THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
October 23, 2018

In the Matter of:	:	
	:	
LUIS F. SALGADO,	:	
	:	Board Docket No. 16-BD-041
Respondent.	:	Disciplinary Docket No. 2010-D158
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 342444)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

An Ad Hoc Hearing Committee found that Disciplinary Counsel proved by clear and convincing evidence that Respondent Luis F. Salgado violated Rule 1.15(a) and Rule XI, § 19(f) because he engaged in commingling and failed to keep adequate records of his handling of entrusted funds, but did not prove that Respondent violated Rule 8.1(b) and 8.4(d).[1] In a Report and Recommendation dated August 16, 2018, the Hearing Committee recommended that Respondent be suspended for thirty days, with the requirement to prove fitness prior to reinstatement.

* 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.

[1] D.C. Rule XI, § 19(f) was in effect at the time of Respondent's misconduct, but was deleted from Rule XI as duplicative of Rule 1.15(a), effective March 1, 2016. *See* Order, No. M-251-15 (D.C. Feb. 4, 2016).

Respondent has not filed an exception to the Hearing Committee report, the time for doing so having expired. Disciplinary Counsel filed a letter noting that it disagrees with the Hearing Committee's conclusion that Respondent did not violate Rules 8.1(b) or 8.4(d), but that "[i]f Respondent does not file an exception, Disciplinary Counsel waives its right to brief and argue these issues in this case as it would not change the result."[2] We understand this to mean that even if the Board were to find additional Rule violations and recommend a lengthier sanction, "the result" would not change in that Respondent would not be allowed to practice until he proves that he is fit to do so.

The Board, having reviewed the record, concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record, and with its conclusions of law that Respondent's inadequate recordkeeping violated Rule 1.15(a) and D.C. Rule XI, § 19(f).

We also agree that Respondent's admitted commingling violated Rule 1.15(a), but separately address that issue because the Specification of Charges did not allege that Respondent had engaged in commingling, and *In re Smith* provides that "an attorney can be sanctioned only for those disciplinary violations enumerated in formal charges." 403 A.2d 296, 300 (D.C. 1979); *see* H.C. Report at 24-27.

[2] Letter from Hamilton P. Fox, III, Disciplinary Counsel, to James T. Phalen, Executive Attorney (Aug. 24, 2018). In its exception letter, Disciplinary Counsel requested an opportunity to address the Hearing Committee's recommendation that Disciplinary Counsel did not prove violations of Rule 8.1(b) and 8.4(d) if the Board intended to address that conclusion. *Id*. We decline to address the Hearing Committee's conclusion that Respondent did not violate Rules 8.1(b) and 8.4(d) because the resolution of that issue would impede the timely resolution of this matter, with no material effect on Respondent's suspension from practice.

During the hearing, Respondent repeatedly testified that, because he was unable to keep track of entrusted funds, he purposely kept his own funds in his trust account to prevent unauthorized use of entrusted funds. *See, e.g.*, Hearing Transcript at 273 ("I was keeping more funds in IOLTA that [sic] I knew were necessary to make sure I never touched entrusted funds from clients"); *see also* Hearing Committee Finding of Fact 47. Based on Respondent's testimony, Disciplinary Counsel then argued in its post-hearing brief that Respondent engaged in commingling. In his responsive brief, Respondent – who was represented by counsel – did not claim to be surprised by this argument and again conceded intentional commingling. *See, e.g.*, Respondent's Brief at 11, ¶ 26 ("Even without performing an accounting, Respondent had kept enough earned funds in IOLTA to know he had maintained an appropriate balance in his entrusted funds.").

Board Rule 7.21 applies to this circumstance and provides, in relevant part, that:

> Whenever, in the course of a formal hearing, evidence shall be presented upon which another charge or charges against respondent might be made, it shall not be necessary to prepare or serve an additional petition with respect thereto, but upon motion by respondent or by Disciplinary Counsel, the Hearing Committee Chair may continue the hearing. After providing respondent reasonable notice and an opportunity to answer, the Hearing Committee may proceed to the consideration of such additional charge or charges as if they had been made and served at the time of service of the original petition.

Because Respondent (1) did not claim surprise when Disciplinary Counsel argued in its post-hearing brief that it had proved a commingling violation, (2) has not excepted to the Hearing Committee's conclusion that he engaged in

commingling (while its analysis specifically addressed the lack of notice in the Specification of Charges), and (3) because nothing in the record suggests that Respondent was denied the opportunity to defend against the commingling allegation, we find no error in the Hearing Committee's consideration of this charge. We caution that this conclusion is limited to the facts of this case. In order to avoid due process issues in future cases, we encourage Disciplinary Counsel (when it intends to argue that a respondent committed an uncharged Rule violation based on evidence disclosed at the hearing) to provide the respondent with clear notice of the additional alleged Rule violation *during* the hearing so that the respondent may consider whether to invoke the protections afforded by Board Rule 7.21.

With respect to sanction, the Board must recommend a sanction that does not "foster a tendency toward inconsistent dispositions for comparable conduct or otherwise be unwarranted" (s*ee* D.C. Bar R. XI, § 9(h)), which typically requires a comprehensive, multi-factor "comparability analysis." *See In re Martin,* 67 A.3d 1032, 1053 (D.C. 2013) (discussing the factors considered in making a sanction recommendation).

We question whether a thirty-day suspension is a consistent sanction for comparable misconduct given that, in another matter, the Board is currently considering a Hearing Committee's recommendation (supported by Disciplinary Counsel), that the respondent should be suspended for three years (with fitness) for intentional commingling, bad recordkeeping, and dishonesty. *In re Thomas-*

Edwards, Board Docket No. 15-BD-030 (H.C. Rpt. Apr. 12, 2018). To resolve this case, however, we need not consider if and how that case is distinguishable.

Since neither Disciplinary Counsel nor Respondent disagrees with the recommended sanction and we agree with the Hearing Committee that Respondent should have to prove fitness prior to reinstatement, we do not believe that it serves the interests of the parties or the discipline system to seek briefs from the parties, entertain oral argument, and conduct a comparability analysis in this case for the sole purpose of recommending a suspensory sanction consistent with comparable misconduct.[3] To do so would unnecessarily delay the final resolution of this case, and would be inconsistent with the disciplinary system's goal of fair and efficient case resolution. The discipline system is intended to protect the public, the courts and the integrity of the profession from the misconduct of individual attorneys, and to deter similar misconduct. *See In re Martin*, 67 A.3d at 1053; *In re Smith*, 403 A.2d at 300. The recommended fitness requirement adequately serves those ends. We thus recommend that the Court suspend Respondent for thirty days with fitness, but that this case not be considered precedent for purposes of determining the length of suspension to be imposed for the misconduct reflected in the Hearing Committee report.

[3] In making this recommendation, we afford great weight to the fact that Disciplinary Counsel, apparently relying on the inherent protection afforded by the fitness requirement, does not seek a greater period of suspension. We agree with the Court's observation in *In re Cleaver-Bascombe*, 892 A.2d 396, 415 n.14 (D.C. 2006), that Disciplinary Counsel "conscientiously and vigorously enforces the Rules of Professional Conduct." While we have the ability to recommend that the Court impose a longer suspension than that recommended by Disciplinary Counsel (*id.*), we do not see the need to make such a recommendation on the facts of this case.

We do not mean to suggest that a fitness requirement eliminates the need to review the period of suspension recommended by a Hearing Committee in every case. However, where a fitness requirement ensures the protection of the public, where neither party excepts to the recommended period of suspension, and where the determination of a consistent sanction for comparable misconduct will not have a material effect on Respondent's resumption of the practice of law, we see little to be gained by the delay inherent in full-blown sanction litigation before the Board. The Court and the Board have ample numbers of contested matters on their crowded dockets that require such decision-making. This case is not one of them.

For the foregoing reasons, and those set forth in the attached Hearing Committee Report (which is incorporated by reference herein), the Board finds that Respondent violated Rule 1.15(a) and Rule XI, § 19(f). We recommend that Respondent be suspended for thirty days and be required to prove his fitness to practice prior to reinstatement. We further recommend that the period of suspension imposed in this case not be considered as precedent in future cases, and that Respondent's attention be drawn to the requirements of D.C. Bar R. XI, §§ 14 and 16, relating to suspended attorneys.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Robert C. Bernius, Chair

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

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

In the Matter of:	:	
	:	
LUIS F. SALGADO,	:	
	:	
Respondent.	:	Board Docket No. 16-BD-041
	:	Bar Docket No. 2010-D158
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 342444)	:	

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

Respondent, Luis F. Salgado, is charged with violating D.C. Rule of Professional Conduct ("Rule") 1.15(a) and D.C. Bar R. XI, § 19(f) (failure to maintain complete records for five years after distribution of funds), Rule 8.1(b) (knowingly fail to respond to lawful demand for information), and Rule 8.4(d) (seriously interfere with the administration of justice by failing to respond to Disciplinary Counsel[1]), arising from Respondent's alleged failure to respond to Disciplinary Counsel's inquiries during its investigation into payments made from his firm's IOLTA. Disciplinary Counsel contends that Respondent committed all of the charged violations and should be suspended for six months with a fitness

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

requirement as a sanction for his misconduct. Respondent contends that none of the charges were proven, thus no disciplinary sanction is necessary, but he should be required to attend training on handling entrusted funds so that he may properly supervise his staff.

As set forth below, the Hearing Committee finds clear and convincing evidence that Respondent violated Rules 1.15(a) and D.C. Bar R. XI, § 19(f). The Hearing Committee recommends that Respondent receive a sanction of thirty days suspension, with proof of fitness.

I. PROCEDURAL HISTORY

On June 20, 2016, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"). The Specification alleges that Respondent violated the following rules:

- Rule 1.15(a) and D.C. Bar R. XI, § 19(f), in that Respondent failed to maintain complete records of the handling, maintenance, and disposition of all funds belonging to another person, or to a corporation, association, partnership, or other entity, at any time in his possession, from the time of receipt to the time of final distribution, and failed to preserve those records for a period of five years after final distribution of such funds;
- Rule 8.1(b), in that in connection with a disciplinary matter, Respondent knowingly failed to respond reasonably to a lawful demand for information from Disciplinary Counsel; and
- Rule 8.4(d), in that Respondent seriously interfered with the administration of justice.

Respondent filed an answer on July 11, 2016. A hearing was held on October 17 and 18, 2016, before this Ad Hoc Hearing Committee (the "Hearing Committee"). Disciplinary Counsel was represented at the hearing by Traci M. Tait, Esquire. Respondent was represented at the hearing by Michael E. Veve, Esquire.

Prior to the hearing, Disciplinary Counsel submitted DX[2] A through D and DX 1 through 11C. All of Disciplinary Counsel's exhibits were received into evidence without objection. Tr. 380. During the hearing, Disciplinary Counsel called as witnesses its Senior Forensic Investigator, Kevin O'Connell. Tr. 32. Also during the hearing, Disciplinary Counsel submitted DX 13 and 14 (Tr. 379-80), and following the Hearing Committee's non-binding determination that Disciplinary Counsel had proven at least one Rule violation, it submitted DX 12 as evidence in aggravation of sanction. Tr. 381-82; *see* Amended Disciplinary Counsel's Exhibits (filed Oct. 19, 2016).

Also prior to the hearing, Respondent submitted RX A through H. During the hearing, Respondent's counsel requested the removal of RX B, RX G, as well as portions of RX C. Tr. 6-9, 101-102; *see* Amended Respondent's Exhibits (filed Nov. 4, 2016). All of Respondent's remaining exhibits were received into evidence

[2] "DX" refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to the transcript of the hearing held on October 17 and 18, 2016.

without objection. Tr. 379. Respondent testified on his own behalf and did not call any other witnesses. Tr. 151, 387 (mitigation).

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on November 15, 2016 ("ODC Br."), and Respondent filed his Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on December 9, 2016 ("R. Br."). Disciplinary Counsel's Reply Brief was filed on December 21, 2016 ("Reply Br.").[3]

II. FINDINGS OF FACT

A. Respondent's Law Firms

1. Respondent was admitted to the Bar of the District of Columbia Court of Appeals on December 19, 1980 and assigned bar number 342444. (DX A.)

2. Respondent has practiced immigration law for over thirty years. (Tr. 334.)

3. In 2009, Respondent was the sole principal of the law firm Salgado & Associates, PLLC. (DX B & C, Specification and Resp. Answer to Specification

[3] On December 21, 2016, Disciplinary Counsel also submitted Motion to Strike Attachments to, and Portions of Respondent's Brief, requesting that Attachments 1-3 of Respondent's Brief should be struck because they were filed out of time under Board Rule 12.1(c), either misleading or irrelevant, and that Respondent's mitigation argument asserted facts that were outside the evidentiary record. Respondent did not file a response to the Motion to Strike. Board Rule 12.1(c) provides that the record before the Hearing Committee may be held open for not more than seven days after the close of a hearing and that no additional evidence may be submitted thereafter, unless otherwise ordered by the Chair of the Hearing Committee. Disciplinary Counsel's motion is granted on the grounds that Respondent's additional submission was untimely. *See infra* n.9.

para. 2.)

4. At the same time, Respondent also was the sole principal of the law firm, Oficina de Asistencia Legal, Inc. (OALI), which was incorporated as a non-profit corporation in the State of Maryland. (DX B & C, Specification and Resp. Answer to Specification para. 3; DX 2 at Bates 4; Tr. 105:16-18, 186:15-20.)

5. Respondent created OALI for the purpose of keeping his pro bono work separate from Salgado & Associates, PLLC and intended to seek section 501(c)(3) tax-exempt status for OALI with the Internal Revenue Service (IRS). (DX 2 at Bates 4; Tr. 36:1-5, 105:15-106:7, 161:9-162:14, 186:19-187:1.)

6. Under Respondent's understanding of "pro bono," OALI clients received reduced, but not free legal representation. (Tr. 187:2-5.)

7. OALI clients made an initial payment for legal services, which could be as much as $2,000, and which Respondent characterized as contributions or donations. (Tr. 187:2-188:2; DX 2 at Bates 4.)

8. Even if OALI clients could not pay the remainder of the cost, Respondent would continue working on their cases. (Tr. 187:2-11; DX 2 at Bates 4.)

9. Because he missed the deadline to file for 501(c)(3) status for OALI, Respondent created a third law firm, Esperanza Services, Inc., in 2014. (Tr. 161:21-162:14.)

B. Disciplinary Counsel's Initial Inquiry in 2010

10. In April 2010, Disciplinary Counsel received a complaint from an individual who had previously worked in Respondent's office. (DX 1A.)

11. The complaint alleged that Respondent was violating the Rules of Professional Conduct by comingling funds, evading taxes, double billing, billing for unnecessary work, taking attorney's fees without providing competent services, and falsely claiming OALI was a nonprofit when it operated as a for-profit law firm. (DX 1A.)

12. Specifically, the complaint alleged that Respondent "pays his accountant from the IOLTA account." (DX 1A at Bates 4.)

13. In April 2010, Disciplinary Counsel forwarded the complaint to Respondent and requested a substantive response as well as (1) the OALI articles of incorporation and bylaws; (2) all documents filed with the IRS and/or the Maryland State Department of Assessments and Taxation from 2007 to the present relating to OALI's tax-exempt status; (3) the bank and account number for all OALI bank accounts; and (4) the bank and account number for Respondent's law firm's IOLTA and operating accounts. (DX 1 at Bates 2).

14. In or around May 2010, Disciplinary Counsel issued subpoenas to Respondent's banks for statements covering 2009 and 2010 and obtained those records. (Tr. 6:11-14 (stipulation between Respondent's counsel and Disciplinary

Counsel)); (Tr. 155:3-16.)

15. In June 2010, Respondent submitted, through counsel, a "point by point" response to the complaint (DX 2 at Bates 2-7), provided the bank and account numbers for two OALI accounts and four accounts for Respondent's law firm (DX 2 at Bates 6-7), and enclosed the OALI articles of incorporation (DX 2 at Bates 8-10).

16. Respondent's June 2010 response was silent on and did not enclose the other items requested by Disciplinary Counsel: the OALI bylaws and all documents filed with the IRS and/or the Maryland State Department of Assessments and Taxation from 2007 to the present relating to OALI's tax-exempt status. (DX 2 at Bates 2-10; Tr. 154:19-155:2.) Respondent failed to meet a deadline to file tax-related documents on behalf of OALI, which may suggest such documents do not exist. (*See* Tr. 106:17-107:3.) Disciplinary Counsel did not further investigate the matter, however. (Tr. 113:11-14.)

17. In response to the allegation regarding his IOLTA account, Respondent replied: "If the accounting assistant is being paid from IOLTA, that would be an oversight which will be corrected." (DX 2 at Bates 4.)

18. The Hearing Committee finds that Respondent's June 2010 response (DX 2 at Bates 2-10) complied with the requirement in D.C. Bar Rule XI, section 8(a) to respond to a disciplinary complaint.

19. In November 2010, Disciplinary Counsel requested that Respondent identify all other jurisdictions, courts, and agencies before which he has been licensed to practice law and to update his residential and office addresses with the District of Columbia Bar (DX 3), and Respondent provided the requested information in December 2010 (DX 3A).

20. The Hearing Committee finds that Respondent responded to Disciplinary Counsel's November 2010 request for information.

21. After December 2010, there was no further communication between Disciplinary Counsel and Respondent until 2014. (Tr. 156:9-15 - 158:6)

22. Because Respondent heard nothing further from Disciplinary Counsel, he assumed that Disciplinary Counsel was satisfied with his responses. (Tr. 168:21-169:15.) The Hearing Committee finds that it was objectively reasonable for Respondent to believe that, until further notice, no additional response was required of him.

C. Disciplinary Counsel's Follow-up Inquiry in 2014 and 2015

23. In February 2014, Kevin O'Connell, Disciplinary Counsel's investigator, began investigating and working on Respondent's case. (Tr. 102:19-22.)

24. In March 2014, Disciplinary Counsel issued subpoenas [4] to Respondent's banks for bank statements from 2009 and obtained those records. (Tr. 110:3-111:14.)

25. By letter dated October 23, 2014, Disciplinary Counsel notified Respondent that it was "concluding its investigation" but "would like to discuss certain issues" before doing so. (DX 4 at Bates 1.)

26. Disciplinary Counsel stated that its "primary focus" was Respondent's apparent improper handling of entrusted funds accounts, including "several occasions in 2009" when it appeared that Respondent's firm used entrusted funds to pay law firm operating expenses or other expenses. (DX 4 at Bates 1.)

27. Disciplinary Counsel ended the letter by requesting a meeting "to obtain your assurance that this issue has not recurred and to discuss ways in which the office might move forward to conclude this investigation." (DX 4 at Bates 2.)

28. Disciplinary Counsel also enclosed copies of numerous canceled checks written on Respondent's law firm's IOLTA bank account (account number ending in -3794) in 2009 and obtained from Respondent's bank by Disciplinary Counsel via subpoena in 2014. (DX 4; DX 2 at Bates 7; Tr. 38:18-39:12.)

29. Though Disciplinary Counsel's October 23, 2014 letter to Respondent was not delivered (*see* DX 6), the letter and its enclosures were re-sent by letter dated

[4] The subpoenas issued in 2014 by Disciplinary Counsel are not in the record. (Tr. 111:4-7.)

November 17, 2014. (DX 8.)

30. By email dated December 10, 2014, Respondent acknowledged receiving Disciplinary Counsel's November 17, 2014 letter. (DX 8A.)

31. Respondent also asserted that "the passage of 4 years" since Disciplinary Counsel initiated the investigation put him at a disadvantage in several ways: he was no longer living in the Washington, D.C. area; he had suffered a massive heart attack and was receiving treatment in Boston, Massachusetts; his doctor had prescribed a cardiac rehabilitation program for the next four to six months and advised against any unnecessary travel or stress-provoking situations; he had already closed his practice and was unsure whether he would practice again; he would need to travel back to D.C. to look for documents and talk to former staff in order to refresh his memory to respond to Disciplinary Counsel's further inquiries; and he had lost his prior pro bono representation and would have to find other representation. (DX 8A.)

32. In his December 10, 2014 email, Respondent stated he lacked the physical and emotional strength to respond to Disciplinary Counsel's further inquiry at this time, requested sufficient time to allow him to fully recover from his heart attack, and attached a letter from his doctor. (DX 8A.)

33. Disciplinary Counsel responded via email on December 19, 2014, asking Respondent to schedule a call to discuss the matters in Respondent's email,

along with any other individuals whom Respondent would like to participate on the call, and to discuss "the best way to proceed." (DX 9.)

34. On January 6, 2015, Respondent's new counsel entered his appearance, representing to Disciplinary Counsel that Respondent had not been engaged in the practice of law since his heart attack in August 2014 and had closed his law office due to his health, and that Respondent's files were in storage and his staff engaged elsewhere. (DX 9A; RX E; Tr. 128:20-129:1.)

35. On that same date, Disciplinary Counsel responded to Respondent's new counsel, indicating that if Respondent had indeed closed his practice, then "there are some options going forward" that she would be willing to discuss with him, which "may obviate" the need for Respondent to provide the submission sought by Disciplinary Counsel in order to close its investigation. (DX 9A.)

D. Respondent's Handling of His IOLTA Account

36. The canceled checks enclosed in Disciplinary Counsel's October 23, 2014 letter include more than 75 checks written on Salgado & Associates PLLC's IOLTA account for operating expenses ranging from payroll to petty cash, as reflected in the "Memo" line of the canceled checks. (DX 4 at Bates 5-48.)

37. Respondent concedes he was the only person with authority to sign checks from his firm's IOLTA account (Respondent's Proposed Findings of Fact No. 8 (citing Tr. 222, 233-34); Tr. 222:11-13).

38. Respondent also authorized people in his office to use a stamp of his signature to sign checks from his firm's IOLTA account when he was not in the office. The Hearing Committee finds that Respondent did not exert firm control over delegation of that authority. Respondent admitted that when reviewing checks "[he] wasn't looking particularly whether they used a stamp or didn't use a stamp." (Tr. 231:11-234:17.)

39. Respondent does not dispute that his signature is on each of the canceled checks enclosed in the October 23, 2014 letter from Disciplinary Counsel (DX 4 at Bates 5-48). (Tr. 232:5-14.)

40. Many of the canceled checks were written out to Fabiola Rodriguez, Alejandro Rodriguez, Russel Reyes, Jorge Villalon, and Cesar Garcia, all of whom worked at or for Respondent's law firm. (DX 4 at Bates 5-48; Tr. 40:2-49:13, 240:13-16.)

41. In 2009, funds were transferred from Respondent's IOLTA account to his law firm's operating expenses account (account number ending in -4575) for payroll purposes. (DX 4 at Bates 12 (check # 5133), 14 (check # 5146), 20 (check # 5165), 21 (check # 5171), 24 (check # 5183), 26 (check # 5189), 27 (check # 5197), 28 (check # 5206), 32 (check #s 5230 & 5232), 33 (check # 5240), 34 (check #s 5220 & 5249), 35 (check # 5262), 36 (check # 5265), 38 (check # 5275), 41 (check # 5315), 45 (check # 5343), 46 (check #s 5346 & 5355); Tr. 371:21-372:7.)

42. In 2009, when entrusted funds were earned, those funds were transferred from Respondent's IOLTA account to his law firm's operating expenses account using the notation "Transfer to LO" in the "Memo" line of the check. (Tr. 239:6-14; DX 4 at Bates 21 (check # 5171), 24 (check # 5183), 26 (check # 5189), 27 (check # 5197), 28 (check # 5206), 32 (check #s 5230 & 5232), 34 (check #s 5220 & 5249), 35 (check # 5262), 36 (check # 5265), 38 (check # 5275), 41 (check # 5315), 45 (check # 5343), 46 (check #s 5346 & 5355).)

43. In 2009, payments were made from Respondent's IOLTA account to people who worked at or for Respondent's law firm for work done, partial payment for services, accumulated vacation hours, and "Casual Labor." (DX 4 at Bates 5 (check # 5071), 6 (check # 5070), 7 (check # 5094), 8 (check # 5098), 11 (check # 5118), 12 (check # 5134), 13 (check # 5136), 17 (check # 5147), 19 (check # 5153), 21 (check #5159), 23 (check #s 5173 & 5176), 24 (check # 5185), 26 (check #s 5184 & 5186), 27 (check # 5190), 28 (check # 5188), 31 (check # 5212), 32 (check # 5229), 33 (check # 5243), 34 (check # 5247), 35 (check # 5257), 37 (check # 5269), 38 (check #s 5278 & 5279), 39 (check # 5294), 40 (check # 5292), 41 (check #s 5296 & 5295), 42 (check # 5314), 43 (check # 5313), 44 (check # 5328), 45 (check # 5342), 46 (check # 5340), 47 (check #s 5348 & 5356), 48 (check # 5357).)

44. To Respondent, "casual labor" means "somebody who comes to work not on a regular basis but on a demand basis." (Tr. 239:21-240:5.)

45. In 2009, payments for mileage reimbursements were made from Respondent's IOLTA account to people who worked at or for Respondent's law firm (DX 4 at Bates 6 (check # 5080), 8 (check # 5097), 10 (check # 5119), 16 (check # 5149), 25 (check # 5179), 27 (check # 5195), 31 (check # 5214), 33 (check # 5242), 37 (check # 5268), 38 (check # 5277), 40 (check # 5293), 43 (check # 5304), 46 (check # 5341)), postage reimbursements (DX 4 at Bates 15 (check # 5142), 18 (check # 5150), 20 (check # 5155)), copies (DX 4 at Bates 13 (check # 5082)), and "To Refund Petty Cash" (DX 4 at Bates 24 (check # 5187)).

46. Based on this record and without further documentation, Mr. O'Connell and Disciplinary Counsel were unable to conclude in 2014 that the entrusted funds in Respondent's IOLTA account had remained intact and were not expended on operating expenses or commingled with other funds of the law firm. (Tr. 81:9-94:21, 139:7-12, 147:11-14.)

47. When asked about these payments and transfers made in 2009, Respondent testified that he purposely left earned funds in his IOLTA account to ensure that client entrusted funds were not misused. (Tr. 189:11-190:13, 208:2-210:3, 270:6-17, 273:15-19; *see also* Respondent's Proposed Findings of Fact No. 8.) He stated, "I did something else to make up for the fact that I can't afford to have a sophisticated accounting system in a small law firm that has very low income, which was to leave enough money in escrow account to make sure that the entrusted

funds would never, ever be touched to cover anything that was wrong like what happened in 2009." (Tr. 270:10-17.) He further stated, "I was keeping more funds in IOLTA that I knew were necessary to make sure I never touched entrusted funds from clients." (Tr. 273:16-19.)

48. Respondent admitted that the series of 2009 cancelled checks showed that payments were made to staff directly from the IOLTA. *See* Tr. 165, 226, 228-29. Respondent also admitted that attorney fee-splitting checks were drawn against the entrusted funds in the IOLTA. Tr. 165, 198, 224-25. Respondent testified that these checks were payment for work that had been performed for clients, thus asserting that earned fees were held with entrusted funds in his IOLTA. Tr. 224-25. Respondent further testified that he received an insurance check reimbursing him for property damage to his computers that he deposited into the IOLTA. Tr. 228. Respondent admitted that the insurance reimbursement was not entrusted funds. *Id.*

49. The Hearing Committee finds that Respondent intentionally left earned fees in his IOLTA account and did not timely withdraw them. Respondent did so for the express purpose of ensuring that his IOLTA account did not fall below zero.

50. Keeping extra money in his IOLTA account did not absolve Respondent of his obligations under Rule 1.15(a) and D.C. Bar Rule XI, § 19(f) to maintain complete records of the handling, maintenance, and disposition of all account funds.

51. The Hearing Committee finds that, Respondent commingled funds by intentionally keeping extra money in his IOLTA account and by depositing personal funds in the IOLTA.

E. Disciplinary Counsel's Attempts to Determine Whether Respondent Misused Entrusted Funds

52. The Hearing Committee finds that, as of January 2015, Disciplinary Counsel notified Respondent of several occasions in 2009 in which Respondent's firm used entrusted funds to pay law firm operating expenses or other expenses and provided numerous canceled checks as examples, that Disciplinary Counsel requested a meeting and "assurance" that this issue would not reoccur, and that Disciplinary Counsel stated it wanted to conclude its investigation. *See* Finding of Facts ("FF") ¶¶ 23-28. The Hearing Committee finds that Disciplinary Counsel did not state specifically what further information it needed from Respondent in order to do so.

53. The Hearing Committee finds that Respondent did respond – albeit without much specificity – to Disciplinary Counsel in 2014 and January 2015 and participated in the disciplinary process.

54. By letter dated February 25, 2015, Disciplinary Counsel notified Respondent's counsel that it was still attempting to close its investigation but "must understand" Respondent's handling of funds in his law firm's IOLTA account (account number ending in -3794). (DX 10.)

55. In its February 25, 2015 letter, Disciplinary Counsel enclosed over 400 pages of documents, which included copies of canceled checks from Respondent's IOLTA account that were largely, if not entirely, identical to the canceled checks provided to Respondent in the November 17, 2014 letter. (DX 10.)

56. Disciplinary Counsel also requested, in bold and underlined print, that Respondent "provide an accounting of the funds passing through his entrusted funds account as reflected by the enclosed records." (DX 10 at Bates 1.)

57. The February 25, 2015 letter was the first time that Disciplinary Counsel specifically requested an accounting of Respondent's IOLTA account from Respondent. (Tr. 74: 16-22. *See generally* DX 1-10.)

58. In addition, the February 25, 2015 letter requested that Respondent (1) identify the principals of the Salgado & Associates, PLLC law firm (PLLC); (2) identify the principals of OALI; (3) state whether any debit cards were issued in connection with the PLLC and OALI entrusted funds accounts and, if so, why; and (4) answer the following questions regarding one of Respondent's prior statements ("If the accounting assistant is being paid from IOLTA, that would be an oversight which will be corrected."). Those questions were:

> (a) Did such payments occur? If so, (i) how often, (ii) was the problem corrected, and (iii) how was it corrected?
> (b) Did Mr. Salgado write the checks to pay his "accounting assistant"? If not, how was that person paid?

(DX 10 at Bates 2.)

59. Finally, Disciplinary Counsel noted in its February 25, 2015 letter that, before considering whether to allow Respondent to seek a suspension of the investigation based on medical disability, it would need Respondent's substantive responses to this "final inquiry" or an explanation of why Respondent could not provide those responses. (DX 10.)

60. Respondent's counsel acknowledged receipt of the February 25, 2015 letter and stated that he would forward it (and its enclosures) along to Respondent for a response. (DX 10A.)

61. Neither Respondent nor his counsel responded to Disciplinary Counsel's February 25, 2015 letter. (Tr. 76:11-77:6.)

62. On April 2, 2015, Disciplinary Counsel sent a follow-up letter to Respondent's counsel, reiterating its request for a response by April 10, 2015 to the four questions posed in its February 25, 2015 letter and noting that a motion to compel might be filed if no response was provided. (DX 11.)

63. To verify that Respondent corrected the problem of his accounting assistant being paid from the IOLTA account, Disciplinary Counsel also specifically requested that "pursuant to D.C. Rule of Professional Conduct 1.15(a), please have your client provide records sufficient to account for the last six months of activity in the Salgado & Associates, PLLC IOLTA ending in -3794 prior to his closing that law office." (DX 11 at Bates 1.) Disciplinary Counsel enclosed a subpoena

requesting the following: "the last six months before closing Salgado & Associates, PLLC [sic] produce records identifying all activity in the PLLC IOLTA ending in -3794, consistent with your obligations under D.C. Rule of Professional Conduct 1.15(a)." (DX 11 at Bates 3.)

64. The Hearing Committee finds that Disciplinary Counsel sent its April 2, 2015 follow-up letter because Respondent never responded to Disciplinary Counsel's February 25, 2015 letter. Much of the information and documents requested in the April 2, 2015 letter was identical to that requested in the February 25, 2015 letter.

65. By letter dated April 8, 2015, Respondent responded to the four questions posed in Disciplinary Counsel's February 25, 2015 letter, stating that he was the sole principal of Salgado & Associates, PLLC from its beginning until its closure and had been the sole principal of OALI from its beginning; and that no debit cards were issued in connection with any of his PLLC or OALI entrusted funds accounts. (DX 11A at Bates 4-6.)

66. With respect to paying his accounting assistant from IOLTA funds, Respondent stated:

> My accounting assistant, Jorge P. Villalón, was paid several times from the PLLC IOLTA account during 2009 and 2010. I do not have the IOLTA cancelled checks to know how often this occurred, but I believe they are part of the record in this docket. I requested that this error be corrected soon after this proceeding was filed in 2010. Thereafter, and to my best recollection, Mr. Villalón was paid from the PLLC's

> operating checking account. . . . My accounting assistant was paid by check at all times (never in cash). The checks were prepared by my accounting assistant and signed by me.

(DX 11A at Bates 5.)

67. On April 20, 2015, in response to Disciplinary Counsel's subpoena for records of the last six months of activity in the Salgado & Associates, PLLC IOLTA ending in -3794 prior to his closing that law office, Respondent provided his monthly bank statements from that account for April 2014 through September 2014, which included copies of canceled checks. (DX 11B; DX 11C.)

68. Although Respondent never responded to Disciplinary Counsel's February 25, 2015 request, the Hearing Committee finds that Respondent adequately responded to Disciplinary Counsel's April 2, 2015 request for information and documents. Within the month of April 2015, Respondent answered the four questions (DX 11A at Bates 4-6) and provided monthly bank statements and canceled checks in response to the subpoena for "records identifying all activity in the PLLC IOLTA ending in -3794." (DX 11B; DX 11C).

69. Because Respondent heard nothing further from Disciplinary Counsel after April 2015, he assumed that Disciplinary Counsel was satisfied with his responses. (Tr. 178:4-13, 270:18-271:4.) We find that it was reasonable for Respondent to believe that, until further notice, no additional response was required of him.

70. In November 2015, Disciplinary Counsel sent Respondent a draft specification of charges. (RX H at 1; Tr. 178:7-16.) Respondent wrote back three days later to request a meeting. (RX H at 1-2; Tr. 178:17-179:12.) Disciplinary Counsel did not respond to Respondent's request. (Tr. 180:21-181:2.)

71. On June 17, 2016, Disciplinary Counsel formally filed a specification of charges, alleging that Respondent violated Rules of Professional Conduct 1.15(a), 8.1(b), and 8.4(d) and D.C. Bar Rule XI, § 19(f). (DX B).

III. CONCLUSIONS OF LAW

Respondent is charged with violating Rule 1.15(a) and D.C. Bar R. XI, § 19(f) (fail to maintain complete records for five years after distribution of funds), Rule 8.1(b) (knowingly fail to respond to lawful demand for information from Disciplinary Counsel), and Rule 8.4(d) (seriously interfere with the administration of justice by failing to respond to Disciplinary Counsel). In its post-hearing briefing, Disciplinary Counsel argues that Respondent violated Rule 1.15(a) both by failing to maintain records of entrusted funds in his IOLTA and by his admitted commingling of funds. Disciplinary Counsel also argues that Respondent violated Rules 8.1(b) and 8.4(d) by failing to produce financial records during the disciplinary investigation that he testified he possessed during the disciplinary hearing. In his post-hearing brief, Respondent argues that Disciplinary Counsel failed to prove any the violations by clear and convincing evidence. The Hearing Committee finds that

Disciplinary Counsel proved that Respondent violated the record-keeping requirements of Rule 1.15(a) and D.C. Bar R. XI, § 19(f), but failed to establish by clear and convincing evidence the alleged Rule 8.1(b) and 8.4(d) violations.

A. Respondent Violated Rule 1.15(a) and D.C. Bar R. XI, § 19(f).

Rule 1.15(a) requires lawyers to keep "complete records of . . . account funds and other property" and preserve them "for a period of five years after termination of the representation." *See In re Edwards*, 990 A.2d 501, 522 (D.C. 2010) (appended Board Report) (quotation marks omitted). D.C. Bar R. XI, § 19(f) provided that "Every attorney subject to the disciplinary jurisdiction of this Court shall maintain complete records of the handling, maintenance, and disposition of all funds, securities, and other properties belonging to another person . . . at any time in the attorney's possession, from the time of receipt to the time of final distribution, and shall preserve such records for a period of five years after final distribution of such funds, securities, or other properties or any portion thereof."

The *Edwards* decision explained that "[f]inancial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" 990 A.2d at 522 (alteration in original) (quoting *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (finding Rule 1.15(a) and § 19(f) violations)). The purpose of the requirement of "complete records is so that 'the documentary record itself tells the full story of how the attorney handled client or

third-party funds' and whether, for example, the attorney misappropriated or commingled a client's funds." *Edwards*, 990 A.2d at 522; *see also In re Pels*, 653 A.2d 388, 396 (D.C. 1995) (finding Rule 1.15(a) violation when attorney showed a "pervasive failure" to maintain contemporaneous records accounting for the flow of client funds within various bank accounts). Thus, "[t]he records themselves should allow for a complete audit even if the attorney or client is not available." *Edwards*, 990 A.2d at 522.

Disciplinary Counsel contends that Respondent failed to maintain records of entrusted funds in violation of Rule 1.15(a), despite his assertions that he did, in fact, maintain such records, due to his failure to produce them to Disciplinary Counsel. ODC Br. at 17-18. Disciplinary Counsel did not brief the companion violation of D.C. Bar R. XI, § 19(f), since it was deleted by the Court as redundant on March 1, 2016. Because it remains one of Disciplinary Counsel's charges, the Hearing Committee nevertheless addresses the alleged violation of R. XI, § 19(f) under the same standard as Rule 1.15(a).[5] Respondent argues that Disciplinary Counsel failed to prove these violations by clear and convincing evidence. R. Br. at 19.

The Hearing Committee concludes that Respondent violated Rule 1.15(a) and D.C. Bar R. XI, § 19(f). During 2009, Respondent issued numerous checks to his

[5] *In re Reilly*, Bar Docket No. 102-94 at 4 (BPR July 17, 2003) (concluding that Bar Counsel did not have the authority to dismiss charges approved by a Contact Member).

law firm employees from his IOLTA account. FF 36, 40, 43-45. Respondent did not maintain complete records of his law firm accounts during that time period. FF 46-48, 66. Respondent admitted that he did not exercise control over those accounts. FF 38.

Separately, Disciplinary Counsel contends that Respondent engaged in commingling, also in violation of Rule 1.15(a), because he admitted depositing and maintaining personal funds into his trust account during the hearing. ODC Br. at 18-19; *see* FF 47-48. In addition to the requirement to keep records of entrusted funds, Rule 1.15(a) provides that "[a] lawyer shall hold property of clients or third persons . . . in connection with a representation separate from the lawyer's own property." "The rule against commingling has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client funds might be taken by the attorney's creditors, and most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally or inadvertently." *In re Rivlin*, 856 A.2d 1086, 1095 (D.C. 2004) (per curiam) (appended Board Report).

The United States Supreme Court has held that disciplinary proceedings are quasi-criminal in nature, and that charges "must be known before the proceedings commence." *In re Ruffalo*, 390 U.S. 544, 551 (1968). Furthermore, late-added charges "become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused" and the respondent "can then be given no

opportunity to expunge the earlier statements and start afresh." *Id.* Ruffalo had been charged with deceptively employing an individual to investigate against his own employer, but the Supreme Court overturned his disbarment due to a due process violation for lack of notice of a disbarable offense. *Id.* at 546, 552.

The D.C. Court of Appeals, citing a concurrence in *Ruffalo*, held, however, that a due process violation would not arise from a late-added charge involving "'conduct which all responsible attorneys would recognize as improper for a member of the profession.'" *In re Smith*, 403 A.2d 296, 302 (D.C. 1979) (quoting *Ruffalo*, 390 U.S. at 555 (White, J., concurring)); *see also In re Slattery*, 767 A.2d 203, 211 (D.C. 2001) (same). In *Smith*, 403 A.2d at 300, the respondent argued that under *Ruffalo*, he could not be disciplined based on his admission to fraud during the disciplinary proceedings since he was never formally charged with fraud. The Court rejected that argument, holding that fraud was "clearly proscribed" by the disciplinary rules, the respondent was "aware of the nature of the charges" and was therefore not "lulled into a false sense of security," and that no retroactive standards were applied to the respondent after his admission. *Id.* at 301-02; *see also Slattery*, 767 A.2d at 208, 212 (disciplinary counsel did not violate the respondent's due process rights by amending theory of theft charge from theft by fraud to theft by conversion and misappropriation because all theft is clearly proscribed). In *Smith*, after the respondent admitted to fraud, the disciplinary hearing was adjourned for

approximately six months for Respondent to prepare to defend against the fraud allegation. *Smith*, 403 A.2d at 297; *see also* Board Rule 7.21 (a respondent must have notice and an opportunity to answer new charges based on evidence presented during the hearing, and may be granted a continuance to defend those charges).

Here, Disciplinary Counsel did not charge Respondent with commingling of funds and therefore Respondent was not given notice of this specific charge in the Specification of Charges, nor did Disciplinary Counsel amend the Specification of Charges after Respondent's testimony during the hearing. However, Respondent did not claim surprise when Disciplinary Counsel argued in its post-hearing brief that he had engaged in commingling, and instead, repeatedly admitted that he had commingled.[6] *See* R. Br. at 11 (¶ 26), 14-15 (¶¶ 46-51), and 16 (¶ 53); *see also* FF 11 (complaint letter (DX 1A) alleging commingling), FF 13 (DX 1 sent to Respondent), and FF 15 (Respondent's "point-by-point" response (DX 2) including commingling allegation). Respondent admitted that he engaged in the practice of

[6] *See In re Haseltine*, Board Docket No. 14-BD-053 at 9-10 n.10 (BPR Oct. 12, 2017) (appended H.C. Rpt.) (noting that although the respondent's "bank transactions . . . indicate[d] that misappropriation may have occurred," it was not considered in determining the Rule 1.15(a) violation or analyzing for comparable sanction because "it was not charged.") The respondent's situation in *Haseltine* differs significantly from that of the Respondent in this matter. Here, the record clearly establishes that the additional Rule 1.15(a) violation **is** based on Respondent's conscious and intentional assertion of the commingling violation as constituting his defense to the recordkeeping charge. In addition, both parties fully addressed the issue of commingling in post-hearing briefing. (ODC Br. at 1, 18-19, 28; R. Br. at 11, 14-15, 16; Reply Br. at 2, 6-9, 11-13). Under the circumstances of this case, therefore, the Hearing Committee determines that it is appropriate to make findings and conclusions concerning Respondent's having engaged in deliberate commingling of funds.

commingling to prevent the misuse of clients' entrusted funds. FF 47. Thus, the Hearing Committee also finds that Respondent engaged in commingling of accounts. FF 48.

B. Respondent Did Not Violate Rule 8.1(b).

Rule 8.1(b) provides that "a lawyer in connection with a . . . disciplinary matter, shall not . . . [f]ail to disclose a fact necessary to correct a misapprehension known by the lawyer . . . to have arisen in the matter, or knowingly fail to respond reasonably to a lawful demand for information from . . . [a] disciplinary authority . . . ." Thus, a knowing failure to respond to a request from Disciplinary Counsel regarding an ethical complaint constitutes a violation of Rule 8.1(b). *See, e.g.*, *In re Beller*, 802 A.2d 340 (D.C. 2002) (per curiam). Note that "Rule 8.1(b) specifically addresses the requirement of responding to [Disciplinary] Counsel as opposed to the more general requirements of Rule 8.4(d)." *In re Rivlin*, Bar Docket Nos. 436-96 et al., at 41 n.20 (BPR Oct. 28, 2002), *recommendation adopted*, 856 A.2d 1086.

Disciplinary Counsel contends that Respondent violated Rule 8.1(b) because he testified that he possessed extensive financial records, but failed to produce them to Disciplinary Counsel. ODC Br. at 20-21 (citing Tr. 181, 185, 268-70, 275-76). The Hearing Committee does not credit Respondent's claim that exculpatory documents exist because Respondent did not produce the documents during the hearing or submit them after the close of the hearing.

Respondent argues that Disciplinary Counsel failed to prove this violation by clear and convincing evidence. R. Br. at 19. Respondent contends that after a four-year delay, Disciplinary Counsel insisted on meetings with Respondent against his treating physician's advice and requested documents from Respondent which he could not provide at the time. *Id.* at 19-20.

During the May to December 2010 period, Respondent provided information and documentation in response to Disciplinary Counsel's subpoenas and requests for additional information. FF 15-17, 19. As of December 2010, Respondent had responded to Disciplinary Counsel's requests. FF 18, 20.

As the hearing testimony and exhibits demonstrate, Respondent did not wholly ignore Disciplinary Counsel's 2014 and 2015 demands for information and for documentation of Respondent's accounting practices. FF 25, 29-32, 52-53, 58, 64-67. Respondent provided a limited explanation of his law firm's financial conditions. FF 65-67. The parties engaged in extended correspondence on this issue, although there ultimately was no resolution. FF 44, 47, 48-49. Thus, the Hearing Committee finds that Disciplinary Counsel failed to establish by clear and convincing evidence that Respondent knowingly failed to respond to lawful demands for information.

C. Respondent Did Not Violate Rule 8.4(d).

Rule 8.4(d) provides that it is professional misconduct for a lawyer to

"[e]ngage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when he should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). Rule 8.4(d) is violated if the attorney's conduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *See In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009). Failure to respond to Disciplinary Counsel's inquiries and orders of the Court constitutes a violation of Rule 8.4(d). Rule 8.4, cmt. [2]; *see, e.g.*, *In re Askew*, Board Docket No. 12-BD-037, at 22-23 (BPR May 22, 2013) (appended HC Rpt.) (finding a violation of 8.4(d) where the respondent failed to comply with a court orders requiring her to file a brief and to turn over client files), *aff'd in relevant part*, 96 A.3d 52 (D.C. 2014) (per curiam) (imposing a six-month suspension, with all but 60 days stayed in favor of one year of supervised probation, instead of the 30-day suspension stayed in favor of one year of probation with conditions recommended by the Board).

Disciplinary Counsel contends that Respondent violated Rule 8.4(d) on the

same grounds as the alleged violation of Rule 8.1(b). Respondent contends that he did not violate Rule 8.4(d) for the same reason he did not violate Rule 8.1(b) – that after a four-year delay, Disciplinary Counsel insisted on meetings with Respondent against his treating physician's advice and requested documents from Respondent which he could not provide at the time. R. Br. at 19-20.

The Hearing Committee finds that Disciplinary Counsel has not established by clear and convincing evidence that Respondent seriously interfered with the administration of justice by failing to respond to Disciplinary Counsel.

As described *supr*a, Respondent did respond to Disciplinary Counsel's 2010 inquiries. FF 15, 18-20. Similarly, in 2014 and 2015, when Disciplinary Counsel renewed its investigation, Respondent did respond to Disciplinary Counsel's additional requests for information.[7] FF 67. Although the Hearing Committee concludes that Respondent was not particularly forthcoming or cooperative, Respondent's conduct fell short of an actual interference with Disciplinary Counsel's investigation. *See supra* at 27-28. Respondent, although not cooperative, was not obstructive. For that reason, cases such as *In re Cole* and *In re Askew* are distinguishable from the facts in this case.

[7] The Hearing Committee notes that four years elapsed between Respondent's responses to Disciplinary Counsel's November 2010 requests for information and Disciplinary Counsel's February 2015 demands for additional information. *See* FF 20-22.

IV. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend that Respondent be suspended for a period of six months with a fitness requirement. Disciplinary Counsel further contends that, as conditions of reinstatement, Respondent should be required to provide Disciplinary Counsel with his firms' financial records, and demonstrate fitness, before he is permitted to resume the practice of law. ODC Br. at 28.

Respondent has requested that the Committee recommend no disciplinary sanction, but recommend that Respondent be ordered to attend training on handling entrusted funds so that he may properly supervise his staff. R. Br. at 20.

The Hearing Committee recommends that Respondent receive a sanction of thirty days suspension, with proof of fitness to practice law, as described below.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and

professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *Elgin*, 918 A.2d at 376). The Court also considers "'the moral fitness of the attorney'" and the "'need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)) (internal quotation marks omitted).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

The Hearing Committee concludes that Respondent's violation of Rule 1.15(a) was serious, particularly in its duration. Respondent's records reflected serious inattention on his part to his fiduciary duties. FF 40-41, 66. Respondent also failed to supervise his employees in the management of the law firm's accounts. FF 38.

The Hearing Committee also takes into account that Respondent practiced immigration law, specifically assisting individuals who may lack legal status in this country, and who are, therefore, a vulnerable segment of the population. *See In re Ukwu*, 926 A.2d 1106, 1148 (D.C. 2007) (appended Board Report).

2. Prejudice to the Client

Disciplinary Counsel has not asserted that any client was prejudiced by Respondent's failure to maintain financial records.

3. Dishonesty

During the course of the hearing, the Hearing Committee had the opportunity to observe Respondent as he testified. At times, Respondent was evasive, and he also was non-responsive to Disciplinary Counsel's questions and to the questions of Hearing Committee members. Tr. 262:21 – 263:9; Tr. 329:5 – 332:11; Tr. 339:5 – 22. In the cited instances, Respondent tried to avoid responding to inquiries about

his conduct during Disciplinary Counsel's investigation. In other answers, Respondent was evasive as to the nature or the extent of prior client complaints against him. Tr. 279:1-280:3; Tr. 395:9 – 396:20. Respondent also gave evasive testimony as to his lack of oversight of subordinates and the law firm's accounting practices. Tr. 221:3 – 233:18. The Committee was left with the firm impression that Respondent did not want to answer questions that would reflect adversely on his conduct.

Respondent's evasive answers, however, fell short of actually obstructing Disciplinary Counsel's efforts to elicit the truth about the nature and extent of Respondent's conduct. Respondent did not engage in the type of "knowing misrepresentation" of his conduct that was at issue, for example, in *In re Cleaver-Bascombe*, 892 A.2d 396, 412-13 (D.C. 2006) (remanded). Nor did Respondent deliberately lie as to his accounting practices. *See In re Silva*, 29 A.3d 924, 926 (D.C. 2011) (noting that dishonesty during the disciplinary proceeding is a significant aggravating factor in a sanction recommendation).

This case is also unlike *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam), in which the respondent gave technically correct answers but did so with the specific intent of avoiding giving any incriminating answers, and which, the court concluded, showed a "lack of integrity and straightforwardness."

> In *Shorter*, an attorney who had evaded paying his taxes for many years, and who owed the IRS hundreds of thousands of dollars, was found to

> have engaged in dishonesty because he knowingly made technically true but evasive statements in an interview with Internal Revenue Service agents who were attempting to locate his assets to satisfy the unpaid taxes. Shorter answered the agents' questions in such a narrow and parsimonious fashion as to be dishonest (for example, he indicated he had no individual assets when he had an interest in partnership assets). He knew what information the IRS agents were after, and that they wanted it in order to seize his assets to satisfy his tax debt, but refrained from supplying that information for his own financial gain even when the agents' questions "grazed the truth." 570 A.2d at 768. Under these circumstances, the Court of Appeals found no "active deception or positive falsehood" but nonetheless found dishonesty in light of Shorter's "lack of integrity and straightforwardness[.]" *Id.*

In re Rigrodsky, Bar Docket No. 243-06 at 28 (Board Order Aug. 6, 2009) (dismissing Specification of Charges) (appended H.C. Rpt. June 26, 2009). *Shorter* involved overarching evidence of a lack of integrity and straightforwardness. *Shorter* "spent years arranging his finances in such a way as to evade paying his taxes, and provided parsimonious answers to the IRS agents consistent with that evasive pattern" and the background of his tax evasion "gave credence to the finding that [he] acted dishonestly with the IRS agents." *Id.* at 29.

In this case, Respondent did not give answers that were designed to conceal his wrongdoing, and there is no pattern of evasiveness or lack of integrity. Thus, the Hearing Committee ultimately concludes that Respondent's sometimes evasive testimony did not constitute a pattern of dishonesty that would be an aggravating factor for the imposition of discipline in this case.

4. Violations of Other Disciplinary Rules

Respondent violated the recordkeeping requirements of Rule 1.15(a) and D.C. Bar R. XI § 19(f), but not Rules 8.1(b) or 8.4(d).

5. Previous Disciplinary History

Respondent has previously been the subject of discipline in this jurisdiction. DX 12. On January 11, 2007, the Office of Disciplinary Counsel issued an Informal Admonition to Respondent. *Id.* The Office of Disciplinary Counsel determined that Respondent's "failure to accurately and adequately explain" an immigration matter, "failure to return [a] client's telephone calls, and failure to disclose all necessary information to [the] client," violated Rules 1.4(a) and 1.4(b). *Id.* at 2. Additionally, during the course of Disciplinary Counsel's investigation of this matter, Respondent also violated Rules 8.4(a), 8.4(d), and 1.16(d) by attempting "to condition a settlement of the client's ACAB claim on the client's withdrawing his [disciplinary] complaint," and failing "to pay the award by the due date" after the ACAB found in favor of the client. *Id.*

6. Acknowledgement of Wrongful Conduct

As explained *supra*, pages 33 and 35, the Hearing Committee has concluded that, at times, Respondent was evasive and was non-responsive to questions posed by the Hearing Committee members concerning his conduct. Respondent avoided responding to questions that might elicit acknowledgment of his wrongful conduct.

In addition, although Respondent was not charged with commingling in violation of Rule 1.15(a), he candidly admitted that he purposefully left earned fees in his IOLTA account to make sure funds were available for his clients and to make up for his lack of any kind of an accounting system. *See* FF 41-43, 47. Respondent's lack of supervision over his non-lawyer employees' access to his signature stamp for the IOLTA account is also of concern. *See* FF 38. The Hearing Committee finds Respondent has failed to acknowledge the wrongfulness of his misconduct here and that Respondent lacks insight into the failures of his fiduciary responsibilities, responsibilities which are not delegable to his accountants or bookkeepers.[8]

[8] The D.C. Rules of Professional Conduct do not permit the unquestioned delegation of the duty to safeguard entrusted funds. *See In re Gregory*, 790 A.2d 573, 578 (D.C. 2002) (per curiam) (appended Board Report) (holding money in trust for clients is a non-delegable fiduciary duty, and lawyers are required to supervise the non-lawyers who assist in safeguarding the entrusted funds); *see also* Rule 5.3 (responsibilities regarding nonlawyer assistants).

7. Other Circumstances in Aggravation and Mitigation

Respondent argues in mitigation that he has practiced over thirty years without a client complaint involving funds and is involved in extensive "*pro bono*" immigration law activities including representation, education, and political participation. R. Br. at 17-19.[9] Respondent also asserts that Disciplinary Counsel's delays during the investigation should be considered in mitigating sanction. Delay may be considered a mitigating factor in determining an appropriate sanction. *In re Williams*, 513 A.2d 793, 798 (D.C. 1986) (per curiam). But, the Court has clarified that the circumstances must be "sufficiently unique and compelling to justify lessening what would otherwise be the sanction necessary to protect the public interest." *In re Fowler*, 642 A.2d 1327, 1331 (D.C. 1994). Delays that are necessary to the decision-making process or the result of a respondent's own actions or inaction do not qualify. *Id.*

The Hearing Committee acknowledges that Respondent has performed various *pro bono* services on behalf of the local immigrant community. FF 4-8. The Hearing Committee takes that factor into account in recommending a 30-day suspension, but the Hearing Committee notes that Respondent's *pro bono* work was

[9] Respondent's brief proffers additional mitigation evidence that was not presented during the hearing. Disciplinary Counsel has moved to strike the portion of his brief that presents such evidence. That motion is granted. The Hearing Committee has considered only the mitigation evidence presented during the hearing. Similarly, the Hearing Committee grants Disciplinary Counsel's motion to strike all of the attachments to Respondent's brief because they were not presented during the hearing.

not quantified or described in particular detail. The Hearing Committee does not find that the delays during the disciplinary investigation rise to the level of "sufficiently unique and compelling to justify lessening" the recommended 30-day suspension.

C. Sanctions Imposed for Comparable Misconduct

The Hearing Committee concludes that Respondent violated Rule 1.15(a) and D.C. Bar R. XI, § 19(f). Generally, the sanction for record-keeping violations range from Board reprimand to public censure. *See In re Klass*, Board Docket No. 13-BD-041 (Board Order Dec. 22, 2014) (Board reprimanded respondent for violating Rules 1.15(a) and (e) for failing to maintain complete records and commingling personal funds to cover an overdraft charge in the trust account, where no client funds were in the account at the time of the overdraft); *In re Mott*, 886 A.2d 535 (D.C. 2005) (per curiam) (public censure for violating Rules 1.15(a) and 1.17(a) and R. XI, § 19(f) "by failing to deposit client funds in a designated escrow or trust account, failing to adequately safeguard the funds, and failing to keep appropriate records."); *In re Clower*, 831 A.2d 1030 (D.C. 2003) (per curiam) (public censure for violating 1.15(b) by failing to furnish prompt notice of a settlement and make prompt payment to a third party who had an interest in the funds, and Rule 1.15(a) and D.C. Bar R. XI, § 19(f), by failing to maintain complete records regarding the disbursements that respondent made from the settlement proceeds). Notably, each of these matters involved the failure to maintain records related to a single matter.

In *In re Ukwu*, 712 A.2d 502 (D.C. 1998) (per curiam), the Court imposed a thirty-day suspension, stayed in favor of a one-year probation period subject to practice management conditions, where the respondent violated Rule 1.15(a) by commingling clients' funds with his own, and failing to maintain proper financial records. Ukwu "was an experienced litigator, did not keep accurate financial records, and routinely wrote checks on his one account for which insufficient funds were available" and the Rule 1.15(a) violation occurred over an extended period of time and involved the settlement funds of thirteen clients. *In re Ukwu*, Bar Docket No. 53-93, at 1-2, 4-5 (BPR Nov. 21, 1997). The Board reasoned that "sanctions short of suspensions" are recommended only "when it was clear that there was no harm to the client or to third-party providers, where the violation was inadvertent, and where the respondent was inexperienced and clearly unaware of the requirements of the Rule 1.l5(a)." *Id.* at 3-4 (citations omitted).

Although Respondent was not charged with commingling, the Hearing Committee finds that his conduct is comparable to the misconduct in *In re Ukwu*. Respondent is an experienced practitioner, who routinely failed to maintain accurate financial records that were adequate enough to determine whether his clients' funds were properly held in trust or were instead expended on operating expenses or commingled with other funds over an extended period of time. *See* FF 46. Thus, the Hearing Committee recommends a 30-day suspension.

D. Fitness

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

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

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

Cater, 887 A.2d at 22.

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

(a) the nature and circumstances of the misconduct for which the attorney was disciplined;

(b) whether the attorney recognizes the seriousness of the misconduct;

(c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;

(d) the attorney's present character; and

(e) the attorney's present qualifications and competence to practice law.

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

Here, Disciplinary Counsel recommends a fitness requirement because Disciplinary Counsel contends that Respondent has not cooperated in its investigation and still refuses to do so (ODC Br. at 25), shows no appreciation of his ethical obligations (*Id.* at 25-26), has not remedied the problems that resulted in misconduct (*Id.* at 26), gave inconsistent testimony (*Id.* at 27-28), and at least potentially refused to produce records to cover up mishandling of client funds (*Id.*). Respondent did not address the issue of fitness in his post-hearing brief. *See* R. Br. at 20.

In circumstances where the respondent's conduct during the disciplinary hearing raises "a serious doubt as to whether Respondent will act ethically and competently in the future," the Board has "conclude[d] that a fitness requirement should be imposed." *In re Yelverton*, Board Docket No. 11-BD-069, at 23 (BPR July 30, 2013) (citing *In re White*, 11 A.3d 1226, 1252 (D.C. 2011) (per curiam) (appending Board Report) ("conduct in this matter does not demonstrate the ethical

sensitivity required for practice, and [Respondent] is a prime candidate for future problems if the Bar does not intervene at this juncture"); *In re Lea*, 969 A.2d 881, 893 (D.C. 2009) (Respondent's "testimony, tone, and behavior [during the disciplinary proceedings] demonstrated a lack of contrition or appreciation for the seriousness of her conduct.")), *recommendation adopted*, 105 A.3d 413, 430-31 (D.C. 2014).

Here, Respondent admitted during the disciplinary hearing that he purposefully left earned fees in his IOLTA (FF 41-43, 47), that he lacked an accounting system to track funds despite having a total of six bank accounts for his various business entities (FF 15, 41; DX 2 at Bates 7), and that he had failed to exercise supervision over his non-lawyer employees' access to his signature stamp for the IOLTA (FF 38). Respondent failed to acknowledge the wrongfulness of this misconduct, and his testimony reflected his failure to appreciate his fiduciary responsibilities for the clients' entrusted funds. Thus, Respondent's conduct during the disciplinary hearing raises a serious doubt that he will act ethically and competently in the future when handling entrusted funds. The Hearing Committee recommends that Respondent be suspended from the practice of law for 30 days. As part of his proof establishing his fitness, Respondent should show that (1) he has sufficient accounting mechanisms in place to comply with Bar Rules and fiduciary standards, and (2) he has taken a continuing legal education class on law practice

management and accounting.

V. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated Rules 1.15(a) and D.C. Bar R. XI, § 19(f), and should receive the sanction of a 30-day suspension with the requirement that Respondent prove his fitness to practice as a condition of reinstatement. We recommend that the Court direct Respondent's attention to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

AD HOC HEARING COMMITTEE

Esther Yong McGraw, Esquire, Chair

Marcia Carter, Public Member

Theodore Hirt, Esquire, Attorney Member