THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
November 16, 2020

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

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Disciplinary Counsel charged John F. Kennedy and Kathleen A. Dolan with two counts based on misconduct arising out of a litigation and settlement of a collective action and their misappropriation of the entrusted settlement funds. Count I focused on Respondents' representation of over 100 current and former security officers with wage claims against their employer, Inter-Con Security Systems ("Inter-Con"). Respondents settled without informing the clients of the terms and Kennedy misled their clients by telling them that Inter-Con would pay their attorney's fees. Kennedy concealed that the fees were paid out of the lump-

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

sum settlement. An Ad Hoc Hearing Committee found both Respondents violated Rules 1.2(a) (failure to abide by clients' decisions), 1.4(a) (failure to keep clients reasonably informed), 1.4(b) (failure to explain a matter to clients), 1.4(c) (failure to inform clients of settlement offer), 1.5(b) (failure to communicate in writing the basis or rate of fee within a reasonable time after commencing representation), and 1.8(f) (failure to obtain informed written consent of an aggregate settlement of claims for two or more clients). The Hearing Committee also found Kennedy was dishonest in violation of Rule 8.4(c).

Count II related to the mishandling and misappropriation of the Inter-Con settlement funds and other trust account violations. After unilaterally agreeing to a $310,000 settlement, Respondents paid their firm 67% of the settlement funds as attorney's fees and determined the amount of recovery for each client with the remaining settlement funds. Respondents divided the funds between themselves and their clients without client knowledge or approval. The Hearing Committee found that both Respondents violated Rules 1.5(a) (unreasonable fee), 1.15(a) (failure to maintain records of entrusted funds), and 1.15(c) (failure to notify clients promptly of receipt of funds). And the Hearing Committee found both Respondents misappropriated entrusted funds in violation of Rule 1.15(a), finding Dolan's misappropriation was negligent because the record does not demonstrate direct involvement in the settlement negotiation and client communication or knowledge of Kennedy's dishonesty. But the Hearing Committee found Kennedy's misappropriation was intentional in large part because of his dishonesty.

Respondents took exception, mainly arguing that they had a "good faith belief" that they were "group counsel" representing a "class of plaintiffs" under the Fair Labor Standards Act ("FLSA") and that their communications and fees followed the FLSA. R. Br. 9-20, 25-28.[1] Disciplinary Counsel did not take exception but argued in its brief that the Board should conclude Dolan's misappropriation was intentional or reckless. ODC Br. 1, 33-36.

The Board, having reviewed the record, concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record and adopts and incorporates those findings. Board Rule 13.7; *In re Cleaver-Bascombe*, 986 A.2d 1191, 1194 (D.C. 2010) (per curiam) ("[T]he Board is obligated to accept the hearing committee's factual findings if those findings are supported by substantial evidence in the record, viewed as a whole." (quoting *In re Elgin*, 918 A.2d 362, 373 (D.C. 2007))).[2] We have also made supplemental factual findings, citing directly to the transcripts and exhibits. *See* Board Rule 13.7. In addition, following our review of the parties' arguments and the record, we agree with the Hearing Committee's conclusions of law as supported by clear and convincing evidence and with the recommended sanction of disbarment for Kennedy. But, with respect to Dolan's sanction, we recommend that, rather than a fitness requirement,

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[1] The following citation protocols are used: "Rpt." refers to the Hearing Committee Report and Recommendation; "FF" refers to the Hearing Committee's Findings of Fact; "Tr." refers to the consecutively paginated transcript of the disciplinary hearing; "DX" refers to Disciplinary Counsel's exhibits; "R. Br." refers to Respondents' corrected Brief to the Board, filed on November 20, 2019; and "ODC Br." refers to Disciplinary Counsel's Brief to the Board.

[2] Respondents did not take exception to the factual findings. *See* R. Br. 6-9 (Respondents' summary of the facts).

Dolan be required to take a practice management course, six hours of continuing legal education ("CLE") on trust account management, and serve one year of probation under the supervision of a practice monitor, with her failure to cooperate with the practice monitor resulting in revocation of her probation with a requirement that she demonstrate fitness before reinstatement. The Board briefly summarizes the facts, addresses the arguments raised by the parties, and resolves two dispositive motions.

I. Background

A. Litigation and Settlement of Inter-Con Claims

Between late 2000 and 2002, current or former security officers of Inter-Con hired Respondents to pursue wage claims. FF 6-7. Respondents entered into an agreement that provided a 40% contingency fee with three individuals and the agreement explained that "[n]o settlement of any nature shall be made of any of Client's claims without their [sic] approval." DX L2-2; *see* FF 8.

Kennedy, on behalf of one client, filed suit against Inter-Con under the D.C. Wage Payment Collection Law, D.C. Code §§ 32-1301 to 32-1310, and the litigation eventually made its way to arbitration at JAMS as a collective action and included claims under the FLSA, 29 U.S.C. §§ 201 to 219.[3] FF 10-11. In 2004, Respondents

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[3] Both the FLSA and the D.C. Wage Payment Collection Law have a fee-shifting provision. The FLSA provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid

pursued these wage claims as a collective action and mailed over 100 notices with opt-in forms to potential clients. FF 11, 15. The notice explained that if the claimants joined the action they would be represented by John F. Kennedy and would "not be required to pay attorney's fees directly. The plaintiffs' attorneys will receive a part of any money judgment entered in favor of the class." FF 15 (quoting DX B41 at 2). Over 100 claimants signed opt-in forms and in doing so accepted Kennedy as their attorney. FF 12-16. Other than through the name of the law firm, Dolan was not identified in the notice. DX B41 at 1, 3. Respondents did not enter

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> minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.
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> . . .
>
> The court in such action shall, *in addition to any judgment awarded to the plaintiff* or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

29 U.S.C. § 216(b) (emphasis added). And the D.C. Wage Payment Collection Law provides:

> [A] person aggrieved by a violation of this chapter . . . may bring a civil action in a court of competent jurisdiction against the employer or other person violating this chapter . . . and, *upon prevailing, shall be awarded reasonable attorneys' fees and costs* and entitled to relief including:
> (i) The payment of any back wages unlawfully withheld;
> (ii) Liquidated damages equal to treble the amount of unpaid wages;
> (iii) Statutory penalties; and
> (iv) Such legal or equitable relief as may be appropriate, including reinstatement of employment, and other injunctive relief.

D.C. Code § 32-1308(a)(1)(A) (emphasis added). For both laws, the plaintiffs need to be prevailing parties and then the court awards attorney's fees. *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 799 n.7 (5th Cir. 2006) (per curiam) ("Though the attorney's fee provision of the FLSA does not mention 'prevailing party,' we typically cite prevailing party fee-shifting jurisprudence in FLSA cases."). And settlements can result in the award of fees by a court. *See, e.g.*, *Jackson v. Estelle's Place, LLC*, 391 F. App'x 239, 240 (4th Cir. 2010) (per curiam) ("[T]he parties settled the action, leaving to the district court, however, determination of the amount of attorney's fees to be awarded to Appellants as prevailing parties."); *Saizan*, 448 F.3d at 798; *Small v. Richard Wolf Med. Instruments Corp.*, 264 F.3d 702, 707 (7th Cir. 2001).

into an attorney-client agreement with their new clients, but Kennedy told the arbitrator in 2005 that the "claimants . . . hired me to represent them and they have signed individual attorney-client agreements." FF 20 (quoting DX C86 at 2).

In 2007 a new arbitrator was assigned to the matter and new notices and opt-in forms were mailed to the claimants. FF 21-23. The notice informed the claimants: "If you prevail in your claim against Inter-Con, Inter-Con will be required to pay your reasonable attorney's fees. If you do not prevail, you may or may not be required to pay your attorney's fees and costs depending on the terms under which he or she agreed to represent you." FF 23 (quoting DX H19 at 9). The opt-in forms provided three options for representation: "1) pro se representation; 2) Respondent Kennedy; or 3) another attorney of their choice." FF 24. Most of the 100 claimants elected to have Kennedy represent them. FF 24. Respondents did not have written fee agreements with these clients. FF 24-25.

The arbitrator issued a summary judgment ruling that reduced the number of claimants with valid claims against Inter-Con. FF 27. Shortly thereafter in January 2008, Respondents, without authority from or notice to their clients, initiated settlement discussions with Inter-Con, demanding $700,000. At that time, Respondents estimated their fees at over $1 million. FF 28-29. Kennedy continued to negotiate a settlement with Inter-Con's attorney. FF 33, 35, 37.

In late January 2008, Kennedy contacted his clients—not to inform them of the settlement negotiations—but to obtain signed attorney-client agreements. He did not tell his clients about his offer to settle for $700,000 or that his fees were over $1 million. FF 31, 33. The attorney-client agreements he provided his clients stated: "Attorney will be paid at 40% of the recovery or at an hourly rate pursuant to the applicable Adjustable [sic] Laffey Matrix in Washington, DC at his choosing upon recovery or upon application to the arbitrator for payment of attorney[']s fees and costs pursuant to applicable statutes." FF 32 (quoting DX E37 at 4). Attorney is defined in the agreement as "Kennedy & Dolan." DX E47 at 3 ("Client hires Kennedy & Dolan (hereinafter 'Attorney') to represent Client in the arbitration claim against from [sic] Inter-Con . . . .").

In February 2008, at a client meeting, Kennedy told his clients that he was engaged in settlement discussions, FF 38, and asked them to sign authorizations to allow him to settle for "as much as he believes is reasonable for any and all claims I may have had with Inter-Con arising from this action and give him the power to sign any and all papers, releases (sic) for me." FF 39 (quoting DX E47 at 2). But he provided no details of the settlement discussions, to include that he offered to settle for $330,000 just three days before the meeting. FF 37-38. Kennedy sent letters to clients who did not attend the meeting, seeking authorization to settle and explaining that if the client does not sign the form they "risk being excluded from the case and/or not getting anything from it." FF 40 (quoting DX E48 at 1).

Kennedy entered into an agreement with Inter-Con to settle for $320,000 and he agreed to provide Inter-Con the amount to be paid to each claimant. FF 42. Kennedy told his clients the matter was settled but did not share the settlement. FF 44-47. He misled his clients by telling them that they had no obligation to pay attorney's fees and that Inter-Con would pay Respondents' fees. FF 46; *see, e.g.*, DX E63 ("you will pay me nothing . . . all fees & costs are paid by Inter-Con *by statute*" (emphasis added)). The statement that Inter-Con was paying fees by statute was simply untrue. Kennedy concealed from his clients that he planned to take his fees from the settlement and that he would determine the amount of those fees. FF 46. In fact, the settlement agreement stated: "each side agrees to separately bear all of its own costs and attorney's fees." FF 46. The Hearing Committee found that Kennedy "deliberately concealed the settlement details" because he believed disclosing the details to his clients would put the settlement at risk. FF 49. Each client learned only the amount they received. FF 50.

Kennedy and Inter-Con moved to have the arbitration dismissed, explaining in the motion that they entered a "private settlement" and that each party would bear their own attorney's fees and costs. FF 62 (citing DX F63 at 2). Some clients were unresponsive to Kennedy's demands for signed authorizations and releases. Kennedy dismissed those clients' claims with prejudice. FF 54.

In the end 90 clients settled and the total settlement was reduced to $310,000. FF 63. Kennedy signed the releases for all 90 clients. FF 63. Neither the arbitrator nor the Superior Court saw the private settlement. FF 64, 65-67. Kennedy did not apply "to the arbitrator for payment of attorney[']s fees and costs pursuant to applicable statutes" as outlined in his attorney-client agreement. *See* FF 32; DX E37 at 4.

Kennedy applied a formula of his own making to determine the amount of settlement funds for each client. This formula was not based on the FLSA, the D.C. Wage Payment Collection Law, or the clients' hourly wages. Instead, for each month of employment, the client received $80, and if the client testified in a deposition, they received an additional $500 of settlement funds. FF 69. In total, the clients received less than a third of the total settlement: $100,086.68. And Respondents took $209,913.32 as fees. FF 70-73. Respondents did not give their clients an accounting of the settlement funds. FF 70-71.

Throughout the litigation, Kennedy was the lead attorney who communicated with the clients and opposing counsel. Disciplinary Counsel questioned Kennedy extensively about the litigation, communication with clients, and settlement. And his testimony described his actions, decisions, and communications. *See, e.g.*, Tr. 272-73. Kennedy also explained Dolan's more limited involvement. Tr. 1116, 1170-71. In addition, Disciplinary Counsel called three former clients who testified that Kennedy was the lead attorney or the only attorney on the case based on their experience. Tr. 655 (Jermaine Fitzgerald: "Mainly, I was speaking to Mr. Kennedy . . . . I may have spoken to Ms. Dolan, I'm not a hundred percent sure. I don't recall."); 768 (Michel Ashton testifying that he only spoke to Kennedy); 844 (Daniel Quagliarello: "I only had contact with Mr. Kennedy").

Dolan's testimony was more limited to the firm's trust account and tax issues. But Dolan testified that she "knew the full terms of the settlement agreement." Tr. 1556. And Kennedy testified that Dolan was involved in the litigation during negotiations and involved in drafting a demand letter. Tr. 1182; DX E14; Rpt. 9 n.4 (discussing Dolan's more limited involvement in the litigation).

B. Trust Account

Respondents maintained trust and operating accounts. FF 76. Dolan was mainly responsible for the oversight of the trust account. FF 77. During the relevant period, Respondents' practice was to deposit client funds into the trust account and withdraw the earned fees anytime during the same tax year that the fees were earned. FF 78-79. Respondents did not maintain complete records of the client or third-party funds in the trust account. FF 81. The only records maintained were disbursement or cost sheets maintained in the individual client files—this means that at any given time Respondents were unable to identify whose funds were in trust or the purpose of any disbursement. FF 82-84.

In January 2008, Respondents deposited $15,000 into their trust account from a settlement for a client, Louanne Anderson, whom they represented in a matter unrelated to the Inter-Con litigation. FF 88. In March and April 2008 Respondents withdrew funds totaling $15,000 for "Partnership Distribution" and "Referral Fee Income." FF 88. Dolan had "no idea" what the reference to "Referral Fee Income" meant.[4] FF 88. Dolan was unable to identify the client matters/source of the $15,000 withdrawal. FF 88.

In December 2008, another $15,000 was withdrawn from the trust account through two checks signed by Dolan and made payable to Respondents that noted

[4] The phrase "referral fee income" appears on another $5,000 check in May 2008. FF 88.

"Fees Inter-Con" and "Inter-Con Fee" in the memo lines. FF 85. But at the time of the withdrawal, Respondents had no funds from the Inter-Con litigation. FF 86. Dolan testified incredibly that the memos incorrectly identified Inter-Con and that the funds were from the Anderson settlement almost a year earlier—even though $15,000 had already been withdrawn from the account in March and April. FF 88-90. The Hearing Committee found, and the Board agrees, that Dolan's testimony about these two checks is "inconsistent, speculative, reliant on a partial (if not selective) memory, and therefore not credible." FF 88; *see* FF 89-90. The evidence demonstrates that Dolan withdrew funds from the trust account in December 2008 without knowing the source of the funds and misidentified the funds as from the Inter-Con litigation. *See* FF 88. The $15,000 was deposited in the firm's operating account, which had a low balance and was used to pay various expenses, including rent and parking. FF 87. At the hearing, Dolan tried to shift blame for the reference to Inter-Con on the memo of these two checks onto her assistant but also admitted that she reviewed and approved each check. FF 88-90.

In January 2009, $209,913.32 of the Inter-Con settlement funds were received and deposited into the trust account. FF 91. This was the amount that Respondents determined to pay themselves from their clients' $310,000 lump-sum settlement. FF 73, 91. Over the next ten months Respondents withdrew their fees. FF 92-93. Respondents never provided their clients an accounting of the settlement, and none of the clients nor any court or arbitrator approved the fees taken by Respondents. FF 74-75.

II. Dispositive Motions

A. February 24, 2017 Motion to Dismiss

Respondents moved to dismiss "all charges that are dependent upon or supported by the cooperation and/or anticipated testimony of [Respondents'] clients in the Inter-Con matter," arguing that the Office of Disciplinary Counsel violated Board Rule 2.9(b):

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

As background, in June 2010, Disciplinary Counsel received notice from Wachovia Bank of an overdraft from Respondents' trust account and Disciplinary Counsel docketed the matter for investigation. FF 80. During the investigation, Disciplinary Counsel contacted Respondents' clients from the Inter-Con litigation. Respondents argue Disciplinary Counsel needed their consent to contact those clients because they were not the complainants in the 2010 overdraft investigation and the Inter-Con settlement funds were transferred from the IOLTA account to the firm's operating account in 2009 and thus were not involved in the 2010 overdraft. Mot. Feb. 24, 2017; R. Br. 28-31. The Hearing Committee recommended denying this motion. Rpt. 55.

Respondents' argument relies on the first sentence of Board Rule 2.9(b), which prohibits Disciplinary Counsel from contacting clients without first obtaining the consent of a respondent, or if unable to obtain that consent, the consent of a Board member. But the second sentence explains that the consent requirement "shall *not* apply when Disciplinary Counsel believes the client has knowledge of a matter under investigation in a docketed case." Bd. R. 2.9(b) (emphasis added). Disciplinary Counsel had a docketed case when they contacted Respondents' clients in the Inter-Con litigation. Disciplinary Counsel docketed an investigation of a 2010 IOLTA overdraft. It is reasonable that this 2010 IOLTA investigation would include 2009 IOLTA transactions. The Inter-Con settlement funds were in the IOLTA account as late as October 15, 2009. FF 93. Given this factual background, the record supports that Disciplinary Counsel was reasonable in acting on a belief that Respondents' Inter-Con clients had "knowledge of a matter under investigation in a docketed case." *See* Bd. R. 2.9(b). We thus disagree that Rule 2.9 prohibited Disciplinary Counsel's contact with Respondents' clients.[5]

The February 24, 2017 motion to dismiss is denied.

B. July 24, 2017 Motion to Dismiss

On July 24, 2017, Respondents moved to dismiss the dishonesty and misappropriation charges that are based on two checks from their IOLTA account in

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5 Because of this conclusion we need not reach Disciplinary Counsel's alternative arguments that Rule 2.9(b) does not require consent before Disciplinary Counsel contacts former clients or whether D.C. Bar Rule XI, § 6(a)(2) provides additional authority to contact clients without a respondent's consent. *See* Rpt. 54.

December 2008, that were designated “Fees Inter-Con” and “Inter-Con Fee” and totaled $15,000. Respondents sought to preclude testimony about these two checks. Mot. July 24, 2017. The checks were drawn on the IOLTA account before Respondents received the Inter-Con settlement funds. FF 85. Respondents argued that Disciplinary Counsel learned during the investigation that the trust account had $15,000 related to another case (the Anderson settlement) and thus Disciplinary Counsel’s assertions that Respondents were unable to identify the source of the $15,000 was inaccurate. Disciplinary Counsel opposed, explaining that this evidence needed to be presented in the hearing because it was relevant and material to the charged misappropriation and recordkeeping violations. The Hearing Committee recommended denying the motion. Rpt. 56-57.

The Board agrees with the Hearing Committee’s recommendation. Respondents’ motion did not present justification for dismissing charges or excluding evidence. It instead presented a disagreement about interpreting evidence—evidence that included the withdrawal of $15,000 identified as Inter-Con fees even though this $15,000 transaction occurred before Respondents had deposited any Inter-Con funds into their IOLTA account. Respondents’ argument that there was exculpatory evidence showing that these funds were unrelated to the Inter-Con settlement funds misses the point. That these were not Inter-Con funds is the precise evidence a Hearing Committee needs to consider when assessing whether Respondents complied with their professional obligations related to IOLTA funds and recordkeeping. Based on this record, rather than being exculpatory, the Hearing

Committee found this evidence was material to Respondents' misconduct—failure to maintain complete trust account records. And the Hearing Committee found that Dolan's testimony about the two checks was not credible. FF 88 (describing Dolan's testimony to be "inconsistent, speculative, reliant on a partial (if not selective) memory, and therefore not credible").

For these reasons, the motion to dismiss the dishonesty and misappropriation charges based on the December 2008 checks is denied.

III. Respondents' Exceptions

The Board agrees with the Hearing Committee's conclusions of law for each rule violation. Respondents took exception to most of those conclusions, and we address each of their arguments below.

A. Count I

1. Violations of Rules 1.2(a) and 1.4(a), (b), and (c)

Respondents did not keep their clients reasonably informed about the settlement negotiations, did not communicate any of the settlement offers to their clients, and did not seek client approval before settling the clients' claims in violation of Rules 1.2(a) and 1.4(a), (b) and (c).[6] The Hearing Committee found that Dolan's

[6] Rule 1.2(a):

> A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the

failures to communicate with the clients was passive, but Kennedy engaged in deliberate concealment when he withheld settlement information because he believed disclosure would put the settlement at risk. Rpt. 65. The Board agrees.

Respondents do not challenge the factual underpinnings of the Hearing Committee's conclusions; instead they argue that as a legal matter they did not have to communicate the settlement information or seek client approval because of the nature of a collective action and because of the fee-shifting provisions in the FLSA. R. Br. 9-17. We are unpersuaded by their arguments.

First, Respondents rely on Civil Procedure Rule 23, governing class actions, to argue that a collective action, like a class action, requires an attorney to act in the interests of the group rather than an individual client. R. Br. 10-12. Their argument is that they met their obligations of Rules 1.2 and 1.4 with class action procedures. R. Br. 16 (citing Rule 1.8, cmt. [12]: "Lawyers representing a class of plaintiffs or defendants . . . must comply with applicable rules regulating notification of class members, compensation of class counsel, and other procedural requirements designed to ensure adequate protection of the entire class.").

> client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

Rule 1.4:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
> (c) A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case shall inform the client promptly of the substance of the communication.

But Respondents did not follow class action procedures and no court ruled that the plaintiffs were a class. Had Respondents followed the class action requirements this may have been a compelling argument because those requirements include elaborate settlement procedures to provide notice to class members, a mechanism for class members to object, a fairness hearing, and ultimately approval by the court. *See* Super. Ct. Civ. R. 23(e) ("The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised *only with the court's approval*." (emphasis added)). And those procedures make good sense: they protect the interests of the class and prevent class counsel from acting without oversight. In their brief, Respondents acknowledge that counsel in a class action cannot act independently, noting that where there is a conflict the attorneys need to apply to the court to take appropriate steps. R. Br. 12-13 (citing *In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 18 (2d Cir. 1986)); *see* R. Br. 24 (acknowledging their "conflicting roles").

But Respondents did not comply with any of the Rule 23 procedural protections. They did not treat the litigation as a class action. They did not apply to the court or arbitrator to provide oversight over the settlement. They acted independently and without client involvement or authorization required by Rules 1.2 and 1.4.

Second, Respondents argue that their entitlement to fees under the FLSA's fee-shifting provision is mandatory and they conducted the settlement discussions under the FLSA's fee-shifting scheme and under the "auspices of two arbitrators and a D.C. Superior Court judge." R. Br. 13-17. The Hearing Committee correctly found the FLSA's fee-shifting provision does not apply. Rpt. 86-87.

The FLSA does not authorize an attorney to determine his own attorney's fees. Instead, the fee-shifting provision applies when there is a judgment for the claimants. *See supra* note 3. And then the court awards the attorney's fees. Here, there was no judgment. And Respondents did not present the settlement to the arbitrators or Superior Court judge for approval. Instead, they dismissed the litigation as a "private settlement" with each party bearing their own attorney's fees and costs. FF 62 (citing DX F63 at 2).

2. Violation of Rule 1.5(b)

The Hearing Committee found Respondents failed to provide their clients with the basis or rate of the fee in writing within a reasonable time after commencing representation in violation of Rule 1.5(b).[7] Rpt. 59. The Hearing Committee explained that other than the three original clients, FF 16, 29, the clients did not receive an agreement until January 26, 2008, almost four years after the clients first selected Kennedy as their attorney, and months after they opted-in a second time and again selected Kennedy as their attorney, FF 26, 31. *See* Rpt. 59-60. The second opt-in forms specifically refer to a separate agreement with their attorney,

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[7] Rule 1.5(b):

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

explaining: "If you prevail in your claim against Inter-Con, Inter-Con will be required to pay your reasonable attorney's fees. If you do not prevail, you may or may not be required to pay your attorney's fees and costs depending on the terms under which he or she agreed to represent you." FF 23 (quoting DX H19 at 9). Respondents did not provide a separate agreement until three days *after* Kennedy offered to settle and under the false statement that Inter-Con would pay the attorney's fees. Rpt. 60. Under these facts, we agree with the Hearing Committee that the agreements eventually entered were "neither prompt nor reasonable as required by the Rule." Rpt. 60.

Respondents again do not dispute the factual basis of this conclusion but argue that the opt-in forms satisfied the requirements of Rule 1.5 because the form advised that "Mr. Kennedy as group counsel was[] by statute to be paid by the defendant." R. Br. 18. As explained above, there is a mechanism for payment of fees under the FLSA, but that mechanism is triggered with a judgment or award of damages. The opt-in form did not address payment of fees when, as here, there was no judgment or award. Instead, the opt-in form referred to a separate agreement with counsel that would govern such a situation. Thus, the opt-in form did not satisfy the rule because it did not provide the basis or rate of the fee when there was a settlement.

3. Violation of Rule 1.8(f)

The Hearing Committee found that Respondents violated Rule 1.8(f) because they did not have informed written consent from their clients before they negotiated and entered an aggregate settlement.[8] Rpt. 66. The factual findings fully support this conclusion. Respondents did not obtain consent—written or otherwise—from their clients about the nature and terms of the aggregate settlement. Instead, Respondents acted independently to negotiate, approve, and divide the settlement among the clients and themselves. The terms of the settlement were in fact "deliberately concealed" by Kennedy out of fear that informed clients would put the settlement at risk. FF 49.

Respondents argue that Comment 12 to Rule 1.8 provides for an exception to informed written consent for class actions. R. Br. 19-20 (citing Rule 1.8, cmt. [12]). But Respondents misunderstand the purpose of Comment 12. Comment 12 provides that there are a different set of procedures for class counsel before entering an aggregate settlement, and those procedures are designed to protect class members. "Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, must comply with applicable rules regulating notification of class members, compensation of class counsel, and other procedural requirements designed to ensure adequate protection of the entire class." Rule 1.8, cmt. [12]. And as already explained, Respondents did not follow the "procedural requirements

[8] Rule 1.8(f):

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent in a writing signed by the client after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

designed to ensure adequate protection of the entire class" when they settled the Inter-Con litigation. Rule 1.8, cmt. [12]; *see* Super. Ct. Civ. R. 23.

The Board agrees with the Hearing Committee that Rule 1.8(f) applies to Respondents and they violated the rule when they entered an aggregate settlement without first obtaining informed written consent from their clients.

4. Violation of Rule 8.4(c) by Kennedy

The Hearing Committee found two violations of Rule 8.4(c) by Kennedy.[9] First, the Hearing Committee found Kennedy's conduct involved dishonesty, deceit, and misrepresentation in violation of Rule 8.4(c) when he intentionally concealed the terms of the Inter-Con settlement from his clients out of fear that it would put the settlement at risk. Rpt. 67-68.

Kennedy does not dispute that he intentionally concealed the settlement terms from his clients but argues it was not a violation because "[n]one of the clients objected" to the settlement process or amount of recovery. R. Br. 20. The Board is unpersuaded. A lack of objection from clients who have been intentionally uninformed is not an endorsement of Kennedy's actions. The Board agrees with the

[9] Rule 8.4(c) provides: "It is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Specification of Charges only alleges that Respondents "engaged in conduct involving dishonesty." However, Disciplinary Counsel's brief to the Hearing Committee referenced the "fraud, deceit, [and] misrepresentation" aspects of Rule 8.4(c), and Respondents did not object to the Hearing Committee's consideration of those aspects in their briefs to the Hearing Committee or the Board. Accordingly, we do not limit our consideration of the Rule 8.4(c) charge to "dishonesty" alone, which, in any event, is broad enough to encompass the other three terms. *See In re Samad*, 51 A.3d 486, 496 (D.C. 2012) ("The term 'dishonesty' includes not only fraudulent, deceitful or misrepresentative conduct, but also 'conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.'" (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990))).

Hearing Committee that Kennedy's actions involved dishonesty, deceit, and misrepresentation when he deliberately withheld information from clients—information that clients have a right to know—in order to ensure that the settlement would be entered without client objection.

Second, the Hearing Committee found that Kennedy fraudulently and deceitfully obtained signed client authorizations when he falsely told his clients that if they did not sign the authorizations, they risked being excluded from the case. As the Hearing Committee explained, the clients had a right to reject the settlement and have a hearing on their claims. Rpt. 69. But Kennedy argues that his statement to clients was true: "In order to avoid being excluded from the case, a client who rejected the settlement would have to take steps to litigate his or her claim, including possibly retaining counsel, which, if they [sic] failed to do, could result in their [sic] losing their [sic] individual case." R. Br. 21. Kennedy's argument depends on defining the term "case," as used in the notice to the clients, to be only the collective action he was litigating and not the client's individual case. Kennedy's vague statement to the clients does not fully explain that clients who did not sign the authorizations were still allowed to litigate their claims and if successful would recover damages. Instead, Kennedy's notice to the clients appears to be intentionally vague to get the unresponsive clients to sign the authorizations. The Board agrees with the Hearing Committee that Kennedy's statement violated Rule 8.4(c).[10]

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[10] The Hearing Committee found insufficient evidence that Dolan was "an active participant during this time." Rpt. 69; *see also* Rpt. 68. Disciplinary Counsel did not take exceptions to this

B. Count II

1. Violation of Rule 1.15(a) (misappropriation)

The Hearing Committee found that Respondents misappropriated client entrusted funds when they paid themselves a fee out of the Inter-Con settlement funds without client authorization.[11] Rpt. 69-79. The Board agrees with this finding. Misappropriation is an unauthorized use of client funds entrusted to the attorney. *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001). Here, the Inter-Con settlement funds were client entrusted funds in which Respondents claimed an interest. The settlement was between the clients and Inter-Con with each party to bear his or her own attorney's fees and costs. FF 46. When asked about this provision of the settlement agreement, Mr. Kennedy conceded that his fees and costs would be paid by the plaintiffs—his clients—not by Inter-Con:

> Q. When he writes, Mr. Kennedy, that each side is to bear its own attorney's fees and costs, "each side" is the claimants that have to bear the attorney's fees and costs, correct?
> A. No. I think each side means -- again, I don't know what it means, but I think it means both sides.
> Q. So the plaintiffs have to pay their attorney fees and costs, correct?

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finding. We have reviewed the record and agree that the evidence does not support that Dolan was dishonest with the clients. Rpt. 9 n.4.

[11] Rule 1.15(a):

> A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

A. Yes.
Q. And InterCon will take care of its attorney's fees and costs?
A. Correct.

Tr. 1269-70. As the Hearing Committee explained, settlements of this nature are treated as client property, and the attorney cannot take his fee without client authorization. Rpt. 74. While the Hearing Committee and parties were unable to identify a case exactly on point, the Hearing Committee concluded that because the settlement agreement with Inter-Con did not divide the settlement between the clients and the attorneys, the "economic substance" of that agreement was the "equivalent of a settlement check jointly payable to a lawyer and client." Rpt. 74. Those settlement "funds must be treated as client property until there has been an accounting and a severance of interest in the funds." Rpt. 74 (citing *In re Lee*, 95 A.3d 66, 75 (D.C. 2014) (per curiam)).

The *Haar* cases support the Hearing Committee's conclusion. In *Haar I*, the Court held that an attorney may not withdraw settlement funds to pay his fees—even if those fees were "rightfully earned"—if there is a fee dispute. *In re Haar* (*Haar I*), 667 A.2d 1350, 1353 (D.C. 1995). And in *Haar II*, the Court explained that settlement funds belong to the client where "there was no agreement that [the attorney] was entitled to take his fee from the trust account holding the settlement proceeds," and, that if the attorney takes those funds, it "would be a clear case of misappropriation, because [the attorney] would have taken client funds over which he had no claim greater than that of a general creditor." *In re Haar* (*Haar II*), 698 A.2d 412, 416 (D.C. 1997).

Here, there was no agreement from the clients for Respondents to take 67% of their settlement proceeds. Respondents point to the opt-in form to fulfill their obligation to provide an agreement with their clients, *supra* 18-19, but that document only addresses fees if the clients prevail, explaining that Inter-Con would be "required to pay your reasonable attorney's fees." FF 23; DX H19 at 9. The opt-in form did not allow Respondents to recover fees in a settlement. *See* FF 23; DX H19 at 9. And the agreement that Respondents eventually entered did not allow 67% recovery of settlement proceeds with no accounting. FF 32; DX E37 at 4 ("Attorney will be paid at 40% of the recovery or at an hourly rate pursuant to the applicable Adjustable [sic] Laffey Matrix in Washington, DC at his choosing upon recovery or upon application to the arbitrator for payment of attorney[']s fees and costs pursuant to applicable statutes.").

The Hearing Committee's conclusion also tracks with the requirements of Rule 1.15, which requires an attorney to hold client funds separate from his own funds in a trust account. Rule 1.15(a). The attorney also must notify the client that he receives such funds. Rule 1.15(c). If the attorney believes he is entitled to some amount of those funds, as his fee, the funds must remain in trust until his fee is resolved. *Accord In re Midlen*, 885 A.2d 1280, 1286-88 (D.C. 2005) (finding misappropriation where the attorney withdrew funds for his fee before the client acknowledged he had earned and was entitled to those fees).

To be sure, there was no dispute here about the fees to be paid. R. Br. 24-25 (noting that no client objected). But silence from the clients does not amount to consent or approval, especially where Respondents not only failed to inform their clients how those fees are to be calculated but Kennedy actively deceived the clients about the source of the attorney's fees. *Cf. In re Pierson*, 690 A.2d 941, 949 (D.C. 1997) (noting that the attorney "knowingly took away [the client's] ability to refuse" when she took funds "without prior consent" from the client).

Respondents disagree and argue that there was no misappropriation because the FLSA "mandates that attorney[']s fees . . . be paid" by Inter-Con. R. Br. 22. And they claim that "Kennedy operated on a good faith belief that pursuant to the fee-shifting provision of the FLSA, he was entitled to attorney[']s fees." R. Br. 24.

This argument is unavailing. As explained, the FLSA does not mandate attorney's fees from a settlement. To the contrary, the FLSA allows a court to award an attorney fees. 29 U.S.C. § 216(b). And Respondents have not pointed and cannot point to anything in the FLSA that permits attorneys to award themselves fees from a settlement with no oversight.[12] In short, Respondents knew that they were taking funds from a settlement without approval—"a clear case of misappropriation." *Haar II*, 698 A.2d at 416. Based on this record, the Board agrees with the Hearing Committee's conclusions that Respondents misappropriated their clients' funds when they paid themselves fees out of their clients' settlement funds without notice to or approval from those clients.

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[12] Both Respondents are found to have misappropriated because Dolan admitted that she was fully aware of the settlement terms. Tr. 1556.

Having found misappropriation, the Hearing Committee also determined the level of culpability for Kennedy and for Dolan. The Court has delineated three types of misappropriation: intentional, reckless, and negligent. *See Anderson*, 778 A.2d at 336. Disciplinary Counsel bears the burden of establishing the level of culpability by clear and convincing evidence but where Disciplinary Counsel fails to establish deliberate or reckless conduct then "[Disciplinary] Counsel proved no more than simple negligence." *Anderson*, 778 A.2d at 338.

Here, the Board agrees with the Hearing Committee that Kennedy's misappropriation was intentional based on his dishonest conduct. Rpt. 76. Intentional misappropriation occurs where an attorney takes a client's funds for the attorney's personal use. *See Anderson*, 778 A.2d at 339 (citations omitted) (attorney handles entrusted funds in a way "that reveals . . . an intent to treat the funds as the attorney's own"). Kennedy's misappropriation flows directly from his false statements and misrepresentation to the clients. He deliberately did not share settlement details with clients to ensure that the settlement would be finalized. He misrepresented to the clients that Inter-Con would pay his fees. He then calculated his own fee from the clients' settlement proceeds and paid his firm with no authorization or oversight. These are intentional acts.

Kennedy's pattern of dishonesty contradicts his argument that he acted on a "good faith belief" that the FLSA permitted his unilateral withdrawal of fees. R. Br. 20-21 (arguing for prospective application of the ruling here). So does his reference in the attorney-client agreement that he could apply to "the arbitrator for payment of attorney[’]s fees and costs pursuant to applicable statutes.” FF 32 (quoting DX E37 at 4). This statement reflects that Kennedy knew he could not unilaterally award himself fees. And as explained, Kennedy’s actions of paying himself fees with no oversight conflicted with the FLSA. Based on this record, we see no justification to apply this ruling prospectively. *Cf. In re Mance*, 980 A.2d 1196, 1206 (D.C. 2009) (explaining the need for prospective rulings to avoid disciplining attorneys for “inadvertent violations based on *reasonable*, but mistaken interpretations” of the law (emphasis added)).

Dolan’s level of culpability is a closer case. The Hearing Committee found that her misappropriation was negligent—or more specifically it found that Disciplinary Counsel did not establish reckless or intentional misappropriation. Rpt. 78-79. Disciplinary Counsel did not take exception to this determination but explained that the Board’s review of legal conclusions is de novo and argued that the Board should find that Dolan’s conduct was at least reckless. ODC Br. 33-36. In support, Disciplinary Counsel cites generic statements that Respondents (in the plural) litigated the Inter-Con matters and were involved in the settlement of the case. ODC Br. 34-36 (noting that Dolan reviewed some of the correspondence from Kennedy to the clients). But those statements do not establish, by clear and convincing proof, that Dolan was involved or fully aware of Kennedy’s dishonest communications with the clients. And there is no proof that she was dishonest with the clients.

After reviewing the record, the Board agrees with the Hearing Committee that there is insufficient evidence to establish Dolan's conduct was reckless or intentional.[13] The record shows Dolan had general knowledge of the litigation and negotiations but did not communicate directly with the clients. *See* Rpt. 9 n.4; *see also supra* 9-10, 15-16, 22 n.10.

It is worth repeating that Disciplinary Counsel bears the burden to prove the level of culpability for *each* respondent. Here, there was a materially different approach to the evidence presented against Kennedy compared to Dolan. Disciplinary Counsel questioned Kennedy extensively about the litigation, communication with clients, and settlement. And his testimony described *his* actions, decisions, and communications. *See, e.g.*, Tr. 272-73. Kennedy also explained Dolan's more limited involvement. Tr. 1116, 1170-71.

In addition, Disciplinary Counsel called three former clients who testified that Kennedy was the lead attorney or the only attorney on the case based on their experience. Tr. 655 (Jermaine Fitzgerald: "Mainly, I was speaking to Mr. Kennedy . . . . I may have spoken to Ms. Dolan, I'm not a hundred percent sure. I don't recall."); 768 (Michel Ashton testifying that he only spoke to Kennedy); 844 (Daniel Quagliarello: "I only had contact with Mr. Kennedy").

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13 In determining whether a respondent's unauthorized use of funds was reckless, one must determine whether the act "reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds." *See Anderson*, 778 A.2d at 338. And "'[r]eckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person.'" *Id.* at 339 (quoting 57 Am. Jur. 2d *Negligence* § 302 (1989)).

And significantly, Disciplinary Counsel's examination of Dolan was almost exclusively about the financial practice of the firm and tax issues. Disciplinary Counsel asked a couple of questions about Dolan's involvement in the litigation, received a generic statement that Dolan was "completely involved," and moved on. Tr. 1555-56. There were no follow up questions to explore what was meant by "completely involved." There was no development of her communications with clients or questions about her specific knowledge of Kennedy's communications with the clients. These omissions are significant when the record shows less overall involvement by Dolan in the litigation, the clients had already testified that they did not communicate with her, and Kennedy's testimony limited her involvement.

Based on this record, we agree with the Hearing Committee that Dolan's misappropriation was negligent because there was insufficient proof that it was reckless or intentional.

2. Violations of Rule 1.5(a), 1.15(a) (record-keeping), and 1.15(c)

The remaining violations in Count II can be addressed summarily.

Rule 1.5(a) (unreasonable fee):[14] Respondents repeatedly told their clients they would not be responsible for paying fees and then they paid themselves fees

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[14] Rule 1.5(a):

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

directly from the clients' settlement funds. The Board agrees with the Hearing Committee's conclusions that "[u]nder the circumstances proven in this matter, Respondents' collection of 67% of their clients' settlement in attorneys' fees [*without authorization*] crossed the border from unethical to unconscionable behavior." Rpt. 86; *see In re Martin*, 67 A.3d 1032, 1041-42 (D.C. 2013) ("[A]n attorney should not acquire 'a greater interest in the outcome of the litigation than his clients.'" (quoting *Attorney Grievance Comm'n of Maryland v. Korotki*, 569 A.2d 1224, 1233 (Md. 1990))); *Martin*, 67 A.3d at 1041-42 (citing cases holding that fees over fifty percent were unreasonable).[15] Respondents argue that the fee was reasonable because it was "governed by the fee shifting provision of the FLSA."

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(3) The fee customarily charged in the locality for similar legal services;
(4) The amount involved and the results obtained;
(5) The limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) Whether the fee is fixed or contingent.

[15] Respondents are not wrong that an attorney may be able to recover a significant fee even if the damages recovery is small under the FLSA's fee shifting provisions. *See, e.g.*, *Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132, 152-53 (2d Cir. 2008) (FLSA damages' award less than $2,000 but court awarded almost $50,000 is attorney's fees); *Jackson*, 391 F. App'x at 239 (settled FLSA damages for just under $20,000 but court awarded $36,000 in attorney's fees). *But see Loughner v. Univ. of Pittsburgh*, 260 F.3d 173, 178 (3d Cir. 2001) (remanding for factual findings but noting that a consideration is that the fees awarded by the trial court was "more than triple the amount of both the overtime claimed in the complaint, and the amount for which the plaintiff settled"). The important fact is that damages and fees were determined separately, and a court reviewed the fees and determined they were reasonable. *Cf. Barbee v. Big River Steel, LLC*, 927 F.3d 1024, 1027 n.1 (8th Cir. 2019) ("We note that if FLSA settlements are subject to judicial review, the court would retain the authority to ensure the attorney fees were in fact negotiated separately and without regard to the plaintiff's FLSA claim, and there was no conflict of interest between the attorney and his or her client."). Respondents did not present the settlement and fees to a court for approval and did not negotiate the damages and fees separately.

R. Br. 26. But as already explained, the fees Respondents paid themselves were inconsistent with the FLSA.

Rule 1.15(a) (failure to maintain records of entrusted funds): Respondents admit to this violation. R. Br. 31. There is clear and convincing evidence that Respondents failed to maintain records of the entrusted funds and were unable to identify the source of the funds in trust. FF 78-84.

Rule 1.15(c) (failure to notify clients promptly of receipt of funds):[16] Respondents do not address this Rule violation in their brief to the Board, though they implicitly take exception to it by conceding only the record-keeping violation. The Hearing Committee's findings sufficiently establish that Respondents did not notify their clients of the settlement funds and the distribution of those funds. FF 63-73.

3. No violations of Rules 1.15(a) (commingling) or 8.4(c)[17]

The Hearing Committee found there was insufficient evidence to establish a violation of Rule 1.15(a) for commingling because Disciplinary Counsel did not establish that the trust account had both client funds and Respondents' funds at the same time. Rpt. 80. And Disciplinary Counsel did not establish a violation of Rule

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16 Rule 1.15(c) provides in part:

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

17 Disciplinary Counsel also charged that Respondent violated Rule 1.5(c) by failing to provide a written statement explaining the outcome and fee calculation in a contingent fee matter; however, it did not brief that violation before the Hearing Committee. Rpt. 87. We agree with the Hearing Committee's conclusion that no violation of Rule 1.5(c) has been proven.

8.4(c) for dishonesty because insufficient evidence showed that Respondents used their trust account to prevent the funds from being subject to an IRS lien for owed taxes. Rpt. 87-88. Disciplinary Counsel did not take exception, and after review of the record, we concur with the Hearing Committee.

IV. Sanctions

There is a presumptive sanction of disbarment, absent "extraordinary circumstances," for intentional or reckless misappropriation. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc) ("In virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence."); *see In re Hewett*, 11 A.3d 279, 286-87 (D.C. 2011) (extraordinary circumstances include *Kersey* disability mitigation and actions designed to benefit the client). Kennedy has not argued extraordinary circumstances and we see none on this record. Thus, we recommend the presumptive sanction of disbarment for Kennedy's misappropriation.

For Dolan, the analysis is more complicated. A six-month suspension is common for negligent misappropriation cases. *See, e.g.*, *In re Kline*, 11 A.3d 261, 265 (D.C. 2011) ("[T]he ordinary sanction for negligent misappropriation would not exceed suspension for six months"); *Anderson*, 778 A.2d at 332; *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board report) (citing cases); *In re Choroszej*, 624 A.2d 434, 436 (D.C. 1992) (per curiam). But longer suspensions are imposed based on aggravating factors, including if there were prior negligent misappropriations, or if there are other serious violations. *See, e.g.*, *In re Bailey*, 883 A.2d 106, 112, 123 (D.C. 2005); *In re Fair*, 780 A.2d 1106, 1115-16 (D.C. 2001) (imposing suspension of one year and sixty days for two negligent misappropriations—each warranting a six-month suspension—with additional neglect).

Dolan has factors in support of a six-month suspension: she does not have a history of misconduct and she did not engage in dishonesty. Along with the misappropriation, however, she violated numerous serious rules to include failure to communicate with clients and failure to maintain trust records.

The Hearing Committee found that *In re Herbst*, 931 A.2d 1016 (D.C. 2007) (per curiam), was the most comparable to Dolan's misconduct. There the Court imposed a nine-month suspension, with three months stayed and two years of probation with conditions because along with the negligent misappropriation, the respondent allowed a nonlawyer employee to negotiate the settlement without consulting the clients. *Id.* at 1016-17. In addition, like Dolan, the respondent in *Herbst* violated Rules 1.2(a) (failure to abide by client's decision/consult clients) and 1.4(a)-(b) (failure to communicate adequately with client). *Id.* *In re Wright*, 885 A.2d 315 (D.C. 2005) (per curiam), another case with similar violations, to include settling a case without client consent, failing to keep clients properly informed or abide by their decisions, and failing to keep adequate records of the source and disposition of funds in his client trust account, resulted in a one-year suspension with a fitness requirement. *Id.* at 315-16. We agree with the Hearing

Committee's analysis of the nine-month suspension based on the total Rule violations as consistent with sanctions imposed in comparable cases.

The Hearing Committee also recommended that before reinstatement Dolan must show fitness, in particular because of her failure to maintain sufficient trust records and the inability to identify the funds in trust or the distributions from the trust account, which demonstrate a need for Dolan to show competency in maintaining trust records and management of a law firm. Rpt. 102.

"[T]o justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *In re Lattimer*, 223 A.3d 437, 453 (D.C. 2020) (per curiam) (quoting *In re Cater*, 887 A.2d 1, 6 (D.C. 2005)). The Court explained in *Cater* that it is

> useful to consider the same factors that guide us in determining whether to reinstate attorneys who have been suspended (or disbarred):
> (1) the nature and circumstances of the misconduct for which the attorney was disciplined;
> (2) whether the attorney recognizes the seriousness of the misconduct;
> (3) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;
> (4) the attorney's present character; and
> (5) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21 (citing *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985)).

The Court recently reiterated that "imposing a proof-of-fitness requirement is 'conceptually different from the reason for suspending a respondent for a period of time.'" *In re Askew*, 225 A.3d 388, 400 (D.C. 2020) (quoting *Cater*, 887 A.2d at 22).

A suspension "is 'intended to serve as the commensurate response to the attorney's past ethical misconduct, . . . [an] open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run.'" *Id.* (quoting *Cater*, 887 A.2d at 22). The Court rejected a fitness requirement in *Askew* explaining that the proof was largely a "contemporaneous . . . failure by respondent to understand her duties as court-appointed counsel" and noting that the record did not provide "'real skepticism' about respondent's fitness to practice law" in the future. *Id.* at 401.

Here, the Hearing Committee relied on several factors to determine that Dolan's fitness to practice is questionable. First, the Hearing Committee relied on Dolan's complete failure to maintain the trust account in compliance with the rules and her failure to correct that system even after Disciplinary Counsel's investigation and *up through the hearing*. Rpt. 102. Dolan displayed a dismissive attitude toward the obligation to track deposits and withdrawals from the trust account, claiming that it is unnecessary because she does not have clients that pay each month. Tr. 1589 (admitting she has not changed her practice of maintaining client ledgers and still does not maintain a record of deposits and disbursements from the IOLTA account). Second, Dolan did not supervise her non-attorney staff over the trust account. And she tried to shift the blame to that staff for the errors in issuing checks from the trust account with "Inter-Con" in the memo line before receipt of such funds. FF 88-90. In this regard, the Hearing Committee found that Dolan did not acknowledge the seriousness of her misconduct and her testimony "reflects a failure to appreciate her fiduciary responsibilities for clients' entrusted funds." Rpt. 102; *see Lattimer*, 223 A.3d at 453 (imposing fitness because of, in part, the respondent's "adamant refusal to accept responsibility and his corresponding willingness to blame any deficiencies in his representation on his clients").

Based on this record, the Board concludes that Disciplinary Counsel did not establish a "'real skepticism' about [Dolan's] fitness to practice law" in the future. *Askew*, 225 A.3d at 401. Though Dolan's continuing failures to recognize her ethical obligations in safeguarding client funds and to take remedial action are concerning, and we see the requirement of fitness as a close question, we conclude that these problems may be remedied with CLE, a practice management course, and practice monitoring. *See, e.g.*, *In re Edwards*, 870 A.2d 90, 92-93, 98-99 (D.C. 2005) (six-month suspension with CLE and six months of probation with practice monitoring for, *inter alia*, negligent misappropriation, commingling, and improper record-keeping, where the respondent was still "'confused' about her obligations," reasoning that practice monitoring, rather than fitness, was "the most practical and effective method of protecting the public and advancing the goals of attorney discipline," unless the respondent failed to cooperate with the practice monitor); *see also, e.g.*, *In re Bailey*, Bar Docket Nos. 442-92 & 483-92, at 37-39 (BPR Feb. 27, 2003) (recommending a nine-month suspension with CLE for negligent misappropriation, commingling, and improper record-keeping, but no fitness requirement, where the misconduct persisted "over a significant period of time" despite experience handling client funds), *recommendation adopted*, 883 A.2d 106, 123 (D.C. 2005).

V. Conclusion

For the reasons set forth above, we recommend that Respondent Kennedy be disbarred for intentional misappropriation and that Respondent Dolan be suspended for nine months. In lieu of requiring her to demonstrate fitness as a condition of reinstatement, we recommend reinstatement conditioned on completion of six hours of CLE courses on trust account management and a practice management course approved by Disciplinary Counsel. The Board also recommends that, following her suspension, Respondent Dolan be required to serve one year of probation under the supervision of a practice monitor, with her failure to cooperate with the practice monitor resulting in revocation of her probation with a requirement that she demonstrate fitness before reinstatement.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Lucy Pittman
Lucy E. Pittman

All members of the Board concur in this Report and Recommendation, except Mr. Walker and Ms. Larkin, who did not participate.