question, and even assuming the Contact Member did consider it, we respectfully disagree with his/her conclusion. Given the facts of the Specification as pled by Disciplinary Counsel and accepted by Respondent, and considering our Court's express views on intentional misappropriation, we are merely following those to bring this matter into conformity with the law in the District of Columbia.

In considering this matter we note some anomalies. First, it is curious that Disciplinary Counsel remarks on the "punctiliousness" of Hearing Committees which, in the face of the Disciplinary Counsel's consistent practice of pleading misappropriation cases in the alternative, that is, not specifying whether charged conduct was intentional, reckless, or negligent, here suggests that this Committee is in contradiction of that general practice of our sister Hearing Committees when we require that in this matter Disciplinary Counsel plead the "general" misappropriation charge when Disciplinary Counsel has pled the "specific" charge which addresses the conduct here. Disciplinary Counsel's argument neglects the core problem in this and those matters, that is, the Court of Appeals has stated a strong preference for a particular sanction when misappropriation is intentional or reckless. That preference compels that a respondent be given sufficient notice of the potential for that sanction, and equal treatment requires

that any and all conduct which amounts to intentional or reckless misappropriation be treated as such.

Finally, this and every other matter before the Board deserves as prompt a resolution as possible, and such is required in fairness to the Respondent and the public we are charged to protect. Having notified the parties that we would do so and then considering the evidence as to a charge of reckless/negligent misappropriation as well as the charge of violating Rule 1.15(d) we have provided the Board and the Court with the fullest record upon which to act. By making clear herein how we would resolve this matter on the charge of Rule 1.15(d) and on the charge of Rule 1.15(a) and (c), if the Court or the Board disagrees with our view, they can address that question without need for a remand.

C. Respondent Violated Rules 1.15(a) and (c).

Considering the question of whether Respondent intentionally misappropriated the funds in dispute by Messrs. Long and Stovall, the Hearing Committee finds that Respondent violated Rules 1.15(a) and (c) when, on notice from the complainant Stovall that the division among the three District of Columbia lawyers of the funds remaining from the settlement after payment to Ms. Bables and Mr. Thompson (Virginia local counsel) was in dispute, Respondent converted nearly all of those funds to his own use.

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." *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) (citation and quotation marks omitted). Misappropriation occurs when a respondent withdraws entrusted funds without the client's consent. *In re Thompson*, 583 A.2d 1006, 1010 (D.C. 1990) (per curiam) (appended Board report).

Misappropriation also occurs where the balance in the attorney's account falls below the amount due to the client or third party, regardless of whether the attorney acted with an improper intent. *In re Edwards*, 990 A.2d 501, 518 (D.C. 2010) (appended Board Report); *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (citing *In re Pels*, 653 A.2d 388, 394 (D.C. 1995)).

Intentional misappropriation most obviously occurs where an attorney takes a client's funds for the attorney's personal use. *See Anderson I*, *supra*, 778 A.2d 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"). Misappropriation is reckless when the attorney's conduct "reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds." *Id.* at 338. "[N]egligent misappropriation cases generally have involved single, or discrete, inadvertent or negligent acts." *In re Carlson*, 802 A.2d 341, 351 n.12 (D.C. 2002).

Here, Respondent engaged in misappropriation when the balance in his trust account fell below the $150,000 that he should have held in trust per the agreement (or even the fact of a disputed agreement) to equally share the fees with Mr. Long and Mr. Stovall. If the Board or the Court were to disagree with our finding that there was an agreement to equally share the fee (or a sufficient dispute of one to require that the funds be kept in trust), Respondent engaged in misappropriation when the balance in his trust account fell below the $40,000 he offered to Mr. Long (together with the promise that that amount would remain in his trust account). We find that Respondent took funds claimed by Messrs. Long and Stovall on purpose and thus, that his misappropriation was intentional.

V. RECOMMENDATION AS TO SANCTION

The appropriate sanction is one that is necessary to protect the public and the courts, to maintain the integrity of the profession, and to deter Respondent and other attorneys from engaging

in similar misconduct. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (citing *In re Scanio*, 919 A.2d 1137, 1144 (D.C. 2007)). The sanction imposed must also be consistent with cases involving comparable misconduct. *See* D.C. Bar R. XI, § 9(h)(1); *In re Elgin*, 918 A.2d 362, 373 (D.C. 2007); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

As discussed above, in *Addams*, the Court that held disbarment is the presumptive sanction for intentional or reckless misappropriation, absent "extraordinary circumstances." 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." *Id.* at 195. However, "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." *Id.* at 191, 193.

Here, the Hearing Committee has found that Respondent intentionally misappropriated funds claimed by Messrs. Long and Stovall. We have already indicated that we are not persuaded by Respondent's claim in mitigation that he acted in good faith reliance on Rule 1.5(e). Our view is that his reliance on Rule 1.5(e) was an after-the-fact reliance to justify actions he took on his reasonable belief that having handled the lion's share of the work, he was entitled to the lion's share of the fee. While Rule 1.5(e) suggests that a division of the fee for a particular matter amongst otherwise unassociated attorneys should be proportional to the effort expended by each attorney on that matter, there are qualifications to that general premise which Respondent conveniently ignored, but more importantly, that Rule even in Respondent's selective reading does not permit Respondent to distribute the fee to himself without regard to the claim by Messrs. Long and Stovall. Finally, Respondent's "reliance" on Rule 1.5(e) did not begin at the start of the

dispute. Rather, Respondent's reliance was late in the dispute and only following his belated consultation with the Office of Disciplinary Counsel. In any event, even assuming that Respondent had a good faith belief in the application of Rule 1.5(e) and that the Rule can somehow be read to justify Respondent's action in totally ignoring the complainants' claims, that good faith belief is not an exceptional circumstance within the meaning of *Addams*.

V. CONCLUSION

For the foregoing reasons, the Hearing Committee finds that Respondent violated Rule 1.15(d) as charged in the Specification of Charges and Rules 1.15(a) and (c). The Hearing Committee recommends that Respondent be disbarred for his violation of Rules 1.15(a), (c), and (d). The Hearing Committee further recommends that should Respondent be considered for reinstatement, such reinstatement be conditioned upon the successful completion of 24 hours of Disciplinary Counsel-approved, ethics-related CLE courses relating to the care and custody of entrusted funds and the management of a law office.

AD HOC HEARING COMMITTEE

/WJO/
WILLIAM J. O'MALLEY, JR., Chair

/CDC/
CURTIS D. COPELAND, JR., Public Member

/JRG/
JOHN R. GERSTEIN, Attorney Member

Dated: December 29, 2016