DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
QUINNE HARRIS-LINDSEY, ESQUIRE,	:	
	:	Board Docket No. 15-BD-042
Respondent.	:	Bar Docket No. 2002-D384
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 451238)	:	

REPORT AND RECOMMENDATION
OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

The Board on Professional Responsibility hereby submits its findings of fact and conclusions of law in this case. This matter arises out of Respondent's conduct during her representation of her cousin, who had been appointed as guardian of her child's estate. The Hearing Committee concluded that Disciplinary Counsel proved by clear and convincing evidence that Respondent violated Rule 1.15(a) (reckless misappropriation) and D.C. Bar R. XI, § 19(f) (recordkeeping), and that she should be disbarred. The Hearing Committee concluded that Disciplinary Counsel did not prove that Respondent violated Rule 8.4(d) (serious interference with the administration of justice), as Disciplinary Counsel had conceded in its post-hearing brief.

After considering the parties' briefs, their oral arguments, and the record of this case, the Board unanimously adopts the Hearing Committee's finding of a recordkeeping violation. No other rule violation has been proven by clear and

convincing evidence. A five-person majority finds that Disciplinary Counsel did not prove that Respondent violated Rule 1.15(a) (misappropriation).[1] A different five-person majority finds that Disciplinary Counsel did not prove that Respondent violated Rule 8.4(d) (serious interference with the administration of justice).

There is no majority position as to sanction. Mr. Carter, in a statement joined by Vice Chair Ms. Butler and Mr. Bundy, recommends an informal admonition for Respondent's recordkeeping violation. Mr. Peirce, in a statement joined by Mr. Bernstein, finds that Respondent also violated Rule 8.4(d), and recommends a public censure. Chair Mr. Bernius, in a statement joined by Ms. Smith, agrees with the Hearing Committee that Respondent engaged in reckless misappropriation, and recommends disbarment.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /RCB/
Robert C. Bernius
Chair

Dated: July 28, 2017

Board Member John C. Peirce drafted the majority Report and Recommendation, except for the section on Rule 8.4(d) (section III.D), which was drafted by Board Member Jason E. Carter.

[1] Board members Mary Lou Soller and Matthew G. Kaiser were recused from consideration of the case.

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REPORT AND RECOMMENDATION
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INTRODUCTION

This case has proceeded since 2009 on the basis that Respondent allegedly misappropriated funds entrusted to her. Disciplinary Counsel charged the case as misappropriation. The parties attempted to resolve it through negotiated discipline as a negligent misappropriation case. The Court and the Board considered the circumstances in which misappropriation charges can properly be resolved through negotiated discipline, and the Court ordered this case to be referred to a Hearing Committee for a full evidentiary hearing. Disciplinary Counsel presented a revised Specification of Charges principally alleging misappropriation. After a full evidentiary hearing, both parties agreed that Respondent had committed negligent misappropriation and violated her recordkeeping obligations, and the Hearing Committee made recommended findings of fact and conclusions of law. Based on the parties' agreement that some kind of misappropriation had occurred, the Hearing

Committee assumed misappropriation and stated that the primary question to be decided was whether the misappropriation was negligent or reckless.[1] The Hearing Committee's principal conclusion was that Respondent committed reckless misappropriation on at least one occasion and therefore should be disbarred.

Both Disciplinary Counsel and Respondent took exception to the Hearing Committee's finding of reckless misappropriation. Neither party disputes the Hearing Committee's finding of a recordkeeping violation or the Committee's conclusion that a Rule 8.4(d) violation had not been proven.

Now the Board is considering this case for the first time on a factual record developed in a contested hearing. After carefully considering and adopting the Hearing Committee's proposed findings of fact, nearly all of which are supported by substantial evidence, and conducting the required *de novo* review of the proposed conclusions of law and recommended sanction, five members of the Board conclude that Disciplinary Counsel failed to meet its burden of proving, by clear and convincing evidence, that either the client or the Superior Court's Probate Division

[1] The Hearing Committee stated: "Because Respondent concedes that she twice engaged in misappropriation by withdrawing funds from the Estate without prior court approval, the Hearing Committee must assess the character of each withdrawal, one of which occurred 15 years ago, the other 20 years ago." Hearing Committee Report at 19. The Report acknowledged that if neither Respondent nor Ms. Fulwood had exclusive control of the estate funds, "under *Travers* [*In re Travers*, Bar Docket No. 463-93 (BPR Jan. 24, 1997)], Respondent would *not* have committed misappropriation," *see id.* at 26 (emphasis added), but added that Respondent may have waived the issue. *Id*. at 26 n.11. In its Brief to the Board, Disciplinary Counsel does not try to distinguish this case from *Travers* or argue that the *Travers* Board Report was wrongly decided.

("Probate Court") entrusted any funds to Respondent.[2] The evidence shows that no estate funds could be spent or were paid to Respondent without the client's signature and approval, and the Probate Court never appointed Respondent to any fiduciary role. Since neither the client nor the Probate Court entrusted any funds to Respondent, the charges of misappropriation must fail as a matter of law. Two Board members dissent from that conclusion and would affirm the Hearing Committee's finding of reckless misappropriation.[3] A different five-member majority affirms the Hearing Committee's conclusion that Disciplinary Counsel (who conceded the issue in post-hearing briefing) failed to prove the charged violation of Rule 8.4(d) by clear and convincing evidence.[4] Two Board members dissent from that determination and would conclude that Respondent's conduct seriously interfered with the administration of justice in violation of Rule 8.4(d).[5]

The Board unanimously affirms the Hearing Committee's determination concerning Respondent's recordkeeping deficiencies in violation of D.C. Bar Rule XI, § 19(f). Because a majority of Board members concludes that the necessary

[2] Board Vice Chair Patricia G. Butler and Board members John C. Peirce, Jason E. Carter, David Bernstein, and Thomas R. Bundy, III, make the five-member majority that finds no Rule 1.15(a) misappropriation violation.

[3] Board Chair Robert C. Bernius dissents from the majority's Rule 1.15(a) analysis in a Separate Statement and is joined by Board member Billie LaVerne Smith.

[4] Mr. Bernius, Ms. Butler, Mr. Carter, Ms. Smith, and Mr. Bundy make the five-member majority that adopts the Hearing Committee's finding of no Rule 8.4(d) violation.

[5] Mr. Peirce dissents from the majority's Rule 8.4(d) analysis in a Separate Statement and is joined by Mr. Bernstein.

elements of a misappropriation were not proven, and a different majority of Board members adopts the Hearing Committee's finding of no Rule 8.4(d) violation, the recordkeeping violation is the only charge that the Board concludes was proven by clear and convincing evidence. As described *infra*, a plurality of Board members recommend an informal admonition, but there is no majority position with respect to the appropriate sanction.[6]

I. PROCEDURAL HISTORY

This case is currently before us after the Court of Appeals had determined that a negotiated discipline was not appropriate in this instance, because "a serious question exists on the face of the record whether respondent acted negligently, or instead recklessly, when she continued to take funds from the estate after having been advised by court officials that she needed approval from the Court and after the Probate Court admonished her not to expend any funds without prior approval."[7] *In re Harris-Lindsey*, 19 A.3d 784, 784-85 (D.C. 2011) (per curiam) ("*Harris-Lindsey I*") (after remand to the Board, Order, *In re Harris-Lindsey*, No. 09-BG-946 (D.C. Aug. 26, 2009) (per curiam)). In doing so, the Court declined to adopt the Board's opinion that negotiated discipline should presumptively be unavailable in certain misappropriation cases: "We express no view on the broader position advanced by

[6] Vice Chair Ms. Butler, Mr. Bundy, and Mr. Carter recommend an informal admonition. Mr. Bernius and Ms. Smith would affirm the Hearing Committee's recommended sanction of disbarment. Mr. Peirce and Mr. Bernstein recommend a public censure based on the violation of Rule 8.4(d) in addition to the recordkeeping charge.

[7] The admonition was directed toward Ms. Fulwood, not Respondent; however, Respondent testified that she was aware of it. Hearing Committee Finding of Fact 21.

the Board . . . . Our decision rests on the insufficiency of the record . . . ." *Id*. at 785; *see also In re Harris-Lindsey*, Bar Docket No. 384-02, at 8 (BPR July 1, 2010).[8] The Court decided that, in this particular case, the record was insufficient "to permit a satisfactory determination of respondent's credibility" and a "fact-finding proceeding, with its careful attention to issues of credibility" was therefore necessary. *Id*.[9]

Accordingly, a contested hearing on a Specification alleging violations of Rule 1.15(a) (misappropriation), D.C. Bar R. XI, § 19(f) and Rule 1.15(a) (recordkeeping), and Rule 8.4(d) (serious interference with the administration of justice) was held on July 21, 2015 before Hearing Committee Number One. Disciplinary Counsel called Respondent as its only witness at the hearing and offered exhibits ("BX") A-D and 1-3, which were admitted into evidence. Respondent testified on her own behalf and submitted one exhibit ("RX"). The parties submitted Joint Exhibits ("JX") 1 and 2, one at the hearing and the second on July 31, 2015, after the hearing ended.

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[8] The Court may have been concerned that the six-month suspension might be too lenient if a contested hearing could establish reckless or intentional misappropriation, resulting in a sanction of disbarment. The fully developed record from the contested proceeding, however, has established, in our view, that the negotiated discipline sanction was actually *too severe*, as explained *infra*.

[9] Disciplinary Counsel's Brief to the Board ("ODC Br.") mistakenly suggests that the current Specification of Charges was forwarded to a Contact Member in 2012. ODC Br. at 2. Disciplinary Counsel, in fact, did not submit a properly verified Specification of Charges containing a reckless or intentional misappropriation charge until March 30, 2015. A Contact Member approved the Specification and the Recommendation to Institute Formal Proceedings on April 13, 2015.

Disciplinary Counsel filed Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction ("ODC PFF") arguing that negligent misappropriation and a record-keeping violation had been proven. Disciplinary Counsel, however, conceded that it did not prove the Rule 8.4(d) charge. ODC PFF at 10 n.6. Respondent filed Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction ("R PFF"), which did not dispute Disciplinary Counsel's position as to any of the alleged Rule violations but argued that the entire six-month suspensory period should be stayed, under specified conditions, in light of significant mitigating factors.[10] Disciplinary Counsel argued in reply that no stay of the six-month suspension was warranted in the absence of extraordinary mitigating factors.

In its Report and Recommendation, the Hearing Committee concluded that reckless misappropriation and recordkeeping deficiencies had been proven, but not misconduct that seriously interfered with the administration of justice. The Committee recommended disbarment, finding no extraordinary mitigating factors or prejudicial delay to warrant a lesser sanction.

II. FACTS

The key facts in this case are not in dispute. We adopt and incorporate the Hearing Committee's Findings of Fact, which are supported by substantial evidence,

[10] Specifically, Respondent recommended that an appropriate sanction would be to stay the six-month suspension "on the condition that Respondent (1) attend a general continuing legal education class and provide proof of attendance to [Disciplinary] Counsel; and (2) consult with the D.C. Bar's Practice Management Advisory Service in the event that she decides to enter private practice." R PFF at 9.

although we reach some different conclusions of law in our *de novo* review of the Hearing Committee's proposed conclusions. In a few instances we make additional findings, based on clear and convincing evidence, supported by citations to the record. *See* Board Rule 13.7. Our supplemental factual findings are noted by citation directly to the transcript of the evidentiary hearing and to the exhibits submitted by Disciplinary Counsel and Respondent, which were all admitted into evidence.[11]

A. Establishing the Guardian Estate

In 1994, Respondent's cousin, Anglia Fulwood—the mother of Deonta Fulwood, who was the beneficiary of an insurance policy[12]—retained Respondent to help her set up a trust in order for her child to receive the life insurance proceeds and to assist Ms. Fulwood in preparing accountings in the Probate Court as well as tax returns. FF 2-3, 5. Respondent had been admitted to the Pennsylvania Bar by examination in November 1993, but was not yet admitted in the District of Columbia. FF 2; BX A. Respondent, then working as paralegal at a personal injury law firm, asked a partner at the firm for his help. Tr. 16-17, 20. The partner explained that he lacked probate experience, but he agreed to enter an appearance, while

[11] The Hearing Committee's Findings of Fact are designated "FF __," and references to its Report and Recommendation are designated "HC Rpt. at __." Disciplinary Counsel's and Respondent's exhibits are designated "BX" and "RX," respectively. The hearing transcript is designated "Tr. __." "Stip." refers to the Stipulations Between Disciplinary Counsel and Respondent, filed as a joint exhibit on July 10, 2015.

[12] Ms. Fulwood's older sister had passed away, and the sister had left a modest life insurance policy in Deonta Fulwood's name, as well as life insurance proceeds to Ms. Fulwood. Tr. 15. Apparently, the life insurance company informed Ms. Fulwood that they could not release the benefits to her child, Deonta, unless she established a guardianship account in Probate Court. Tr. 15-16.

disclaiming substantive involvement with the matter and telling Respondent "'[t]his is your case, you handle it.'" Tr. 16-17, 51. Respondent had never handled a probate matter before. FF 9.

On October 6, 1994, the Probate Court appointed Ms. Fulwood as Deonta Fulwood's guardian and issued guardianship letters. FF 3. On or about December 19, 1994, Respondent deposited the insurance proceeds into an account, on behalf of the minor with Ms. Fulwood identified as the guardian, at Independence Federal Savings Bank (account number ending in 592). FF 6. The opening balance was $40,760.75, and two signatures (Ms. Fulwood's and Respondent's) were required for withdrawals. *Id*.; BX 1A at 50. On or about March 21, 1997, Respondent opened a money market fund account at Independence Federal Savings Bank that was denominated in the same way and required the same two signatures. FF 19; BX 1A at 71. The parties stipulated that there were two signatories to each of the estate accounts. Stip. ¶¶ 5, 9. The Hearing Committee found, in its "review of the evidence," that both signatures were required for withdrawals from both accounts. HC Rpt. at 26, n.10 (citing the account signature cards, BX 1A at 50, 71).[13]

[13] In his Separate Statement, Mr. Bernius argues that Disciplinary Counsel stated at oral argument that "*Travers* did *not* apply" because the account did not require both signatures ("the account at issue was an 'either/or account'"). Separate Statement of Mr. Bernius at 8 (citing Oral Argument Tr. at 27). Disciplinary Counsel's very brief response to the Board member's *Travers* question emphasized, however, that he recalled the account *may* have been an either/or account, but he did not have the exhibits before him: "So that's my *memory* of the record but let's see if I have it here. I don't . . . ." Oral Argument Tr. at 27 (emphasis added).

B. Withdrawals in 1995-1997

The Hearing Committee found that Respondent was "reluctant" to take on the representation, but ultimately agreed "because she wanted to help her cousin." FF 9. Respondent told her cousin that she did not want to be compensated, but because Respondent spent considerable time and effort on the estate, "Ms. Fulwood insisted that Respondent be paid, and Respondent relented." *Id*. With Ms. Fulwood's consent, but without prior court approval, Respondent withdrew as attorney fees $1,650 from the estate account, in the form of a cashier's check, on or about December 27, 1995, and an additional $1,400, also as a cashier's check, on or about February 27, 1996. FF 11-12.

At various times in 1996 and 1997, Ms. Fulwood withdrew and expended funds from the estate account to pay for expenditures related to the minor, but without prior court approval. *See* FF 13-15. Respondent filed a petition for "retroactive approval" of Ms. Fulwood's July and August 1996 withdrawals, which totaled $1,400. FF 16. The Probate Court granted the petition for retroactive approval in an Order dated April 11, 1997. That Order did not include any admonition that prior court approval was required before expenditures could be made. *Id*.; BX 1A at 23.

Sometime after February 27, 1996 but before March 1997, Respondent spoke with a Probate Court employee who told her that court approval was required to withdraw attorney fees. FF 17. In March 1997, at the same time she filed the petition for retroactive approval, Respondent filed the Second Accounting for the period of

October 6, 1995 through December 31, 1996, in which she reported the two payments made for attorney fees. FF 16; BX 1A at 53-80. When describing the attorney fees in this Accounting, Respondent wrote that, at the time she made the payments, she had been unaware that prior court approval was required before withdrawal, but that she had since reimbursed the estate for the two payments. FF 17-18. The Hearing Committee found that Respondent repaid $3,069.46 for the two checks previously issued to her (the amount of the two prior checks plus withdrawal penalty of $19.46) into the money market account at Independence Federal Savings Bank (account ending in number 231), which she had established for the minor Deonta Fulwood with Ms. Fulwood as guardian. FF 19.

On June 3, 1996, Respondent was admitted to the District of Columbia Bar. FF 1. On March 13, 1997, Respondent filed a *praecipe* with the Probate Court noting the withdrawal of the supervising attorney, the partner from her law firm, and indicating that Respondent would continue as sole counsel to the guardian, Ms. Fulwood. FF 4.

In December 1997, Respondent filed the Third Accounting covering the period from January 1 through September 30, 1997, and disclosed a February 1997 disbursement of $800 by Ms. Fulwood. FF 20; BX 1A at 81-102. The record does not show whether or not Respondent was aware of or assented to Ms. Fulwood's expenditure, but the bank records produced by Respondent suggest a cash withdrawal from an ATM. FF 15 n.2, 20; BX 1A at 95. On or about March 3, 1998, Ms. Fulwood filed a petition as guardian of the estate for the retroactive approval of

the expenditure of $800, and the Probate Court granted the petition the following week in an order. This time, the court included the following admonition: "ORDERED, that Anglia Fulwood is admonished not to expend estate assets without prior court authorization." BX 1A at 25. The court mailed a copy of the order to Respondent, who testified that she was timely aware of it. *Id*.; FF 21.[14]

C. Payment of Unapproved Attorney Fees in 1999

Despite the Probate Court's March 1998 order and the earlier instructions of Probate Court personnel that withdrawals from the estate required prior court approval, *see* BX 1A at 58, Respondent again received legal fees from the estate without prior court approval. On October 1, 1999, Respondent received payment of $2,250 paid by a check drawn on the estate account, signed by the client and Respondent. FF 24; BX 1A at 185. Once again, this fee payment was made without prior court approval. FF 24.

On or about November 23, 1999, Respondent filed the Fifth Accounting, purportedly covering the period from October 3, 1998 to November 5, 1999. BX 3 at 222-234.[15] However, the latest entry was for September 30, 1999, reporting

[14] On November 24, 1998, Respondent filed a Fourth Accounting covering the period beginning October 1, 1997 through November 1998. FF 22. Respondent indicated in the Accounting that the only disbursement was the administrative expense of $250 to reimburse Ms. Fulwood for her payment of the surety bond, and that state and federal taxes were paid from sources other than the estate funds. BX 1A at 110-11.

[15] The Hearing Committee found that no complete copy of the Fifth Accounting was in the record. *See* FF 25. However, the complete Fifth Accounting was included in Disciplinary Counsel's Exhibit 3. The Committee's failure to notice this exhibit was understandable as the document was never identified or addressed in the evidentiary hearing or in post-hearing briefing.

interest earned on both estate accounts. *Id.* at 226. As a result, the $2,250 withdrawal was not disclosed to the Probate Court until more than eighteen months later, on June 21, 2001, when Respondent submitted the Sixth Accounting, covering the period from October 1, 1999 to June 11, 2001. FF 26; HC Rpt. at 22; *see also* BX 1A at 141-153.

The Sixth Accounting was one of a number of untimely accountings filed by Respondent that resulted in delinquency notices and the scheduling of hearings in connection with missed deadlines. FF 49. On July 6, 2001, after reviewing the Sixth Accounting, the Auditor for the Register of Wills asked Respondent to explain both the October 1, 1999 withdrawal and her failure to file an estate tax return for 2000. FF 27. Respondent replied to the Auditor's request on July 30, 2001. BX 1A at 27-28. The Auditor then advised the Probate Court that Respondent accepted fees without prior court approval and suggested that the court direct Respondent to redeposit the fee and explain why the matter should not be referred to Disciplinary Counsel. BX 3 at 235. On October 24, 2001, the Probate Court issued an order for Respondent to redeposit the $2,250 within thirty days and to appear at a show cause hearing on November 19, 2001, to explain why Respondent should not be referred to Disciplinary Counsel for taking fees without prior court approval. FF 28.

On November 19, 2001, the Probate Court extended Respondent's deadline to redeposit the funds to December 7, 2001, and directed her to file a Memorandum of Explanation. FF 29. The Hearing Committee credited Respondent's testimony that she believed that the Probate Court was giving her permission to file a petition for

ratification of fees with the Memorandum. FF 29. Respondent filed her "Memorandum of Explanation," along with a Request for Compensation (ratification of fees), on November 26, 2001. FF 30. Among other things, the Memorandum of Explanation claimed that the $2,250 represented fees for services rendered during the entire five-year duration of the guardianship, and contained sometimes inconsistent explanations of Respondent's understanding of the rules governing guardianships. FF 31-34. At some points, including testimony before the Hearing Committee, Respondent characterized the $2,250 as an assignment of the guardian's commission "in lieu of attorney's fees," and at other times as fees. *See, e.g.*, FF 31 ("fees for services rendered throughout the five years of the estate"); FF 34 (explaining that she accepted the guardian's commission from Ms. Fulwood "in lieu of fees"). On June 19, 2002, the Probate Court denied Respondent's Request for Compensation. The Hearing Committee determined that Respondent learned of the court's denial on September 16, 2002. FF 40, 42. It is undisputed that Respondent repaid the estate on December 8, 2003, and the parties agree that she repaid the amount as soon as she was able to, having been though a long period of unemployment. *See* Oral Argument Tr. at 11-12; ODC Br. at 10; *see also* FF 36.[16]

[16] In its briefing to the Board, Disciplinary Counsel differentiated Respondent's repayment of the 1999 attorney fee to the guardian estate from the delayed repayment in *In re Utley*, 698 A.2d 446 (D.C. 1997):

> Respondent here certainly was not recalcitrant or the least bit defiant; she answered every question as soon as it was asked, and *solicited* help from [the Auditor] Ms. Spratley. Although, she did not repay the final withdrawal until she had the funds to do so, she was forthright with the Auditor throughout.

ODC Br. at 17 (emphasis in original).

Respondent left the private practice of law in 2002 and since then has worked in the General Counsel's Office of the District of Columbia Public Schools, where she has held her current position as a supervisory attorney since 2005. FF 45. On July 10, 2002, Ms. Fulwood wrote to the Probate Court requesting that Respondent be removed as her counsel. FF 39. The Probate Court denied the request on the ground that "attorney Harris-Lindsey was retained by the guardian and not appointed by the Court," so "it is within the guardian's sole authority to release attorney Harris-Lindsey." FF 39; BX 3 at 253.

D. Referral to Disciplinary Counsel

In its order of June 19, 2002, in addition to denying Respondent's Request for Compensation, the Probate Court referred the matter to Disciplinary Counsel for investigation, noting that this was not the first time Respondent withdrew a fee without prior court approval. FF 38. In the order, the Probate Court expressed concern over Respondent's explanations for her repeated withdrawals of unapproved fees, as well as her failure to reimburse the estate as ordered. *Id*.

The Hearing Committee found that Respondent had been fully cooperative with Disciplinary Counsel's investigation, although her responses to Disciplinary Counsel's inquiries reflected a number of deficiencies in her record-keeping. FF 40-42, 46. She acknowledged her misconduct and took full responsibility for it. FF 46. Respondent fully reimbursed the estate on December 8, 2003 for the $2,250, FF 43, so she ended up not receiving any compensation for the five-year period of representation. Respondent has no prior discipline, and in mitigation presented a

letter from the former General Counsel of the D.C. Public School System commending her exemplary career as a government attorney since 2002. FF 47. Respondent's representation of her cousin, Ms. Fulwood, was her only probate matter.

The Hearing Committee found Respondent's testimony generally credible, and attributed the inconsistencies to Respondent's imperfect recollection of events that occurred between fifteen and twenty years ago. FF 48 (Respondent was "forthright in her explanations of her conduct as far as she remembered, clear on the gaps in her memory, and did not appear evasive in any way."). We agree that the Hearing Committee's credibility determination is well supported by substantial evidence, and we adopt it.

III. ANALYSIS

The evidentiary facts in this case are largely undisputed. The difficulty lies in applying the law to those facts. The Board owes no deference to the Hearing Committee's proposed conclusions of law, and we review them *de novo*. *In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam); *In re Anderson*, 778 A.2d 330, 341 (D.C. 2001).

A. Disciplinary Counsel Failed to Prove Misappropriation By Clear and Convincing Evidence.

Misappropriation is defined as "any unauthorized use of client[] [or third party] funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." *In re Harrison*, 461 A.2d 1034, 1036 (D.C.

1983) (quoting *In re Wilson*, 409 A.2d 1153, 1155 n.1 (N.J. 1979)). Disciplinary Counsel must prove: "(1) that client [or third party] funds were entrusted to the attorney; (2) that the attorney used those funds for the attorney's own purposes; and (3) that such use was unauthorized." *In re Travers*, 764 A.2d 242, 250 (D.C. 2000).

Disciplinary Counsel bears the burden of establishing each element of charged misconduct by clear and convincing evidence. *See Anderson*, 778 A.2d at 335; *see also In re Anderson*, 979 A.2d 1206, 1213 (D.C. 2009) (per curiam) ("*Anderson II*") (appended Board Report) (applying clear and convincing evidence standard to charge of misappropriation of funds); Board Rule 11.6. Clear and convincing evidence is more than a preponderance of the evidence; it is "'evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.'" *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (citation omitted).

The evidence in this case shows clearly and convincingly that Respondent was engaged by her cousin, the court-appointed guardian of an estate containing about $40,000 in life insurance proceeds belonging to the client's minor son. FF 2-3, 5-6. The money was deposited in two bank accounts, each of which required two signatures. FF 6, 19. Respondent was one signatory. The other signatory was Respondent's client, the guardian. *Id.*; BX 1A at 50 (the account ending in number 592), 71 (the account ending in number 231). The probate court never appointed Respondent in any fiduciary capacity; it is undisputed that she was retained by her cousin. FF 39; *see* BX 2A at 253 (court order noting that "Harris-Lindsey was

retained by the guardian and not appointed by the Court," so that only the guardian could discharge her).

Respondent received three payments of fees and expenses, in 1995, 1996, and 1999, each of which was wrongful because it was made from one of the estate accounts without the required advance approval by the probate court.[17] The probate court in 1998 specifically ordered the client, by name, in her capacity as guardian, not to expend any estate funds without prior court approval. FF 21; BX 1A at 25.[18]

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[17] Disciplinary Counsel cited SCR-PD 308, the wrong Probate Division Rule (it is limited to guardianships of adults or wards of the state) in its Specification of Charges, but the Hearing Committee noted the error in its Report, *see* HC Rpt. at 17 n.8, and Disciplinary Counsel concedes the error. The process for payment of attorney fees related to a guardianship estate for a *minor* is, instead, controlled by SCR-PD 225(e)(1), which provides that:

> At the time of the filing of an annual account or any other time upon the showing of good cause, an attorney may petition for allowance of reasonable attorney's fees for preparing pleadings filed with the Court and for other necessary legal services rendered to the fiduciary in the administration of the estate, including, but not limited to, instructing and advising the fiduciary in regard to the applicable laws so that the fiduciary may properly administer the estate for which he or she is responsible and reviewing and advising with respect to inventories, accounts and other reports to the Court to assure that they comply with the requirements of the law.

SCR-PD 225(e)(1) does not explicitly state that court approval is required before making legal fee payments. By comparison, SCR-PD 308 (guardianship estate of an adult) specifically states that prior court approval is required before a fee may be taken: "Any . . . attorney . . . is entitled to reasonable compensation for services rendered in any intervention proceeding. Compensation paid from the assets of the subject of the proceeding, protected [adult] individual or ward, or from the Guardianship Fund . . . must be approved by Order of the Court *before being paid*." (emphasis added). The parties do not argue that this difference has any effect on the current case, and we agree. Respondent and her client were repeatedly warned that most expenditures of estate funds, including attorney fees, required prior court approval.

[18] The guardian also was admonished on August 3, 1994 that all expenditures "except those provided by statute and court costs" must be made only with prior approval by the Probate Court. BX 3 at 267. That admonitory document was signed by the guardian and by Edwin Harvey, Esq., who was counsel at the outset of the representation (the partner who permitted Respondent's

Each of the wrongful payments was undisputedly made with the client's consent, and the evidence presented by Disciplinary Counsel tends to show that the payments could not have occurred without the client's signature.[19] In particular, the 1999 payment, which the Hearing Committee and the two dissenting members of the Board concluded was Respondent's only act of reckless misappropriation, was made by a check drawn on the money market account (account number ending with 231), signed by both the client and Respondent. BX 1A at 185.[20] Respondent reimbursed the estate for all of the unapproved fees.

1. No Clear and Convincing Evidence of "Entrustment"

To establish misappropriation, Disciplinary Counsel must prove, by clear and convincing evidence, that Respondent took the wrongful fees from funds that were

participation *pro hac vice*). *Id.* At the contested hearing, Disciplinary Counsel elicited testimony that Respondent was not present when the Probate Court gave this admonition, and was not made aware of the filed document. Tr. 23.

[19] The 1995 and 1996 payments were made by cashier's check. FF 11-12. Obviously, a cashier's check would have been signed by a bank official, not Respondent or Respondent's client. Disciplinary Counsel did not present evidence that Respondent could have obtained or did obtain a cashier's check from the estate accounts without the client's signature on the check request form. The only pertinent documentary evidence in the record consists of the bank documents introduced by Disciplinary Counsel, which state that two signatures were required for withdrawals. BX 1A at 50, 71. Each of the cashier's check withdrawals was made with the client's consent. FF 11-12; Tr. 41; JX ¶ 6. This falls far short of clear and convincing evidence that the 1995 and 1996 cashier's checks were taken from funds the client had "entrusted" to Respondent.

[20] The check, which has a single signature line, was signed by Respondent's client on the signature line, and by Respondent in the blank space above the client's signature. BX 1A at 185. Another check, dated the same day, apparently in payment for the premium on a guardian's bond, was also signed by both the client and Respondent in the same manner. *Id.* at 184.

"entrusted to" her. *Harrison*, 461 A.2d at 1036. We conclude that Disciplinary Counsel failed to meet this burden of proof.

This case is factually similar to *Travers*, 764 A.2d at 242. The respondent in that case represented the personal representative in a decedent's estate in which the estate checking account required the signatures *both* of the respondent and of his client. 764 A.2d at 245. The personal representative, without the required court approval, drew two checks payable to the respondent for fees or a fee retainer and expenses, and the respondent, who knew or should have known that court approval was required, nevertheless signed and deposited the checks. *Id.* at 245-46. The hearing committee concluded that the respondent (i) committed negligent misappropriation in violation of Rule 1.15(a), (ii) accepted a wrongful fee in violation of former DR 2-106(a) (whose counterpart is current Rule 1.5), and (iii) seriously interfered with the administration of justice in violation of Rule 8.4(d). *Id.* at 246. The Board, however, concluded that there was no misappropriation in *Travers* because the respondent did not have exclusive control of the estate checking account and therefore had not been "entrusted" with estate funds. *Id.* at 249. The Board agreed with the Hearing Committee as to the other two violations (accepting an illegal fee and seriously interfering with the administration of justice) and recommended the same sanction as the Hearing Committee, a ninety-day suspension with reinstatement conditioned on reimbursement of the wrongful fees. *Id.* at 250.

The Court in *Travers* held that to show misappropriation under Rule 1.15(a), Disciplinary Counsel must prove: "(1) that client funds were entrusted to the attorney; (2) that the attorney used those funds for the attorney's own purposes; and (3) that such use was unauthorized." *Id.* In *Travers*, the issue was "whether an attorney who is a joint signatory on an estate account is 'entrusted' with the funds in that account." *Id*. As the Court observed, "[t]hat is not an easy question to answer. The case law is sparse and inconclusive, especially on the question of whether the attorney must have exclusive control of client funds, as opposed to joint control with the representative of the estate." *Id.*

The Court decided that it was unnecessary to decide the misappropriation question on the facts of *Travers*. *Id.* Assuming, without deciding, that misappropriation occurred, the Court concluded that such misappropriation would have been merely negligent. *Id.* Since the sanction for taking a wrongful fee (the violation determined by the Board) was comparable to that for negligent misappropriation (the violation determined by the hearing committee), the sanction was appropriate whether or not Disciplinary Counsel had proved misappropriation. *Id*. The Court deferred a ruling on the broader misappropriation issue to some future date. In so doing, the Court expressly rejected Disciplinary Counsel's argument that misappropriation occurs "whenever an attorney assumes a fiduciary relationship and violates his duty." *Id.* at 250 n.11. The Court stated: "It is not enough for an attorney

simply to violate a fiduciary duty; the attorney must have been 'entrusted' with client funds and must have used those funds without permission in order to be found guilty of misappropriation." *Id*.

The law on this issue, while nearly as "sparse and inconclusive" as it was when the Court decided *Travers* in 2000, is not absent. As the Court explained in *In re Haar*, 698 A.2d 412, 425 (D.C. 1997), "entrustment" typically occurs when the client relinquishes control over money or property to an attorney:

> The underlying purpose of . . . Rule 1.15(c) [forbidding attorney's withdrawal of funds while his right to the funds is disputed by the client], is . . . to make it possible for a client to entrust property to the safekeeping of a lawyer with confidence that the funds will be *as safe as they would be if the client herself were to continue to hold them*. . . . This same principle also accounts for the severity with which this court has imposed sanctions upon attorneys who take client funds for their own use, . . . even if unwittingly and negligently . . . .

Id. (emphasis added). While the Court has not had occasion to decide the specific issue posed by "two signatures required" accounts, the Board has consistently held—since at least 1995—that misappropriation does not occur when an attorney accepts a fee from a guardian or personal representative, issued without prior court approval, unless that client has also relinquished control of the account to the attorney.

In *In re Mudd*, Bar Docket No. 472-92 (BPR Nov. 13, 1995), the Board issued an Order of Dismissal where the personal representative of a decedent's estate paid the respondent a fee from the estate checking account prior to any court approval. The personal representative was the sole signatory on the account, although the respondent had control of the checkbook. *Mudd*, Bar Docket No. 472-92, at 1-2. The

Board concluded that there was no misappropriation because the estate account was not "'entrusted' to and under the control of" the respondent. *Id*. at 14.[21] The Board also determined that the fee payment was not unauthorized because it was made with the personal representative's consent. *See id.* at 15-16.

Prior to the Board's decision in *Mudd*, the Board had similarly concluded that no misappropriation occurred where two checks were made out to the respondent for fees (one for $3,000 and one for $600), consented to and signed by the personal representative, but drawn without prior court approval. *See In re Ray*, Bar Docket No. 516-92, at 13-16 (BPR Apr. 13, 1995). In *Ray*, the Board described "entrusted" funds as those where an attorney has "dominion and control" over the account. *See id*. at 15 (Distinguishing the case at hand, the Board noted: "The cases cited by [Disciplinary] Counsel, in support of the argument that Respondent committed misappropriation, involved attorneys with dominion and control over funds 'entrusted' to them."). Because Disciplinary Counsel did not challenge the Board's conclusion that no misappropriation took place when the respondent received fees from the estate paid by two checks, the Court did not address the "entrustment"

[21] Disciplinary Counsel did not take exception to the Board's Order dismissing the misappropriation and other charges in *Mudd*. The Board had also denied Disciplinary Counsel's post-hearing motion to add a charge of accepting an illegal fee in violation of former DR 2-106(A). *See Mudd*, Bar Docket No. 472-92, at 10-12.

In the instant case, before the Hearing Committee, Disciplinary Counsel not only relied on the *Mudd* Board Order, arguing in mitigation of sanction that Respondent "did not have exclusive control of the funds in question," *see* ODC PFF at 27 n.14, but also attached a copy of the twenty-two-page *Mudd* Order of Dismissal to its Proposed Findings of Fact and Conclusions of Law.

question. *See In re Ray*, 675 A.2d 1381, 1385 n.2 (D.C. 1996).[22] However, the Court affirmed the Board's conclusion that the respondent's receipt of the two aforementioned checks had instead constituted the taking of an illegal fee, as the payments were made without prior court approval. *Id*. at 1386.

In *In re Fair*, 780 A.2d 1106, 1115 (D.C. 2001), the Court found a negligent misappropriation where the respondent, acting in her capacity as successor court-appointed personal representative of a decedent's estate, paid herself fees from the estate account prior to court approval. The hearing committee concluded that no misappropriation occurred because in *Travers*, *Ray*, and *Mudd*, *supra*, the Board had found no misappropriation when a personal representative paid unauthorized fees to counsel. *Fair*, 780 A.2d at 1108. In the hearing committee's view, the result should be the same when attorney and personal representative were the same person. *Id.* at 1108-09. The Board and the Court both rejected the hearing committee's analysis and followed established Court precedent providing that misappropriation occurred when a court-appointed fiduciary paid herself unauthorized legal fees from an estate account that she controlled. *Id*. at 1110.[23] The Court acknowledged the Board's

[22] The Court affirmed the Board's conclusion that the respondent committed misappropriation on another occasion when he deposited client funds into his firm's escrow account and then withheld an unapproved fee when he turned the balance over to the estate's personal representative. *Ray*, 675 A.2d at 1386-87.

[23] *Fair* typifies misappropriation cases in which the respondent both controlled the estate account and was also a court-appointed fiduciary. *See, e.g.*, *In re Pye*, 57 A.3d 960, 969-971 (D.C. 2012) (per curiam) (appended Board Report) (attorney acting in his capacity as successor personal representative to a decedent's estate committed intentional misappropriation when he withdrew disallowed attorney fees from a probate account that he controlled); *In re Pleshaw*, 2 A.3d 169, 171 (D.C. 2010) (attorney appointed by the court as attorney and guardian/conservator committed reckless misappropriation by repeatedly withdrawing attorney fees, without court approval, from

holdings in *Travers*, *Ray*, and *Mudd*, but saw no need to rule on them when, as in *Fair*, the fiduciary also controlled the estate account: "As already indicated, the Board's consistent position has been that no misappropriation is involved when an attorney who is not also the personal representative [the fiduciary to the estate] accepts payment of a fee without court authorization. We have had no occasion to rule on that precise issue ourselves and do not do so now." *Id.* at 1110 n.10.

Most recently, in *In re Clair*, Bar Docket Nos. 2009-D376 *et al.*, at 5 (BPR Aug. 3, 2015), *recommendation adopted*, 148 A.3d 705 (D.C. 2016) (per curiam), the Board applied its reasoning in *Mudd*, *Ray, Fair*, and *Travers* to overrule a hearing committee's conclusion that the respondent had misappropriated $21,400 from a decedent's estate account.[24] The respondent in *Clair* received bank statements for

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estate account that he controlled); *In re Bach*, 966 A.2d 350, 350-51 (D.C. 2009) (attorney acting as court-appointed conservator committed intentional misappropriation by paying himself unapproved fees from estate account that he controlled, even though the probate court later approved the amounts); *In re Utley*, 698 A.2d 446, 449-450 (D.C. 1997) (attorney acting as court-appointed conservator committed misappropriation by repeatedly paying herself without prior court approval from estate account that she controlled); *In re Evans*, 578 A.2d 1141, 1148 (D.C. 1990) (per curiam) (attorney acting as personal representative committed misappropriation when he paid himself unapproved fees from estate account that he controlled). Respondents in these cases were "entrusted" with estate funds by the court and maintained full control over the entrusted funds. Respondent in this case was not a court-appointed fiduciary and did not control the estate account. It appears that the Court has never previously found misappropriation where an attorney for the fiduciary-client received fees from an estate with the fiduciary-client's consent and authorization.

[24] The Board affirmed the hearing committee's report in other respects, including a conclusion that the respondent, on another occasion, intentionally misappropriated nearly $30,000 in entrusted funds from an account that he controlled. *Clair*, Bar Docket Nos. 2009-D376 *et al.*, at 6-7. The recommended sanction was disbarment, with any future reinstatement conditioned on full restitution. *See id.* at 6-7. Neither party excepted to the Board's Report, and the Court adopted the Board's recommended sanction without opinion, pursuant to D.C. Bar Rule XI, § 9(h)(2). *Clair*, 148 A.3d at 705.

the estate account and, like the respondent in *Mudd*, maintained control over the checks, but did not have check writing authority. *Clair*, Bar Docket Nos. 2009-D376 *et al.*, at 2-3, 5. The respondent in *Clair* obtained unapproved fees by instructing his client, a personal representative, to write him a $21,400 check on the estate account in violation of a settlement agreement of which the respondent had actual knowledge. *See id.* at 3-5; *Id.*, appended Hearing Committee Report at 26-28 (Jan. 9, 2015).[25]

The Board in *Clair* reversed the hearing committee's misappropriation finding despite the fact that neither the respondent nor Disciplinary Counsel briefed the issue or took exception. Bar Docket Nos. 2009-D376 *et al.*, at 1. We respectfully disagree with the Dissenting Chair Mr. Bernius, who argues that the failure of Disciplinary Counsel and Respondent to address the legal issue posed by *Travers*—even when prompted by the Hearing Committee—prevents the Board from addressing the issue in our *de novo* review of the Hearing Committee's recommended conclusions of law and findings of ultimate fact. Disciplinary Counsel cannot satisfy its burden of proving the "entrustment" element of misappropriation by avoiding discussion of the legal issues presented by Disciplinary Counsel's own evidence that the guardianship estate account required two signatures.

Mr. Bernius suggests that funds were "entrusted" to Respondent in part because "the funds belonged to a minor," *i.e.*, the guardian/client's son. *See* Separate

[25] We do not, of course, intend to suggest that the Court's summary affirmance in *Clair* decided the misappropriation issues raised here and in *Mudd*, *Ray*, *Fair*, and *Travers*.

Statement of Mr. Bernius at 6-7. Mr. Bernius's reasoning appears to be that Respondent, in her role as counsel to the guardian/client, took on the duties of that fiduciary, so that funds entrusted by the Probate Court to the guardian/client were in some sense also "entrusted" to Respondent.[26] However, that is not the law. *See Hopkins v. Akins*, 637 A.2d 424, 428 (D.C. 1993) (attorney to an estate has no co-fiduciary relationship with the beneficiaries of the decedent's estate, as his client is only the personal representative); *Poe v. Noble*, 525 A.2d 190, 193 (D.C. 1987) (same). "[U]nder the substantive law of the District of Columbia, as well as the law of most jurisdictions, the client of a lawyer representing an estate is the fiduciary . . . and not the estate." D.C. Bar Ethics Op. 259 (Oct. 1995); *see also* American College of Trust and Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct* 2 (4th ed. 2006) ("Under the majority view, a lawyer who represents a fiduciary generally with respect to a fiduciary estate stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary estate or the beneficiaries."). "The lawyer retained by a fiduciary for a disabled person, including a guardian, conservator, or attorney-in-fact, stands in a lawyer-client relationship with respect to a fiduciary." *See* D.C. Bar Ethics Op. 259 at 3 (quoting *ACTEC Commentaries* (2d ed. 1995) at 133).

[26] The Hearing Committee also suggested that *Travers* might be distinguishable from this case because *Travers* involved a probate estate and this case a guardianship, "since arguably a guardianship requires enforcement of the most stringent fiduciary requirements." HC Rpt. at 26 n.12. While such heightened fiduciary duties may apply to the guardian/client, they do not, as discussed *infra*, apply to Respondent, who represented the guardian but was not herself appointed by the Probate Court.

An American Bar Association ("ABA") Legal Ethics Opinion similarly explains that a fiduciary's lawyer does not owe any special duties to beneficiaries, even where possible misconduct could be revealed:

> A lawyer who represents the fiduciary in a trust or estate matter is subject to the same limitations imposed by the Model Rules of Professional Conduct as are all other lawyers. The fact that the fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary client under the Model Rules, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. Specifically, the lawyer's obligation to preserve the client's confidences under Rule 1.6 is not altered by the circumstance that the client is a fiduciary.

ABA Legal Ethics Op. 380 at 1 (May 9, 1994) (emphasis added).[27]

The Court in *Travers* touched on this issue in rejecting Disciplinary Counsel's argument that misappropriation occurs "whenever an attorney assumes a fiduciary relationship and violates his duty." *Travers*, 764 A.2d at 250 n.11. The Court stated: "It is not enough for an attorney simply to violate a fiduciary duty; the attorney must have been 'entrusted' with client funds and must have used those funds *without permission* in order to be found guilty of misappropriation." *Id.* (emphasis added).

The issue in this case can be stated simply: Did Disciplinary Counsel prove, by clear and convincing evidence, that "client funds were entrusted to the attorney"?

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[27] *Cf.* Restatement (Third) of the Law Governing Lawyers § 51(4) (2000) (lawyer representing trustee or guardian may be liable to beneficiaries in limited situations where the lawyer knows that action is necessary to prevent breach of fiduciary duty constituting crime or fraud, or where lawyer is assisting the client in such a fiduciary breach). However, the question of whether a fiduciary's lawyer may be liable to a beneficiary for enabling the fiduciary's crime or fraud is not the same as the question of whether money entrusted to the fiduciary is also "entrusted" to the lawyer for purposes of a misappropriation charge.

Travers, 764 A.2d at 250. The answer is no. The well-supported findings of the Hearing Committee, based on substantial evidence (most of which was introduced by Disciplinary Counsel), show that neither the client nor the Probate Court entrusted funds to Respondent. Respondent was not appointed by the court as a fiduciary or as a co-guardian of the estate. The client retained check-writing oversight by remaining as a signatory of the account; as a result, Respondent could not issue a check without the client's consent and participation. Under those circumstances, the payment of fees, with the client's consent and participation but without prior court approval, was not a misappropriation of entrusted funds.[28]

2. No Clear and Convincing Evidence of "Unauthorized Use"

In addition to the "entrustment" element, Disciplinary Counsel has the burden of proving an "unauthorized use." *See Travers*, 764 A.2d at 250; *Harrison*, 461 A.2d at 1036. The Court has previously stated that "[t]o establish misappropriation [Disciplinary] Counsel had to prove 'by clear and convincing evidence that the *client did not consent* to the attorney's use of funds.'" *See In re Arneja*, 790 A.2d 552, 556 (D.C. 2002) (emphasis added) (quoting *In re Shelly*, 659 A.2d 460, 466 (N.J. 1995)) (commingling found, but not misappropriation, where Disciplinary Counsel failed to prove Respondent lacked client's consent). The Court has therefore treated the misappropriation element of an "unauthorized temporary use [of entrusted funds] for

[28] We do not believe this case requires the Board, or the Court, to decide whether an attorney appointed by a court to a fiduciary role is thereby "entrusted" with safekeeping the estate funds even if those funds are kept in an account where the attorney is not the only signatory. That is not the situation here, nor was it the situation in *Mudd*, *Ray*, *Travers*, or *Clair*.

the lawyer's own purpose" as connected to the issue of a client's consent. *See In re Evans*, 578 A.2d 1141, 1142 (D.C. 1990) ("When Respondent acted on his erroneous belief that Ms. Byrd [the non-consenting heir] had authorized the extra fee, he acted at his peril. When Respondent took Ms. Byrd's share of the extra attorney fee, he misappropriated her funds." (alteration in original) (quoting Board Report)).

We have also previously determined that "unauthorized use," in the context of misappropriation in estate cases, means without the client's consent. *Mudd*, Bar Docket No. 472-92, at 6 (where the personal representative directed respondent to write check for attorney fees and also signed check, "there had been no misappropriation because Respondent's actions were not 'un-authorized'"—even though the Auditor found that attorney fees were taken without the court's prior approval).

> [Disciplinary] Counsel . . . argued that the word "authorized" as used by the District of Columbia Court of Appeals in misappropriation cases covers a situation where an attorney received payment of a legal fee before being "authorized" by a court order to take the fee. We see nothing in any decision of the Court which suggests that interpretation of that word. To the contrary, the definition of misappropriation in *Harrison*, *supra*, expressly covered the unauthorized *temporary* use of entrusted funds for the lawyer's own purpose. (461 A.2d at 1036), clearly implying that the term "authority" related to the client's authorization or lack thereof. At most it can be argued that Respondent collected an illegal fee, which, of course, was not charged by [Disciplinary] Counsel.

Id. at 15-16 (emphasis in original).[29]

[29] The Petition for Negotiated Discipline in *Harris-Lindsey I* included a Rule 1.5(f) (illegal fee) charge, *see* 19 A.3d at 784 n.1, but Disciplinary Counsel did not include that charge in the Specification of Charges filed in this contested proceeding.

Here, because the client consented to each of Respondent's withdrawals and signed the 1999 check at issue, Disciplinary Counsel has not met its burden of proving the "unauthorized use" that is a necessary element of a misappropriation.

B. The Parties' Stipulations and Their Failure to Brief the Issue Do Not Prevent the Board From Concluding That Disciplinary Counsel Failed to Prove Misappropriation.

The Hearing Committee recognized *sua sponte* that if Respondent did not have exclusive control of the estate funds, Respondent would not have committed misappropriation under the Board's analysis in *Travers*. HC Rpt. at 26. However, because neither Respondent nor Disciplinary Counsel had raised the issue, the Hearing Committee decided that it was "not in a position to decide the question and leaves it for the Board's consideration, with the benefit of the parties' input." *Id*. Both parties ignored the Hearing Committee's pointed guidance. Their briefs and argument to the Board failed to address the question of whether or not Disciplinary Counsel met its burden of proving the "entrustment" or "unauthorized use" elements of the misappropriation charge.

The Separate Statement by Mr. Bernius suggests that this constitutes waiver. We respectfully disagree. To begin with, the Board owes no deference to the Hearing Committee's proposed conclusions of law, and we review them *de novo*. *See Bradley*, 70 A.3d at 1194; *Anderson*, 778 A.2d at 341. Whether Disciplinary Counsel met its burden of proving by clear and convincing evidence that Respondent misappropriated entrusted funds is a question of law, and Disciplinary Counsel always bears the burden of proof. It is not an issue, like an affirmative defense, that

the Respondent can waive—not even by stipulation.[30] Neither the Board nor the Court is bound by the parties' stipulations on a question of law or an ultimate fact. *See Mims v. Mims*, 635 A.2d 320, 322 (D.C. 1993) (Court of Appeals is not bound by stipulations on questions of law); *Weston v. Wash. Metro. Area Transit Auth.*, 78 F.3d 682, 685 (D.C. Cir. 1996) ("parties may enter into stipulations of fact but 'may not stipulate to the legal conclusions to be reached by the court'" (citation omitted)).

We recognize that a respondent can forfeit the right to present argument by failing to file an exception to the Hearing Committee's Report and failing to submit a brief to the Board, *see, e.g.*, *In re Green*, 136 A.3d 699, 699-700 (D.C. 2016) (per curiam) (despite Board's grant of an extension of time in which to file exception, the respondent did not file an exception to the hearing committee's report or file a brief to the Board, thus waiving argument before the Court); but here, Respondent did both. In his Separate Statement, Mr. Bernius emphasizes that Respondent took no exception to the finding of misappropriation and only argued that the misappropriation was negligent and not reckless. Her counsel failed to address the issues raised by *Travers* despite the Committee's finding that the two bank accounts were joint signatory accounts.

But even when a respondent concedes misappropriation—whether as a result of positions taken in the unsuccessful negotiated discipline, mistaken assumptions,

[30] Mr. Bernius takes the position that the Board is not bound by the fact that both Disciplinary Counsel and Respondent assert that any misappropriation was, at most, negligent. *See* Separate Statement of Mr. Bernius at 12-13, 18-19. We agree. However, the Board's *de novo* review covers not only the parties' legal conclusions concerning Respondent's intent, but also their legal conclusions as to whether there is clear and convincing evidence of misappropriation.

or uncertainty in the case law—it does not relieve the Board of our responsibility to review the Hearing Committee's proposed conclusions of law *de novo*, to consider findings of fact based on substantial evidence developed at a contested hearing, and to ensure that our recommendations to the Court, and in particular our recommended sanction, have a sound basis in law and fact.[31] Indeed, Disciplinary Counsel and Respondent stipulated in the contested proceedings that Respondent withdrew fees in violation of SCR-PD 308, an incorrect statement of law which the Hearing Committee properly reviewed and corrected. *See* Joint Exhibit (Stipulations), ¶ 6; HC Rpt. at 17 n.8; *see also* note 17, *supra*.

[31] Dissenting from our reliance on *Travers*, Mr. Bernius does not believe the record here is sufficiently developed as to the facts or the law. *See* Separate Statement of Mr. Bernius at 7. ("Without further development of the factual and legal issues presented here, including Disciplinary Counsel's argument on this important area of misappropriation law, I am not prepared to join my colleagues in adopting the Board's conclusion in *Travers* . . . ."). Asserting that Respondent should have called a bank witness or briefed *Travers*, Mr. Bernius implicitly shifts the burden of proof to Respondent. *See id.* at 8. But Disciplinary Counsel has the burden of proving each element of misappropriation by clear and convincing evidence. Substantial evidence, including Disciplinary Counsel's exhibits, supports the Hearing Committee's findings that both estate accounts required the client's signature as well as Respondent's, and that the client consented to each payment of unapproved fees and signed at least one of the checks. That being the case, we will not speculate about other evidence that neither party chose to present.

The parties chose not to provide the legal argument that Mr. Bernius would prefer. Disciplinary Counsel was well aware of *Travers*, citing it in support of mitigation its briefing to the Hearing Committee. However, after the Hearing Committee Report noted that the existence of two-signatures-required accounts might be fatal to the misappropriation charge, and invited briefing on that issue, Disciplinary Counsel went silent. Significantly, Disciplinary Counsel neither sought to distinguish *Travers* nor argued that the Board's analysis in that case was incorrect. Of course, Respondent also was strangely silent; but she did not have the burden of proof. In any case, the parties' briefing tactics do not change the Board's responsibility to conduct a *de novo* review of the Hearing Committee's proposed conclusions of law, with deference to findings of fact supported by substantial evidence.

Further, as noted above, the Board decided a very similar issue in *Clair*, reversing the hearing committee's misappropriation conclusion concerning one unauthorized fee payment to the respondent, without the benefit of any briefing by Disciplinary Counsel or the respondent on the particular issue either before the hearing committee or the Board. We did not abstain in *Clair* and need not abstain here. Before we can sustain the Hearing Committee's recommendation of disbarment, we must consider whether Disciplinary Counsel has proven misappropriation in the first place—not to do so, would, in fact, "lessen confidence in the discipline system." *Cf.* Separate Statement of Mr. Bernius at 9-10 ("to the extent that the Board is perceived as acting precipitously, [it] can lessen confidence in the discipline system").

C. Respondent Violated the Recordkeeping Requirement

While both parties object to the reckless misappropriation finding, neither party disputes the Hearing Committee's conclusion that Respondent failed to maintain proper records for the five-year period as required by D.C. Bar Rule XI, § 19(f).[32] The Board unanimously affirms the Hearing Committee's conclusion, a rule violation for which no party has taken an exception.

[32] The Hearing Committee Report addresses the recordkeeping charge very briefly. HC Rpt. at 31 ("Respondent Violated D.C. Bar Rule XI, §19(f) by Failing to Maintain Necessary Records"). The Hearing Committee only referenced D.C. Bar Rule XI, § 19(f) in the section heading and conclusion, only once mentioning Rule 1.15(a), when concluding that Respondent had failed to maintain complete records. *See* HC Rpt. at 31. Disciplinary Counsel briefed Respondent's incomplete recordkeeping as a violation of *both* D.C. Bar Rule XI, § 19(f) and Rule 1.15(a), so the record is silent as to why the Committee elected to essentially limit its finding in the conclusion to the D.C. Bar Rule XI, § 19(f) violation.

At the time of Respondent's representation of Ms. Fulwood, D.C. Bar Rule 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.

By its plain language, D.C. Bar Rule XI, § 19(f)'s recordkeeping obligation appears not to be limited to accounts where an attorney has "exclusive control" of estate funds or where entrustment is through court-appointment. Under this rule, Respondent had to maintain complete records of funds "belonging to another person . . . at any time in [her] possession, from the time of receipt to the time of final distribution," and "preserve such records for a period of five years . . . ." In finding the recordkeeping violation, the Hearing Committee did not include its reasoning for focusing on this rule and not Rule 1.15(a).

The version of Rule 1.15(a) in effect at the time of Respondent's representation (1994-1999) provided:

> A lawyer shall hold property of clients or third persons[33] that is in the lawyer's possession in connection with a representation separate from

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Effective March l, 2016, Section 19(f) was deleted from D.C. Bar Rule XI as duplicative of the complete records requirement of Rule 1.15 of the D.C. Rules of Professional Conduct. Order, No. M-252-15 (D.C. Feb. 4, 2016). It was in effect, however, at the time of Respondent's conduct at issue, and the Specification charges the violation of Section 19(f).

[33] The separate holding of property of a "third person" has been applied to third parties such as a medical providers that may have just claims to funds held in a lawyer's escrow or IOLTA accounts. *See, e.g.*, *In re Davenport*, 794 A.2d 602, 603 (D.C. 2002) (misappropriation where funds were required to be held separate on behalf of third-party medical provider, who possessed a lien on the

> the lawyer's own property. . . . 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.[34]

The meaning of "property" or "other property" is not defined anywhere in the Rules of Professional Conduct. In *In re Bailey*, the Court commented on this omission, noting that "[t]he word 'property' as used in [this] subsection[] is not defined," but that the Restatement of the Law of Property defines the word "property" "'to denote legal relations between persons with respect to a thing.'" 883 A.2d 106, 116 (D.C. 2005) (quoting Restatement of the Law of Property, introductory note (1936)). We have previously considered a recordkeeping charge related to "property" in *In re Shannon*, Bar Docket No. 2004-D316, at 29-30 (BPR Nov. 27, 2012) (respondent failed to maintain complete records relating to payment of taxes and transfers of his client's property, as well as drafting and execution of a will). In finding a violation of both Rule 1.15(a) and D.C. Bar. R. XI, § 19(f), the Board concluded in *Shannon* that the respondent violated the recordkeeping rule because he "did not maintain complete records regarding his representation of Ms. Taylor for a period of five years." *Shannon*, Bar Docket No. 2004-D316, at 29-30; *see also* Rule 1.15, cmt. [1] (2007) ("This rule also requires that a lawyer safeguard 'other property' of clients, which may include client files.").

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account). Ms. Fulwood's son, the minor, was the beneficiary of the estate, not a third-party who had a lien on the estate account.

[34] An amended version of Rule 1.15(a) went into effect on February 1, 2007, after Respondent's representation of Ms. Fulwood. The quoted excerpt of Rule 1.15(a) was not affected by the amendment.

Here, Respondent was retained by Ms. Fulwood to prepare the accountings and file the tax returns for the guardian estate. FF 5. In addition, all correspondence from Independence Federal Savings Bank relating to the account was addressed to Respondent's office. *See* FF 7. In its factual findings, the Hearing Committee determined that the records relating to the representation were incomplete: "Respondent failed to submit her complete file, asserting that a number of the relevant documents had been lost in an office move." FF 42. Accordingly, the Hearing Committee properly concluded that Respondent violated her recordkeeping obligations for the five-year period. *See* HC Rpt. at 17.

We affirm the Hearing Committee's conclusion on the recordkeeping violation, which the parties do not dispute, because Respondent had an obligation to keep records related to the guardianship estate, a matter for which she was retained by Ms. Fulwood, the guardian. Even in the absence of dominion and control over the estate funds, Respondent had an obligation to keep the records related to the representation, or client's file, under Rule 1.15(a) as the attorney for the fiduciary of the estate. *See Shannon*, Bar Docket No. 2004-D316, at 30.[35]

[35] Although the Specification of Charges refers to the failure to maintain the records of "entrusted funds" rather than "other property" in the charge citing Rule 1.15(a), the fact that we now have concluded that the funds were not "entrusted" does not raise any due process concerns as to Respondent, who was retained to prepare and file the relevant documents for the guardian. *See, e.g.*, *In re Slattery*, 767 A.2d 203, 2011 (D.C. 2001) (scope of original charges sufficient to any "'shortcomings in charging documents'" (citation omitted)); *see also In re Smith*, 403 A.2d 296, 302 (D.C. 1979) (finding no due process violation where the respondent admitted to misconduct that was clearly proscribed).

D. Disciplinary Counsel Failed to Prove a Violation of Rule 8.4(d).[36]

Disciplinary Counsel charged Respondent with violating Rule 8.4(d), yet did not press that issue at the hearing or in post-hearing briefing. *See* Tr. 12-32; ODC PFF at 10 n.6. Disciplinary Counsel advised the Hearing Committee that it "failed to adduce clear and convincing evidence to support that charge." ODC PFF at 10 n.6. As a consequence, Respondent did not address the Rule 8.4(d) charge following the hearing. The Hearing Committee agreed with Disciplinary Counsel that the charge was not sustained. HC Rpt. at 16 n.6. Neither party has taken exception to that finding by the Hearing Committee. Dissenting Board Member Mr. Peirce argues that the Board has authority to consider the rule violation despite the absence of exception by any party. *See* Separate Statement of Mr. Peirce at 6-8. We agree with him on that point, but disagree with his conclusion that Disciplinary Counsel has proven a Rule 8.4(d) violation with clear and convincing evidence.

Clear and convincing evidence requires a degree of persuasion higher than mere preponderance of evidence. *Cater*, 887 A.2d at 24. Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that seriously interferes with the administration of justice." To establish a Rule 8.4(d) violation, Disciplinary Counsel must prove that Respondent's conduct: (i) was improper (i.e., that Respondent either acted or failed to act when she should have); (ii) bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) tainted the judicial process in more than a *de minimis* way (i.e., potentially impacted

[36] Mr. Carter authored Part III.D of this Report.

the process to a serious and adverse degree). *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996).

"Improper" conduct is defined broadly in the Rules of Professional Conduct, *see* Rule 8.4, cmt. [2] (2007) ("Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples."), and the late accountings and the 1999 check payment without prior court approval fall within this definition. The conduct affected the guardianship case in the Probate Court, but we agree with Disciplinary Counsel that it did not taint the judicial process in more than a *de minimis* way.

The Hearing Committee's factual finding relating to the Rule 8.4(d) charge provided that Respondent "did not prepare for filing in a timely or complete manner a number of the required accountings that were due during her tenure as Ms. Fulwood's counsel, requiring the court to send Respondent and her client repeated notices and to schedule multiple hearings in connection with the missed accounting deadlines." FF 49. The Hearing Committee, however, also found that "despite the Superior Court's issuance of several notices of delinquent filings, the accountings that Respondent filed were all ultimately approved." FF 44. These findings support a conclusion that the judicial process was not tainted in more than a *de minimis* way. *See Hopkins*, 677 A.2d at 60-61.

In his Separate Statement, Board Member Mr. Peirce cites to *In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009), to support a finding that Respondent violated Rule 8.4(d). In *Cole*, the Board agreed with Disciplinary Counsel's arguments and

overruled the Hearing Committee's finding of no Rule 8.4(d) violation. 967 A.2d at 1266. In contrast to the instant case, however, Disciplinary Counsel had advanced multiple factors in *Cole* to support a finding that the judicial process was tainted in more than a *de minimis* manner:

> The Board found persuasive [Disciplinary] Counsel's argument that Mr. Cole's misconduct significantly tainted the administration process for two reasons. First, Mr. Dogba "'permanently lost the opportunity to obtain permanent residence in the United States based on the facts alleged in the political asylum.'" Second, Mr. Cole's misconduct "led to an unnecessary expenditure of time and resources by the Immigration Court as Mr. Dogba's new counsel took belated steps to try to rectify the situation left by [Mr. Cole]." These steps required successor counsel to file a new motion, immigration prosecutors to file papers in opposition, the Immigration Court to prepare a Memorandum of Decision and Order denying the motion, all parties to prepare appellate documents for filing, and the Board of Immigration Appeals to draft an opinion.

Id. (alteration in original). Here, we note that Ms. Fulwood's court appointment as guardian to her son's estate was never at risk, additional steps were not required of successor counsel, and the time required of the Auditor and Probate Court was not so significant a burden on the judicial process as that which occurred in *Cole*.[37]

[37] In *Cole*, the additional expenditure and time on the judicial process involved a fully contested political asylum hearing with pleadings filed by two parties and an appeal that required the filing of appellate briefs by immigration prosecutors and successor counsel. 967 A.2d at 1266. Two judicial bodies were inconvenienced—the Immigration Court which had held the hearing and then prepared the Memorandum Decision and Order and the Board of Immigration Appeals which had to consider the appeal and draft the appellate decision. *Id.* If the "unnecessary expenditures of time and resources" finding in *Cole* were to also apply to Respondent's single hearing on an order to show cause and the nominal late filing notices over a five-year period, the scope of what constitutes more than a *de minimis* effect under Rule 8.4(d) would be significantly broadened.

While Disciplinary Counsel cannot unilaterally dismiss a charge in a Specification, it is clear from the transcript of the contested hearing that it did not develop a sufficient record to prove the Rule 8.4(d) violation by clear and convincing evidence, and hence properly conceded the point in its post-hearing briefing to the Committee. Accordingly, we adopt the Hearing Committee's conclusion that no Rule 8.4(d) violation has been proven.

IV. SANCTION

While a majority of Board members has determined that Respondent did not violate Rule 1.15(a) (misappropriation) and a different majority has found no Rule 8.4(d) violation, we have no majority sanction recommendation despite the unanimous finding of a recordkeeping violation. The recommended sanctions in this case run the gamut. Mr. Bernius and Ms. Smith recommend disbarment, as they must because they find reckless misappropriation without any extraordinary mitigating factors. Mr. Peirce and Mr. Bernstein recommend public censure, as they find two rule violations with the additional Rule 8.4(d) charge. Vice Chair Ms. Butler, Mr. Bundy, and Mr. Carter recommend that Respondent be sanctioned with an informal admonition for the recordkeeping charge, which they believe is the only violation for which Disciplinary Counsel has met its burden of proof.

Because the Board unanimously agrees that Respondent violated her recordkeeping obligations, we briefly note the following. We are unaware of any contested hearings that involve only a single recordkeeping rule violation. Nonetheless, Disciplinary Counsel has issued letters of informal admonition for

comparable conduct involving a finding of only the recordkeeping rule violation. *See, e.g.*, *In re Fabayo*, Bar Docket No. 2013-D011 (ODC Letter of Informal Admonition, Sept. 4, 2013) (violation of D.C. Bar Rule XI, § 19(f) and Rule 1.15(a) (safekeeping funds)); *In re Sanders*, Bar Docket No. 445-02 (ODC Letter of Informal Admonition, July 16, 2007) (same); *In re Rothman*, Bar Docket No. 348-01 (ODC Letter of Informal Admonition, July 17, 2003) (violation of D.C. Bar Rule XI, § 19(f) and Rule 1.15(a) (safekeeping property)). Accordingly, an appropriate sanction for this one rule violation found by the Board would be an informal admonition.[38]

[38] Because an informal admonition is the least severe sanction, we do not address Respondent's argument concerning undue delay as a mitigating factor, but that issue is addressed in all three Separate Statements. Respondent addresses delay in mitigation of sanction, not as a due process violation warranting dismissal. *See, e.g.*, *In re Saint-Louis*, 147 A.3d 1135, 1147 (D.C. 2016) (distinguishing between delay that violates due process, requiring dismissal, and delay that is a mitigating factor). "[E]xtended delay in prosecuting a case may be a mitigating factor with respect to the discipline imposed; it may result in a shorter period of discipline, but not in the elimination of the proposed sanction." *Id*. at 1147-48 (citing *In re Schneider*, 553 A.2d 206, 212 (D.C. 1989) (considering in mitigation that during the six-year delay, respondent "has had, we understand, an unsullied record at the bar"); *In re Ponds*, 888 A.2d 234, 244 (D.C. 2005) (declining to adopt the Board's approach of placing so much weight on delay in mitigation that it resulted in "effectively no suspension at all," citing the absence of unique and compelling circumstances or prejudice).

V. CONCLUSION

The Board finds that Disciplinary Counsel proved the recordkeeping rule violation, pursuant to D.C. Bar Rule XI, § 19(f) and Rule 1.15(a), by clear and convincing evidence. Two separate majorities of Board members have concluded that Disciplinary Counsel has not met its burden of proof as to the other charges.

By: /JCP/
John C. Peirce

/JEC/
Jason E. Carter

Dated: July 28, 2017

Vice Chair Ms. Butler, Mr. Bundy, and Mr. Carter concur in all respects to the Board Report.

Mr. Peirce, with whom Mr. Bernstein joins, concurs in the finding of no Rule 1.15(a) (misappropriation) violation and the finding of a proven recordkeeping violation, but submits a separate statement dissenting from the Board's finding of no Rule 8.4(d) violation. Mr. Peirce recommends a sanction of public censure.

Chair Mr. Bernius, with whom Ms. Smith joins, concurs in the finding of no Rule 8.4(d) violation and the finding of a proven recordkeeping violation, but submits a separate statement dissenting from the Board's finding of no Rule 1.15(a) (misappropriation) violation and providing a different basis for the recordkeeping violation. Mr. Bernius recommends disbarment.

Mr. Carter, with whom Mr. Bundy and Vice Chair Ms. Butler join, submits a separate statement for the purpose of responding to Mr. Bernius's arguments on reckless misappropriation. Mr. Carter recommends a sanction of an informal admonition.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
QUINNE HARRIS-LINDSEY, ESQUIRE,	:	
	:	Board Docket No. 15-BD-042
Respondent.	:	Bar Docket No. 2002-D384
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration Number: 451238)	:	

SEPARATE STATEMENT OF JOHN C. PEIRCE

INTRODUCTION

While I join in the Board's conclusion that Disciplinary Counsel failed to prove the charge of misappropriation by clear and convincing evidence, but did prove a recordkeeping violation, I also conclude that Disciplinary Counsel met its burden of proving by clear and convincing evidence that Respondent's misconduct seriously interfered with the administration of justice in violation of Rule 8.4(d). I therefore respectfully dissent from the majority's conclusions concerning Rule 8.4(d). Because I believe Respondent violated Rule 8.4(d), I also respectfully dissent from the Board's recommended sanction. For the reasons stated below, I conclude that the appropriate sanction would be a public censure.

A. Disciplinary Counsel Proved by Clear and Convincing Evidence that Respondent Violated Rule 8.4(d).

Disciplinary Counsel charged Respondent with violating Rule 8.4(d) and presented substantial evidence at the hearing to prove it. After the hearing,

Disciplinary Counsel took the position—in a single sentence in a footnote in its proposed conclusions of law—that it had "failed to adduce clear and convincing evidence to support that charge." [Disciplinary] Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction at 10 n.6. Informed of Disciplinary Counsel's new position, Respondent's post-hearing brief incorporated Disciplinary Counsel's proposed findings as her own, admitted in a single sentence that she had violated Rule 1.15(a) and D.C. Bar Rule XI, § 19(f), and ignored the Rule 8.4(d) charge. Respondent's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction at 3. The Hearing Committee made extensive findings of fact (which, for the reasons explained below, I believe support the Rule 8.4(d) charge) but then asserted, in a single sentence in a footnote, without any substantive analysis, that the charge was not sustained. HC Rpt. at 16 n.6.[1] Neither party took exception to that proposed conclusion.

It is obvious from the parties' post-hearing briefs that they are in agreement about the facts and the legal conclusions they believe should be drawn therefrom. This consensus dates back at least to the failed attempt at negotiated discipline. As the Board majority concluded, however, consensus among the parties, in the absence of supporting evidence, is not binding on the Board. That is why I joined the majority in concluding that, notwithstanding the parties' arguments, the evidence does not support the charge of misappropriation. Unlike the majority, however, I do not believe that a conclusory sentence in a footnote in Disciplinary Counsel's post-

[1] The Hearing Committee's Report and Recommendation is cited as "HC Rpt." The Hearing Committee's Findings of Fact are cited as "FF." Disciplinary Counsel's exhibits are cited as "DX."

hearing brief and a conclusory sentence in a footnote in the Hearing Committee's Report adequately addressed the Rule 8.4(d) charge. Those two footnotes do not excuse the Board from its duty to make a *de novo* determination of whether or not there is clear and convincing evidence to support the Rule 8.4(d) charge. After reviewing the Hearing Committee's findings and the underlying evidence, I conclude that the record contains clear and convincing evidence that Respondent's misconduct seriously interfered with the administration of justice in violation of Rule 8.4(d).

1. Respondent's Conduct Seriously Interfered with the Administration of Justice.

Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that seriously interferes with the administration of justice." To establish a Rule 8.4(d) violation, Disciplinary Counsel must prove that Respondent's conduct: (i) was improper (i.e., that Respondent either acted or failed to act when she should have); (ii) bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) "'taint[ed] the judicial process in more than a *de minimis* way,' meaning that it 'at least potentially impact[ed] upon the process to a serious and adverse degree.'" *In re Owusu*, 886 A.2d 536, 541 (D.C. 2005) (alterations in original) (quoting *In re Hopkins*, 677 A.2d 55, 61 (D.C. 1996)). The "failure to obey court orders" is a type of misconduct that Rule 8.4(d) is intended to address. *See* Rule 8.4, cmt. [2].

There is ample evidence of Respondent's misconduct and its impact, over a period of years, on the guardianship case she handled in the Superior Court Probate

Division ("Probate Court"). Respondent repeatedly accepted fees without the required court approval and failed to comply timely with the repayment orders of the Probate Court. *See* FF 11, 12, 24, 36, 43. She repeatedly filed untimely or incomplete accountings, which forced the Probate Court and staff to send repeated delinquency notices and schedule multiple hearings in connection with missed deadlines. FF 49. In particular, the deficient Sixth Accounting made it necessary for the Auditor for the Register of Wills to ask Respondent to explain both her unapproved October 1, 1999 fee and her failure to file an estate tax return. FF 27. Respondent's inadequate and evasive response required the Probate Court to hold a show cause hearing and consider a further Memorandum of Explanation from Respondent, which the Probate Court found to be "purely disingenuous." FF 28-30, 38; DX 1 at 4. Despite extensions granted by the Probate Court, Respondent did not reimburse the estate for her unauthorized October 1, 1999 fee until December 8, 2003, more than two years after the Probate Court had initially ordered her to do so. FF 43. Finally, the record shows that on March 11, 1998, the Probate Court ordered that Angela Fulwood was "not to expend estate assets without prior court authorization," and Respondent acknowledged receiving notice of that order. FF 21. After that order issued, Respondent co-signed the check with Ms. Fulwood which withdrew the attorney fees without prior court authorization in direct violation of the Probate Court's explicit order. *See* FF 24.

All of this misconduct bore directly on the specific guardianship case pending in the Probate Court. The first two elements of a Rule 8.4(d) violation thus were clearly established.

Respondent's misconduct tainted the judicial process in more than a *de minimis* way. Rule 8.4(d) is violated if the attorney's actions cause the unnecessary expenditure of time and resources in a judicial proceeding. *In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009). Here, the Probate Court and its staff were required repeatedly to intervene in the matter over a period of years to rectify Respondent's repeated accounting deficiencies and to secure—after a delay of more than two years—repayment of the unauthorized fees. *See, e.g.*, *In re Hewett*, 11 A.3d 279, 284 (D.C. 2011) (respondent's failure to promptly examine court files and inform the Probate Court of his payment of fees contributed to delay in the return of funds, resulting in a finding of a Rule 8.4(d) violation). Moreover, in its order denying Respondent's request for compensation, the Probate Court cast doubt on Respondent's candor. The court found Respondent's Memorandum of Explanation "disturbing," in part because "[Respondent] explained that she failed to fully familiarize herself with the rules requiring court approval," even though she had previously been admonished by the court for violating those same rules by taking unauthorized fees in 1995 and again in 1996. DX 1 at 4. The court continued, "when the same mistake occurs twice and ignorance is the same excuse, then counsel's Memorandum of Explanation to the Court is purely disingenuous." *Id*. While Respondent was not charged with dishonesty, misconduct that a judge described as

"disturbing" and "disingenuous" certainly had more than a *de minimis* impact on the proceedings before that judge. *Cf. In re White*, 11 A.3d 1226, 1232 (D.C. 2011) (per curiam) (judge's express finding that respondent's participation had "tainted" litigation indicated that respondent's misconduct, which led to disqualification, imposed more than *de minimis* burden on the judicial process).

Accordingly, I conclude that the well-supported findings of the Hearing Committee present clear and convincing evidence that Respondent violated Rule 8.4(d) as charged.

2. Due Process Does Not Bar the Board's Finding of a Rule 8.4(d) Violation.

The Board's *de novo* review of the evidence supporting the Rule 8.4(d) charge does not raise any due process issue. In *In re Ruffalo*, 390 U.S. 544, 549-551 (1968), the Supreme Court explained that procedural due process can be violated in the context of an attorney's disciplinary proceeding (which is "quasi-criminal" in nature) when a disbarment offense is added to the charges in the middle of a hearing. Unless the charges have been established before a hearing commences, the proceedings "can become a trap" where the attorney's testimony is used to amend the charges and he or she cannot then "be given . . . an opportunity to expunge the earlier statements and start afresh." *Ruffalo*, 390 U.S. at 551. This case, however, does not present those issues.

The D.C. Court of Appeals, following *Ruffalo*, has held that due process is satisfied when, as here, "the Specification of Charges gave respondent notice of the specific rules she allegedly violated, as well as notice of the conduct underlying the

alleged violations." *In re Winstead*, 69 A.3d 390, 397 (D.C. 2013); *see also In re Smith*, 403 A.2d 296, 300-02 (D.C. 1979) (interpreting *Ruffalo* as allowing the Board to reinstate a charge of fraud, DR 1-102(A)(4), that the Hearing Committee had dismissed, where the respondent had been charged with misconduct based on his admissions during the hearing because the misconduct was clearly proscribed and "[n]o newly-declared standards of professional conduct were applied retroactively"). Even when the parties or the hearing committee dismiss or ignore a charge, the Board is responsible for reviewing the evidence *de novo* and reaching its own conclusions on questions of law and ultimate fact. For example, in *In re Bernstein*, 707 A.2d 371 (D.C. 1998), neither the respondent nor Disciplinary Counsel filed exceptions to the Hearing Committee Report, yet the Board adopted the Report's factual findings, *sua sponte* found two additional rule violations that had been charged, and increased the recommended sanction from public censure to a thirty-day suspension:

> Besides the three violations found by the Hearing Committee, to which neither side excepted, the Board sua sponte found that respondent had violated two additional rules. The Board has the authority to do so. If the record supports a finding that more rules were violated than the Hearing Committee concluded, the Board can take such action.

707 A.2d at 376.

Here, the Rule 8.4(d) charge was included in the Specification of Charges. Respondent, represented by experienced counsel, had a full and fair opportunity to defend the charge at the hearing and contest all adverse evidence. Disciplinary Counsel did not renounce the Rule 8.4(d) charge until after the record was closed. Respondent and her counsel then decided not to mention the Rule 8.4(d) charge in

her post-hearing brief. That tactical decision does not foreclose the Board's responsibility to evaluate all the charges. As provided by Board Rule 13.5, even if neither party files an exception, "the Board shall take action based on the record." *See also In re Mitchell*, 727 A.2d 308, 313 (D.C. 1999) (noting that "the Board has the authority to *sua sponte* determine that additional violations were committed if supported by the findings of record"); Board Rule 13.7; D.C. Bar Rule XI, § 9(c). Similarly, D.C. Bar R. XI, § 9(b) provides: "If no exceptions are filed, the Board *shall* decide the matter on the basis of the Hearing Committee record" (emphasis added). For the reasons stated above, I believe the Board should conclude that Disciplinary Counsel met its burden of proving the Rule 8.4(d) charge.

B. Public Censure Is an Appropriate Sanction.

Because I conclude that Disciplinary Counsel failed to meet the burden of proving the "entrustment" element of a misappropriation charge, I do not conclude that either disbarment (for reckless misappropriation) or a six-month suspension (for negligent misappropriation) would be justified. I respectfully submit that a public censure would be appropriate for Respondent's violation of D.C. Bar Rule XI, § 19(f), Rule 1.15(a) (recordkeeping), and Rule 8.4(d) (serious interference with the administration of justice).

The factors to be considered when determining an appropriate sanction are: "(1) the seriousness of the conduct, (2) prejudice to the client, (3) whether the conduct involved dishonesty, (4) violation of other disciplinary rules, (5) the attorney's disciplinary history, (6) whether the attorney has acknowledged his or her

wrongful conduct, and (7) mitigating circumstances." *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013).

Respondent admittedly made numerous errors during a five-year period in establishing and then administering the guardianship estate for her cousin, Ms. Fulwood. But the misconduct was limited to a single case and did not appear to affect any other client or matter.

Respondent's misconduct did not prejudice Ms. Fulwood,[2] and Respondent reimbursed the estate for all of the fees taken without prior court approval. During Respondent's representation, the Probate Court admonished Respondent's client, Ms. Fulwood, by order on one occasion, but never sought to remove her as guardian.

Respondent was not charged with dishonesty, although the judge in the guardianship case found Respondent's explanations of her misconduct "disturbing" and "disingenuous." DX 1 at 3-4.

In mitigation, Respondent has no prior disciplinary history. The Hearing Committee also found that Respondent acknowledged her misconduct and was "a sincere and credible witness, [who] forthrightly admitted under questioning by her own attorney, 'I don't really know what I was thinking at that point.' Tr. 35." HC Rpt. at 23. Finally, the majority Board Report and each Separate Statement have

[2] The guardian, not the minor, was Respondent's client. "[U]nder the substantive law of the District of Columbia, as well as the law of most other jurisdictions, the client of a lawyer representing an estate is the fiduciary . . . and not the estate." D.C. Ethics Opinion 259 (Oct. 1995); *see also* American College of Trust and Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct* 2 (4th ed. 2006) ("Under the majority view, a lawyer who represents a fiduciary generally with respect to a fiduciary estate stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary estate or the beneficiaries.").

noted the testimonial about her "exemplary" government career (after leaving private practice in 2002) that was submitted by the former General Counsel of the D.C. Public School system, who stated he was well aware of the circumstances of this disciplinary proceeding. *See* HC Rpt. at 2; FF 47.

A review of comparable cases suggests that a public censure is warranted—a sanction more severe than the informal admonition discussed in the majority Board Report, which only finds a recordkeeping violation. Here, the Rule 8.4(d) violation is the more serious charge and involved Respondent's failure to prepare timely accountings that required the court to send repeated notices and to schedule hearings in connection with these missed deadlines. FF 49. In addition, as guardian, Ms. Fulwood did not file the 2000 tax return on time, a matter for which Ms. Fulwood had retained Respondent for assistance. *See* FF 5, 49.

In other cases where Rule 8.4(d) is the more serious violation, public censure has been imposed as the sanction. *See, e.g.*, *In re Solerwitz*, 575 A.2d 287, 292 (D.C. 1990) (per curiam) (reciprocal discipline case; "Public censure is the established sanction in the District of Columbia for conduct prejudicial to the administration of justice."); *In re Thompson*, 478 A.2d 1061, 1064 (D.C. 1984) (public censure appropriate for "continuing pattern of disregard for his obligations to the court"). The sanction in *In re Yelverton* was more severe, a thirty-day suspension with a fitness requirement for violating Rules 3.1 and 8.4(d). *In re Yelverton*, 105 A.3d 413, 428-432 (D.C. 2014). However, in *Yelverton*, the Court believed the more severe sanction was warranted in light of the respondent's repeated and unfounded filings,

which caused harm to the court, and the respondent's never having acknowledged any wrongdoing. *Id*.

Accordingly, an appropriate sanction here is a public censure.[3]

CONCLUSION

I respectfully conclude that Respondent violated Rule 8.4(d), in addition to the recordkeeping violation described in the majority Board Report. For these two rule violations, Respondent should be sanctioned with a public censure.

By: /JCP/
John C. Peirce

Dated: July 28, 2017

Mr. Bernstein concurs with this Separate Statement.

[3] In regard to Respondent's arguments concerning the delay in the disciplinary process, I do not believe a lesser sanction than public censure is warranted on that basis. *See, e.g.*, *In re Howes*, 39 A.3d 1, 19 n.24 (D.C. 2012) (delay allowed respondent to maintain his employment and "'amass the track record of good character on which he relies'" (quoting Board Report)). If the Court were to decide that no Rule 8.4(d) violation was proven, however, I would concur with the Board Report's sanction recommendation of an informal admonition.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
QUINNE HARRIS-LINDSEY, ESQUIRE,	:	
	:	Board Docket No. 15-BD-042
Respondent.	:	Bar Docket No. 2002-D384
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 451238)	:	

SEPARATE STATEMENT OF ROBERT C. BERNIUS

I agree with the Hearing Committee's conclusion that Respondent committed reckless misappropriation and failed to keep adequate records of entrusted funds, and that she must consequently be disbarred.

I disagree, however, with the majority's detection, analysis, and resolution of issues that the parties intentionally did not raise or brief to the Board. The Board should not decide questions that the parties, for their own unexpressed and presumably sound reasons, have chosen to ignore.

A. The Board Should Not Decide Issues that the Parties Waived.

The Board majority in this case relies on the Board Report in *In re Travers,* 764 A.2d 242, 250 (D.C. 2000) to conclude, as a matter of law, that the funds in the estate bank account were not "entrusted" to Respondent because Respondent and the guardian were joint signatories on that account. If the funds were not entrusted, Respondent's payment of her fees would not meet the definition of

misappropriation: the unauthorized taking of *entrusted* funds. *See In re Saint-Louis*, 147 A.3d 1135, 1147 (D.C. 2016).

The "entrustment" issue was actively argued on appeal in *Travers*, where Disciplinary Counsel and the Board both submitted briefs to the Court. The *Travers* Court nonetheless declined to address the entrustment issue after finding that the relevant precedent was "sparse and inconclusive." *Travers*, 764 A.2d at 250. The Court has not addressed the issue since then, and it does not appear that the law has otherwise developed to any meaningful extent.

I do not believe that the Board should reach the *Travers* entrustment issue here. The Hearing Committee Report in this case noted that the *Travers* Board Report might apply, prudently determined not to decide the entrustment question, and explicitly invited the parties to brief that issue to the Board:

> If Disciplinary Counsel is correct as a factual matter [that Respondent did not have exclusive control of the estate funds], under *Travers*, Respondent would not have committed misappropriation. However, Respondent did not raise the entrustment issue and Disciplinary Counsel did not address it. *In the absence of argument or briefing by the parties, the Hearing Committee is not in a position to decide the question and leaves it for the Board's consideration, with the benefit of the parties' input*.

HC Rpt. at 26 (emphasis added). Despite the Hearing Committee's observation that Respondent might have a complete defense to the misappropriation charge, and despite its unambiguous invitation to raise the issue before the Board, Respondent did not do so. Instead, she continued to acknowledge, as she has throughout this case, that the funds in question had been entrusted to her.

In 2009, Respondent admitted to three instances of negligent misappropriation in a negotiated discipline case. Again, in her post-hearing brief filed with the Hearing Committee, she "concede[d] that she violated Rule 1.15(a) by paying herself from estate funds without receiving prior authorization from the court." Respondent's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction ("R PFF") at 3. Certainly, if Respondent believed as a result of the Hearing Committee's discussion of *Travers* that she had mistaken the law, and that the facts would support a finding that the funds were not "entrusted" to her, she could have withdrawn her concessions and argued that she did not engage in misappropriation. But she did the opposite. In her brief to the Board, *after* the Hearing Committee identified the *Travers* entrustment issue, Respondent acknowledged that she had engaged in misappropriation and specifically *conceded* that the funds were entrusted to her. Brief of Respondent in Support of Exception ("R Br.") at 7 (noting that Respondent was "handling a matter involving *entrusted funds* for the first time in her career" (emphasis added)).

It is apparent, then, that even though Respondent (who is represented by able counsel with substantial experience in disciplinary matters) was on notice that *Travers* might support a dismissal of the misappropriation charge, she did not argue that *Travers* applied to this case. That necessarily was a considered decision, made for reasons that have not been disclosed to the Board.

Respondent has thus waived any argument that the funds at issue were not entrusted to her. *See In re Abrams*, 689 A.2d 6, 9 (D.C. 1997) (en banc) ("We have

consistently held that an attorney who fails to present a point to the Board waives that point and cannot be heard to raise it for the first time" with the Court.). Respondent intentionally relinquished a known argument in her own defense—a classic example of waiver. *See Poth v. United States*, 150 A.3d 784, 789 n.8 (D.C. 2016) ("waiver is the intentional relinquishment or abandonment of a known right").

Deeming the entrustment issue to have been waived in this case is also supported by sound policy considerations. The Court has repeatedly warned against deciding issues that have not been tested through the adversary process. In *In re Goldsborough*, 654 A.2d 1285, 1287 (D.C. 1985), a reciprocal matter in which the respondent did not participate in this jurisdiction, the Court declined "to resolve some difficult questions raised in the Board's comprehensive and scholarly opinion," citing "the absence of the refinement of the issues, which would be provided by the adversarial process." *See id.* at 1287 n.5 (citing *United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (courts should not give "advance expressions of legal judgment" in the absence of "that clear concreteness provided when a question emerges precisely framed and necessary for a decision from a clash of adversary argument")); *see also Mackey v. Montrym*, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error . . . ."); *Allen v. United States*, 603 A.2d 1219, 1228 n.20 (D.C. 1992) (en banc) (declining to address issues that have not been "tested by the fires of adversary presentation"). The need for adversary presentation is especially acute here because of the sparse and inconclusive case law, the

seriousness of the charge against Respondent, and, as discussed above, Respondent's repeated admissions that the funds were entrusted to her.

Despite these considerations, and without any input from the parties whatsoever, the majority asserts that "the Board has consistently held—since at least 1995—that misappropriation does not occur when an attorney accepts an unauthorized fee from a guardian or personal representative unless that client has also relinquished control of the account to the attorney." *See* Board Report at 21. For this proposition the majority relies on *In re Mudd*, Bar Docket No. 472-92 (BPR Nov. 13, 1995), *In re Ray*, 675 A.2d 1381, 1387 (D.C. 1996), *In re Clair*, Bar Docket Nos. 2009-D376 *et al*., at 5 (BPR Aug. 3, 2015), *recommendation adopted*, 148 A.3d 705 (D.C. 2016), and *In re Fair*, 780 A.2d 1106 (D.C. 2001). None of those cases, however, supports the majority's conclusion that a lawyer's *joint* control over an account with a guardian means that the funds in the account are not "entrusted" to the lawyer for purposes of Rule 1.15(a).

In *Mudd*, *Ray*, and *Clair*, the respondent did not have *any* control over account funds, and thus did not engage in misappropriation for that reason. *See, e.g.*, *Clair*, Bar Docket Nos. 2009-D376 *et al*., at 5 (where the client paid respondent with a check drawn on an account over which the client had exclusive check-writing authority, the funds were not entrusted to the respondent because he did not have "dominion and control" over them); *In re Ray*, Bar Docket No. 516-92, at 16 (BPR Apr. 13, 1995) ("[B]ecause Respondent lacked any control over the client's funds, his receipt of two estate checks did not constitute misappropriation."); *Mudd*, Bar

Docket No. 472-92, at 17 (respondent's receipt of a fee from funds controlled by the personal representative in advance of court approval, "fell short of establishing by clear and convincing evidence that Respondent engaged in misappropriation"). In *Fair*, the respondent *was* the personal representative. *Fair* thus supports the conclusion that a misappropriation occurs where a lawyer takes entrusted funds without authorization, but it does not hold that joint control means no entrustment, as the majority concludes.

Thus, only the *Travers* Board Report even arguably supports the majority's position. Of course, since the Court declined to endorse the Board's recommendation, there is room to debate whether the *Travers* Board correctly decided the entrustment issue in the first place. However, even if *Travers* was correctly decided, it is questionable whether its holding applies in this case.

The *Travers* Board concluded that funds jointly controlled by a personal representative and a respondent were not "entrusted" to the respondent, noting that the safekeeping rule is intended to ensure that funds held by a lawyer for a client are as safe as funds held by the client itself. The Board concluded that if the client must approve the payment of fees, the funds are as safe as if the client herself held the funds. This position may well be correct if the client owns the funds or has the right to disburse them, and, of course, the personal representative in *Travers* did have the right to disburse funds. *See* D.C. Code § 20-701(a) (personal representative has "general *duty to settle and distribute the estate* of the decedent in accordance with the terms of the will or laws . . . ."). Here, however, the funds belonged to a minor,

and Respondent placed them in a trust account for the minor's sole benefit. Respondent's guardian-client had no interest in the funds, and had no right to disburse them absent prior court approval. Without further development of the factual and legal issues presented here, including Disciplinary Counsel's argument on this important area of misappropriation law, I am not prepared to join my colleagues in adopting the Board's conclusion in *Travers*, or to agree that it applies here.

This is not to say, of course, that the discipline system should ignore a plain error that would result in an obvious miscarriage of justice if left uncorrected. *See In re Hargrove*, 155 A.3d 375, 377 (D.C. 2017) (suggesting that the Court might consider waived arguments in an "extraordinary circumstance"). But that is not the case here, as the majority seems to suggest. The majority misplaces its reliance on the Board Report in *Clair*. In that case, it was clear that the respondent did not have any authority to write checks on an estate account, and thus it was equally apparent that the Hearing Committee erred in finding that the respondent engaged in misappropriation when the *client* wrote him a check from the estate account. *Clair*, Bar Docket Nos. 2009-D376 *et al*., at 5.

In addition, the *facts* regarding entrustment in this case are neither clear nor fully developed, undoubtedly because the parties stipulated that the proceeds of the insurance settlement were entrusted funds. The parties' failure to engage on the entrustment issue, and Respondent's persistent concession that the funds were entrusted to her, suggest that there are relevant and material facts that do not appear

in the record. The Hearing Committee noted that "the parties stipulated that there were two signatories on each of the two estate accounts, but the Stipulations fail to clarify whether both signatures were *required* for a withdrawal (citations omitted; emphasis added)." HC Rpt. at 26 n.10; *see* Joint Stipulations ("Stip.") ¶ 5. The Committee nevertheless concluded that two signatures *were* required for withdrawals. HC Rpt. at 26 n.10. The signature cards do facially support that conclusion, but the Hearing Committee also found that Respondent's records were incomplete. *See* FF 42. No bank witness testified about the characteristics of the trust account, and at oral argument before the Board, Disciplinary Counsel recalled that *Travers* did *not* apply because the account at issue was an "either/or account." Oral Arg. Tr. at 27. All of this leads me to conclude that the Hearing Committee overreached on this point, and that my colleagues' spontaneous and unilateral resolution of the "entrustment" question may well be based on an erroneous factual premise. We do not know why Respondent chose not to press the issue but that is exactly why the Board should not address it.

The Court has recognized that the attorney discipline system is adversarial: Disciplinary Counsel prosecutes and the respondent defends. *In re Cleaver-Bascombe*, 892 A.2d 396, 412 n.14 (D.C. 2006). In order for the discipline system to operate effectively and efficiently, the Board should decide issues presented to it by the parties. It should not ferret out and decide issues that the parties have discarded. In effect, the Board should act in a manner conceptually akin to that of an

intermediate appellate court.[1] The majority should do so; it should exercise the restraint shown by the Hearing Committee.

The majority has instead opted to undertake a more activist role in which the Board identifies, assesses, and determines issues that concern it. But it does so without hearing any argument from the parties. It affords Disciplinary Counsel no opportunity to explain why the funds were entrusted (as it charged). It relies on a possibly flawed factual record, and most assuredly it has no understanding of why Respondent eschewed raising the issue.[2]

The majority's approach, if routinely followed, can serve only to increase delays in the discipline system (as it has in this case), as the Board spontaneously engages in comprehensive adjudication without input from the litigants. Moreover, it can result in less than optimal results and, to the extent that the Board is perceived

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[1] I recognize that, unlike an appellate court, the Board is authorized to make its own findings of fact, which must be proven by clear and convincing evidence. *See* Board Rule 13.7. However, the Board's fact-finding authority is not implicated here, where the majority has undertaken to decide a legal issue not presented by the litigants.

[2] In similar fashion two of my colleagues conclude that Respondent violated Rule 8.4(d). Disciplinary Counsel charged Respondent with violating that rule, but after the hearing conceded that it "failed to adduce clear and convincing evidence to support that charge." Disciplinary Counsel's Proposed Findings of Fact at 10 n.6. As a consequence, Respondent did not brief that issue and the Hearing Committee agreed that the charge had not been sustained. HC Rpt. at 16 n.6. Neither party challenged that conclusion or briefed the issue to the Board. For the reasons discussed above, I think the Board should endorse the Hearing Committee's conclusion. If the Board were spontaneously to find a violation at this point, future respondents in disciplinary proceedings will necessarily be compelled to continue to litigate issues that Disciplinary Counsel has conceded (with the Hearing Committee's agreement), out of a fear that the Board, on its own, may spontaneously resurrect a charge and find against the respondent. Such a dynamic can only serve further to impede the efficient resolution of disciplinary proceedings.

as acting precipitously, can lessen confidence in the discipline system. The Board should not take that path absent clear direction from the Court that it do so.

B. Respondent Committed Reckless Misappropriation.

The Court remanded this case to the Board because

> a serious question exists on the face of the record whether respondent acted negligently, or instead recklessly, when she continued to take funds from the estate after having been advised by court officials that she needed approval from the Court and after the Probate Court admonished her not to expend any funds without prior approval.

In re Harris-Lindsey, 19 A.3d 784, 784-85 (D.C. 2011). The Board was charged with answering that question after "the presentation of evidence in a contested proceeding." *Id.* at 785.

The Hearing Committee found that Respondent committed three misappropriations in violation of Rule 1.15(a), one of which was at least reckless. I agree.

1. Respondent's 1995 and 1996 Misappropriations Were Negligent.

Respondent withdrew $1,650 from the estate account on December 27, 1995. She made a second withdrawal of $1,400 on February 27, 1996. Both withdrawals constituted payment for legal services Respondent rendered in setting up the estate. The withdrawals were made with her client's permission but without court approval. FF 11-12. Respondent, who was utterly inexperienced in probate matters, had made the payments after she sought out and followed what she understood to have been the advice of a Probate Division employee.

After Respondent took her second legal fee payout, she spoke with another Probate Division employee who told her that court approval was required before she could properly do so. FF 17; Stip. ¶ 8.

On March 20, 1997, Respondent filed an accounting and reported her two legal fee payments. *See* BX 1A at 60. Respondent explained that she "erroneous[ly] withdrew attorney fees without the court's prior approval" because she was "unaware that said fees required court approval." FF 17; BX 1A at 58. She further stated that "[u]pon being advised that Court approval was required, [she] reimbursed the Estate account" the full amount that she had withdrawn.[3] FF 18. That latter statement, however, was not entirely accurate. Respondent did deposit a reimbursement check on March 21, 1997, but it was dishonored. Respondent did not actually repay the estate until three weeks later, on April 17, 1997. FF 19.

The Hearing Committee found that Respondent's 1995 and 1996 withdrawals were negligent. It concluded that, at the time she made the withdrawals, Respondent sincerely believed that attorney's fees were administrative expenses of the estate, the payment of which did not require prior court approval. FF 10, 17; HC Rpt. at 21. The Hearing Committee found that Respondent based her misunderstanding upon her interpretation of statements initially made to her by staff in the Probate Division. FF 10-12, 17.

[3] Though phrased in the past tense, the statement was anticipatory, indicating that it was to occur on March 21—the day *after* the accounting was prepared. BX 1A at 58, 63.

Respondent's first two withdrawals thus met the "distinguishing characteristic of . . . [misappropriation] cases involving simple negligence (as opposed to intentional misappropriation)"; that is, she was "acting pursuant to a truly held, albeit inaccurate, understanding of [her] right to withdraw the funds . . . ." HC Rpt. at 20-21 (quoting *In re Pierson*, 690 A.2d 941, 949 (D.C. 1997) (citations omitted)).

I agree with the Hearing Committee's conclusion. *See Fair*, 780 A.2d at 1112 (misappropriation is negligent where "the attorney should have known, but did not in fact know, of the need for authorization") (citation omitted); *Ray*, 675 A.2d at 1388 (finding negligent misappropriation where the attorney was unaware that he could not legally accept estate checks).

2. Respondent's 1999 Misappropriation was Reckless.

The "central issue" in determining the character of a misappropriation is how the respondent handled entrusted funds, that is, "whether in a way that suggests the unauthorized use was inadvertent . . . or in a way that reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his behavior for the security of the funds." *In re Anderson*, 778 A.2d 330, 339 (D.C. 2001) ("*Anderson I*"). Engaging "in a pattern or course of conduct demonstrating an unacceptable disregard for the welfare of the entrusted funds" is sufficient to prove recklessness. *Id*. at 339; *see also In re Hines*, 482 A.2d 378, 380 (D.C. 1984) ("reckless disregard" for the status of an account). Where a respondent "willfully blinded herself" to circumstances suggesting misappropriation, the Court of Appeals had "no difficulty sustaining [a] determination of recklessness." *In re Carlson*, 802

A.2d 341, 349 (D.C. 2002) (citation omitted). Put another way, "recklessness is a 'state of mind in which a person does not care about the consequences of his or her action.'" *Anderson I*, 778 A.2d at 338 (quoting *Black's Law Dictionary* 1277 (7th ed. 1999)).

To evaluate Respondent's pattern of conduct with respect to estate funds, one must necessarily look to her specific understanding as to the propriety of her fee payments, and her general approach to the handling of funds before and after she made her third legal fee payment in 1999. Those assessments reveal that Respondent knew that prior court approval was required, but consistently acted in a manner reflecting an indifference to the welfare of estate funds. She therefore acted recklessly.

i. Respondent's State of Mind

First, of course, Respondent's 1999 misappropriation occurred after she had already twice misappropriated funds in 1995 and 1996, had been admonished by court staff for doing so, had acknowledged her improprieties, and had refunded her legal fees (albeit with a check that initially bounced). She quite clearly understood, no later than the March 1997 accounting, that payment of "attorney fees . . . required court approval." BX 1A at 58, 60.

Her understanding was later emphatically confirmed by the Probate Court.

In February 1997, the guardian had withdrawn $800 from the estate without court authorization. Although the record does not show if Respondent contemporaneously approved it, FF 15, she recognized it as inappropriate when she

reported in a December 1997 accounting that the funds had been "disbursed prior to Court approval, guardian seeking ratification of the above disbursements." FF 20. The Probate Court approved the expenditure, but its March 1998 order (served on Respondent) contained an explicit admonition:

> [I]t is, by the Court, this 10th day of March 1998 . . . ORDERED, that [the guardian] is *admonished not to expend estate assets without prior court authorization*.

BX 1A at 25 (emphasis added); FF 21; Tr. 52.

Disregarding both the Probate Court's order and the probate staff's earlier rebuke, Respondent—again without court approval—paid herself $2,250 legal fees from the estate account on October 1, 1999. FF 24.

ii. Respondent's Pattern of Indifferent Conduct

Respondent did not report her October 1, 1999 fee payment in the accounting she filed seven weeks later, on November 23, 1999. *See* BX 3 at 222. Rather, she waited more than eighteen months, until June 21, 2001, to disclose it. FF 26; HC Rpt. at 22.

The Probate Court reacted on October 24, 2001, ordering Respondent to redeposit the money within 30 days.[4] FF 28. The court later extended that deadline to December 7, 2001, and directed Respondent to file a Memorandum explaining her withdrawal. FF 29. Respondent filed a "Memorandum of Explanation," along with a fee application, on November 26, 2001. FF 30.

[4] The Register of Wills had advised the Probate Court that Respondent accepted fees without prior court authorization and suggested that the court direct Respondent to re-deposit the fee and explain why the matter should not be referred to Disciplinary Counsel. BX 3 at 235.

Respondent's attempts to justify the 1999 payment varied, and troublingly so. She misleadingly characterized it as an assignment of the guardian's commissions (FF 26, 34; BX 1A at 150; Tr. 31 ("[i]t's commission, it's not really attorney's fees")), or as "commission and fees," or as "commission in lieu of the attorney's fees" (FF 27, 34; Tr. 30; BX 1A at 28). Her "commissions" characterization was not true, and the Hearing Committee properly rejected it. The withdrawal "was not an assignment of the guardian's commission but a way of paying Respondent for legal work." HC Rpt. at 22.[5]

Additionally, Respondent failed to redeposit the $2,250 by December 7, 2001, as the court had ordered. FF 36. Instead, she sought ratification of the payment and approval of an additional $225 in legal fees. FF 35; BX 3 at 239. Because Respondent failed timely to repay the funds, the Register of Wills once again transmitted the record to the court for its consideration. FF 36-37.

On June 19, 2002, the court issued another order. FF 38. It found Respondent's explanation of the 1999 payment "purely disingenuous," denied her request for fees, and, noting that she "ignored the mandate to redeposit the funds," reiterated that Respondent was "still obligated to return the funds to the estate":

> [T]his was the second time [Respondent] withdrew fees from the Estate's account without receiving prior court approval. . . . The court advised [Respondent] that court approval was required before withdrawing money from the Estate's account. [Respondent] subsequently reimbursed the account for the entire amount stating that

[5] At the disciplinary hearing, Respondent sought to justify the 1999 legal fee payment by differentiating it from the earlier two. Tr. 37-38. The Hearing Committee rejected the distinction as "a post hoc rationalization," and did not credit it. HC Rpt. at 23.

> she was unaware of this procedure. . . . Ignorance of the law and the rules should never be an excuse for a member of the Bar. Nonetheless, for a first time offence the court would reasonably show some leniency. However, when the same mistake occurs twice and ignorance is the same excuse, then [Respondent's] Explanation to the Court is purely disingenuous. In effect the infraction is compounded because now we have a wrongful acceptance of fees and a glaring inaccuracy in the Memorandum of Explanation. Furthermore, [Respondent] has ignored the mandate to redeposit the funds. … [Respondent] is still obligated to return the funds to the estate and the matter will be referred to Bar Counsel.

BX 1 at 3-4.[6]

In January 2003, during the subsequent disciplinary investigation, Respondent told Disciplinary Counsel that she did not contemporaneously know of the court's June 2002 order because her mail had not been forwarded to her. FF 41-42. She represented that, although she had been unable to repay the estate when the order first issued, by January 2003 she was employed and would "redeposit the funds" within thirty days. BX 1A at 194. But she once again did not timely repay the funds, nor did she seek relief from the court's deadline. She finally repaid the estate on December 8, 2003, more than four years after she had withdrawn estate funds, more than two years after the court-ordered reimbursement deadline, and eleven months after she committed to repay the funds within thirty days. FF 43.

[6] The court also denied Respondent's fee request, concluding that only 1.75 of the 25 hours for which she sought compensation were compensable as attorney's fees. FF 38. The remaining time was spent on services that were either non-compensable by a fee or compensable as ordinary commissions to the guardian. *Id.* Even then, the guardian's commissions would not have exceeded $100, far less than the $2,250 Respondent withdrew. *Id.*

Respondent's apparent indifference to the repayment order was also consistent with her conduct more generally. Although she "didn't really know what [she] was doing" (Tr. 18, 25, 28), even after committing two misappropriations, Respondent never sought the advice of a knowledgeable probate attorney, never read the appropriate court rules, and never familiarized herself with the law. Tr. 51, 58. She did not file required accountings in a timely or complete manner, forcing the court to send her repeated delinquency notices and to schedule multiple hearings in connection with missed accounting deadlines. FF 49. She failed to maintain records adequate to track her handling of funds. *See* Part C, *infra*. She failed to ensure filing of the estate's 2000 tax return, subjecting it to potential tax liabilities. FF 49. She inconsistently characterized her client's disbursements in filings with the court.[7] And, despite having consulted Probate Division staff in the past, she failed to consult with them again *before* making her 1999 payment. "Respondent did not take any number of steps to inform herself, even after a number of times when she was clearly shown the perils of proceeding without understanding the Rules of the Probate Court." HC Rpt. at 24.

In *In re Utley*, 698 A.2d 446 (D.C. 1997), the Court found reckless misappropriation because the respondent made a withdrawal of estate funds without

[7] In the summer of 1996, with Respondent's approval but without court permission, the guardian made two withdrawals from the estate account. FF 13-14. In a subsequent accounting Respondent characterized one withdrawal as a payment for "moving expenses and child's furniture." In a simultaneously filed Petition seeking the court's retroactive approval of the withdrawal, she described it as a payment of "rent and . . . security deposit." FF 13. *Compare* BX 1A at 61, *with* BX 1A at 13-14.

court approval after being advised by the Probate Division that two prior withdrawals were improper. "[I]n light of this third act of payment despite court requests to return the earlier two unapproved payments, we cannot characterize these deliberate acts as the product of simple negligence." *Id.* at 450.

That is precisely what Respondent did in 1999, but here there was more. Respondent's disregard of the mandate of the court and its personnel was accompanied by a broader pattern of indifference that continued after the payment when she mischaracterized the withdrawal as a commission and deferred its repayment—an "aggravating factor of sufficient magnitude to compel [the conclusion] that she was reckless." *See id.*; *see also In re Smith*, 70 A.3d 1213, 1217 (D.C. 2013) (seven-month delay in returning funds constitutes a "'conscious indifference to . . . the security of the funds'" or reckless misappropriation); *In re Cloud*, 939 A.2d 653, 661 (D.C. 2008) ("unjustifiabl[e] refus[al] to disgorge the fees with anything like reasonable promptness after [she] learned that [she] was not entitled to keep them . . . supports [a] finding of recklessness and . . . disbarment").

Respondent says she acted no more than negligently because she had engaged in an "elaborate rationalization" to deny reality. R Br. at 6. That is a wholly unacceptable excuse for the pervasive detachment evidenced here. *See In re Pels*, 653 A.2d 388, 397 (D.C. 1995) ("reject[ing] respondent's argument that his objective good faith—his reasonable but erroneous belief that he was entitled to the balance of the funds—reduced his culpability to simple negligence" where there was

extensive evidence of recklessness). Respondent acted recklessly at the time she misappropriated funds in 1999.

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

Under Rule 1.15(a) and D.C. Bar Rule XI, § 19(f), Respondent was obligated to maintain complete records of her handling of the estate's entrusted funds for at least five years.[8] In *In re Edwards*, 990 A.2d 501 (D.C. 2010) (per curiam), the Court of Appeals explained that "financial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" 990 A.2d at 522 (alteration in original) (quoting *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003)). 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. The records should "allow for a complete audit even if the attorney or client is not available." *Id*.

Here, Respondent concedes that she failed to maintain the necessary records. The Hearing Committee found as much, and a review of the record confirms that conclusion.

D. Sanction

Once misappropriation involving more than simple negligence has been established, the inquiry turns to whether sufficient mitigating factors rebut the

[8] Effective March l, 2016, Section 19(f) was deleted from D.C. Bar Rule XI as duplicative of the complete records requirement of Rule 1.15 of the D.C. Rules of Professional Conduct. Order, No. M-252-15 (D.C. Feb. 4, 2016).

presumption of disbarment. *Anderson I*, 778 A.2d at 337-38 (citing *Addams*, 579 A.2d at 191).

Respondent argues in mitigation that she took on the probate representation solely to assist a family member; had never before practiced in the probate division; reported each payment in required accountings; has no other disciplinary matters; cooperated with Disciplinary Counsel; admitted her misconduct; and agreed to a negotiated discipline. Since the events at issue, she has been employed as a lawyer with integrity and a distinguished record of service to the District of Columbia's public school system. *See* RX 1 (Letter from James J. Sandman, Esquire, to the Board, July 29, 2015).

All of these mitigating factors, though legitimate, are "of the usual sort," and do not constitute the "extraordinary circumstances" sufficient to overcome the presumption of disbarment. *Addams*, 579 A.2d at 191, 193; *see also In re Hewett*, 11 A.3d 279, 286-87 (D.C. 2011) (listing the "usual" mitigating factors); *In re Pierson*, 690 A.2d 941, 948-951 (D.C. 1997) (same). Other than cases involving "*Kersey* mitigation," *see In re Kersey*, 520 A.2d 321 (D.C. 1987), which is inapplicable here, the Court has found "extraordinary circumstances" warranting a departure from the presumption of disbarment only once, in *Hewett*. There, where the respondent withdrew funds to pay his legal fees without first obtaining court approval. *Hewitt*, 11 A.3d at 282. The Court, however, emphasized that the respondent's conduct was "motivated solely by a desire to protect his ward's interests" when it distinguished *Hewett* from cases where disbarment has been

imposed. *Id.* at 288-89. Here, there is no doubt that Respondent's misappropriations were for her benefit, not the minor's, and *Hewett* does not apply.

In urging a lesser sanction, three of my colleagues cite the lengthy delay in this case, which the Hearing Committee characterized as "[b]y any measure, . . . significant and troubling." HC Rpt. at 30; *see* Separate Statement of Mr. Carter at 20-21. Delay alone, however, will not result in the dismissal of misconduct charges, but delay coupled with prejudice that results in a due process violation warrants a dismissal. *Saint-Louis*, 147 A.3d at 1148 (citing *In re Williams*, 513 A.2d 793, 796-97 (D.C. 1986) (per curiam)). Even absent a due process violation, extensive delay can result in a mitigation of sanction. *In re Fowler*, 642 A.2d 1327, 1331 (D.C. 1994). In finding that delay did not justify a lesser sanction in *Saint-Louis*, the Court noted that the Hearing Committee said that "[t]here were no credibility determinations that the Committee has made that turn on a poor memory due to the passage of time." *Saint-Louis*, 147 A.3d at 1149.

In this case, the Hearing Committee found that Respondent's recollection of events had been diminished by the passage of time, but concluded that it was able to fill in Respondent's memory gaps by relying upon the contemporaneous documentary evidence, which Respondent authenticated as her "understanding at the time." FF 48. In effect, that documentation served as Respondent's past recollection recorded and amply supported the Hearing Committee's fact findings. *Id.* More significantly, however, Respondent did not claim to the Hearing Committee that the passage of time in any way prejudiced her, and made no such contention to the

Board. *See* R PFF at 8-9. As a consequence, the record does not show the reasons for the delay or whether Respondent acceded to it, and there is no factual basis upon which to discern any prejudice to Respondent. Once again, Respondent has waived any argument in that regard. *See Cloud*, 939 A.2d at 662 ("when an attorney charged with a violation 'had a fair opportunity to raise . . . [an issue] before the Hearing Committee and the Board, and failed to take advantage of it, he has waived his right to have that issue resolved in this court'" (citing *In re James,* 452 A.2d 163, 169 (D.C. 1982))).

Finally, three of my colleagues cite mitigating factors as warranting a sanction less than disbarment. *See* Separate Statement of Mr. Carter at 17-22. However sympathetic that argument may be, it is unavailable to us. The *Addams* court:

> weighed the concern of seemingly unjust application of a categorical sanction to particular cases against "[its] concern . . . that there not be an erosion of public confidence in the integrity of the bar. Simply put, where client funds are involved, a more stringent rule is appropriate." [citation omitted]. Whether the paramount goal of deterrence that drove the decision in *Addams* can be achieved by lesser, more case-individual sanctions for misappropriation is an issue the full court is always free to revisit—though with the attendant risk of loss of predictability in [its] exercise of this most critical feature of our regulatory supervision.

In re Bach, 966 A.2d 350, 352-53 (D.C. 2009) (quoting *Pels*, 653 A.2d at 398). As was the case with the Court in *Pels*, the Board's "obligation in this case . . . is clear." *Pels*, 653 A.2d at 398. The Hearing Committee properly determined that there are insufficient mitigating circumstances to overcome the presumption of disbarment under *Addams*.

CONCLUSION

For the foregoing reasons, I believe that Respondent committed reckless misappropriation in violation of Rule 1.15(a) and failed to maintain complete records of entrusted funds in violation of Rule 1.15(a) and D.C. Bar Rule XI, § 19(f). Pursuant to the strict mandate of *Addams*, 579 A.2d at 191, she must be disbarred.

By: /RCB/
Robert C. Bernius
Chair

Dated: July 28, 2017

Ms. Smith concurs with this Separate Statement.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
QUINNE HARRIS-LINDSEY, ESQUIRE,	:	
	:	Board Docket No. 15-BD-042
Respondent.	:	Bar Docket No. 2002-D384
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Membership No. 451238)	:	

SEPARATE STATEMENT OF JASON E. CARTER

The posture of this matter is unusual for an adversarial proceeding. Both Disciplinary Counsel and Respondent argue that Respondent acted negligently in misappropriating the funds of her client, and thereby deserves a six-month suspension. I note at the onset that I join the majority members of the Board who believe that Disciplinary Counsel has not proven a Rule 1.15(a) misappropriation where Respondent did not have exclusive control of entrusted funds and acted with her client's consent and direction.

I write separately, however, to reply to Mr. Bernius's argument that Respondent should be disbarred for reckless misappropriation. If Respondent has waived the issue of whether she could have misappropriated funds from the joint checking account, *see* Separate Statement of Mr. Bernius at 1-5, I believe that the 1999 payment for $2,250 was negligent, or, in the alternative, that exceptional mitigating circumstances (not of the "usual sort") exist in this case, thereby

warranting a lesser sanction than disbarment. In short, my reasons for this conclusion are as follows: First, either the proven facts demonstrate that Respondent acted negligently, or the evidence of those facts is insufficient to demonstrate that she acted in a more culpable manner. *See In re Fair*, 780 A.2d 1106, 1113-14 (D.C. 2001). Second, even if one takes the view that Respondent acted in a reckless manner, this case should not warrant disbarment. *Compare In re Hewett*, 11 A.3d 279, 290 (D.C. 2011) (extraordinary mitigating circumstances so that sanction of suspension is consistent with "preservation of public confidence in the legal profession"), *with In re Addams*, 579 A.2d 190, 198-99 (D.C. 1990) (en banc) (disbarment warranted for taking escrow funds without client's permission and aggravating factors of false accountings and dishonesty).

A. Misappropriation: Exclusive Control of Entrusted Funds

The Office of Disciplinary Counsel, which conducted a thorough investigation of the case, determined that the guardian and Respondent were joint signatories on the estate accounts, with neither having exclusive control over the accounts. The parties stipulated that there were two signatories to each of the estate accounts. Stip. ¶¶ 5, 11. The stipulation did not clarify whether a check could issue from the accounts only if it had both the guardian's and Respondent's signatures. However, in its "review of the evidence," the Hearing Committee found:

> Respondent's *and* Ms. Fulwood's [the guardian's] signatures *were required* for withdrawals from *both* accounts. BX 1A at 50 ("Savings Certificate" for the 592 account), 71 (signature card for the 231 account). The 1999 payment—which serves as the basis for the finding

> of reckless misappropriation—was drawn on the 231 account, and was signed by Respondent and her client. *See* FF 24, BX 1[A] at 185.

HC Rpt. at 26, n.10 (emphasis added).

Misappropriation is any unauthorized use of client or third party funds "entrusted to" the lawyer. *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983). The issue presented here is whether funds must be within a lawyer's exclusive control to be considered "entrusted." Although the Court of Appeals has not directly addressed this issue, the Board previously concluded that funds that are not within a lawyer's exclusive control are not "entrusted" funds. Specifically, in *In re Travers*, 764 A.2d 242 (D.C. 2000), the Board and the Court were presented with a matter in which the attorney made withdrawals from an estate account requiring the approval of both the attorney and the personal representative of the estate, and in which the attorney's fees were taken with the personal representative's, but not the court's, approval. The Board found that the funds were not entrusted to the attorney because he lacked exclusive control over them. *In re Travers*, Bar Docket No. 463-93, at 9-11 (BPR Jan. 24, 1997) ("Where, as in this case, a respondent cannot issue a check without the concurrence of the personal representative, misappropriation cannot occur, because estate assets are not entrusted to the respondent.").[1] The Court of Appeals

[1] The *Travers* Board elaborated:

> As the Court explained in [*In re*] *Haar*, [698 A.2d 412 (D.C. 1997)], it has imposed severe sanctions for misappropriation in order to keep funds entrusted to an attorney "as safe as they would be if the client herself were to continue to hold them." [698 A.2d at 425.] Because the release of estate funds required the concurrence of the personal representative, and that she co-sign checks written on the estate account,

recognized the entrustment issue, but explicitly did not decide it when it adopted the Board's recommended sanction of a ninety-day suspension. *Travers*, 764 A.2d at 250 ("we leave for resolution in some future case" the question of whether a misappropriation of a client's entrusted funds requires that the attorney "have exclusive control of client funds, as opposed to joint control").

In the instant case, Respondent and her client were joint signatories to the estate account. Disciplinary Counsel concedes that "the record reflects that . . . neither Respondent nor her client had exclusive control of the funds." Bar Counsel's Proposed Findings of Fact ("ODC PFF") at 27 n.14. It is also undisputed that Respondent's client *consented* to all of Respondent's withdrawals, signing the 1999 check made payable to Respondent. FF 24; *cf. In re Evan*s, 578 A.2d 1141, 1142 (D.C. 1990) (per curiam) (consenting heirs authorized the extra fee but the non-consenting heir had not, so that taking of the latter's share who had not consented, resulted in a misappropriation of funds).

Although both Disciplinary Counsel and Respondent have conceded that Respondent engaged in misappropriation, her ability to have done so is not proved. Absent a decision by the Court of Appeals that establishes the existence of

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> those funds were "as safe as they would be if the client herself were to continue to hold them." As a result, estate funds were not "entrusted" to Respondent within the meaning of the rules prohibiting misappropriation.

Brief of the Board on Professional Responsibility at 10-11, *In re Travers*, DCCA App. No. 97-BG-114 (filed Sept. 10, 1997).

"entrusted" funds in this context, I am unable to recommend a finding that clear and convincing evidence exists to prove that Respondent engaged in misappropriation.

Without question, Respondent and Disciplinary Counsel are in an awkward position to argue *Travers*, due to their having earlier stipulated to negligent misappropriations in the negotiated discipline process.[2] However, the parties cannot put aside neatly the legal issue as to whether Respondent had exclusive control of entrusted funds. *See Mims v. Mims*, 635 A.2d 320, 322 (D.C. 1993) (Court of Appeals is not bound by stipulations on questions of law); *Weston v. Washington Metro. Area Transit Auth.*, 78 F.3d 682, 685 (D.C. Cir. 1996) ("parties may enter into stipulations of fact [but] . . . 'may not stipulate to the legal conclusions to be reached by the court'") (citation omitted). Clearly, the Hearing Committee expected this Board to address the issue: "If Disciplinary Counsel is correct as a factual matter, under *Travers*, Respondent would not have committed misappropriation. . . . [T]he Hearing Committee is not in a position to decide the question and leaves it for the Board's consideration, with the benefit of the parties' input." HC Rpt. at 26-27.

Accordingly, I join the reasoning of the majority Board Report. Lack of exclusive control on the part of Respondent leads to the conclusion that the funds were not "entrusted to" her and that she, therefore, could not have engaged in misappropriation. Because "[t]he signatures of both . . . were necessary under the

[2] *See* Board Rule 17.10 ("Admissions made by a respondent in the petition for negotiated discipline, the accompanying affidavit, or the limited hearing may not be used as evidence against respondent in a contested disciplinary proceeding under chapter 7 of these rules, except for purposes of impeachment at any subsequent hearing in a contested matter.").

bank's terms for the account," estate assets were not "entrusted to Respondent." *Travers*, Bar Docket No. 463-93, at 11.

B. Negligence vs. Recklessness

If, however, the Court finds that despite these facts, Respondent could have misappropriated her client's funds, I believe that either she acted negligently or that Disciplinary Counsel failed to prove otherwise by clear and convincing evidence. I respectfully disagree with Mr. Bernius's Separate Statement, specifically in its finding that the available evidence demonstrates clearly and convincingly that Respondent committed reckless misappropriation and, accordingly, must be disbarred. I urge the Court to end the nightmare scenario faced by Respondent—disbarment over an error that she made eighteen years ago, acting with the consent of her client, all while behaving in an honest manner and with good motivation in representing a family member.

In 1995 and 1996, Respondent and her client wrote two checks for payment of Respondent's fees for work completed in establishing the guardianship estate. FF 11-12. At the time, Respondent, a new lawyer (having only been admitted to the Pennsylvania Bar by examination on November 30, 1993), was not yet a member of the District of Columbia Bar, so she represented the estate *pro hac vice*.[3] The total

[3] Respondent was employed as a paralegal at the time. A partner at her personal injury firm entered his appearance but had no prior experience in probate court. *See* Tr. 16-17. As recalled by Respondent,

> And to be honest with you, it's about 20 years ago so I would be careful about telling you what I remember, telling you what I—to the extent, I know I spoke to

withdrawn was returned to the estate by Respondent when she learned from court staff that the payment required prior court approval. FF 19. Later, in a separate March 1998 court order, the Probate Court approved a payment of $800 to Respondent's cousin for expenses undertaken for the minor and the estate, but, at the same time, admonished the cousin not to expend estate assets without prior court authorization. FF 21. In October 1999, Respondent and the cousin co-signed a check for Respondent's attorney fees of $2,250 for Respondent's completed work in administering the estate for the prior five-year period. FF 24, 26. In June 2001, Respondent disclosed this withdrawal to the Probate Court when she filed the Sixth Accounting, and in November 2001, Respondent filed a request for ratification of the fees along with the Memorandum of Explanation that had been requested by the Probate Court. FF 26, 29, 30.[4] Respondent argues that there is a distinction between

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> [the partner] and he indicated that that wasn't really what we did, but if he would basically sign on/take on the case, but it would be my first case. And this was around the time I had just . . . passed the bar, . . . I was kind of hesitant about it because I knew that this is not what we did. The firm was a PI firm, so we did personal injury accident cases. But I wanted to help my cousin out; there was some hesitation with that, especially within the family about not doing it. But like I said, it was one of my favorite cousins so I decided I would try to help her out.

Id.

[4] On October 24, 2001, the Probate Court ordered Respondent to redeposit the $2,250 within thirty days, but, on November 19, 2001 (*before* the thirty days had run out), the court extended the time to redeposit to December 7, 2001, and asked Respondent to file a Memorandum of Explanation. The Hearing Committee found that Respondent credibly testified that she understood that the court was giving her permission to file a petition for fees with the Memorandum. FF 29. On November 26, 2001 (*before* the December 7, 2001 deadline had passed), Respondent filed a "Request for Compensation of Service (Ratification)," *see* FF 30, with the Memorandum of Explanation which stated that the $2,250 represented "fees for services rendered throughout the five years of the estate." FF 31. On June 19, 2002, the court denied the petition, but Respondent did not learn of the

the first fee payments and the latter fee payment, and now, all these years later, the Board and the Court must make sense of it all.

Following a contested hearing in July 2015 that had to assess Respondent's state of mind in 1999, the Hearing Committee credited Respondent's claim that so many years ago she was advised by someone on staff at the probate court that "administrative expenses" could be paid without court approval. FF 32. In reporting to the Probate Court her taking of fees, Respondent characterized them as "administrative expenses." *Id.* Although advised by court staff in 1997 and aware of the court's 1998 order admonishing her cousin not to withdraw expenses without prior court approval, Respondent explains that she viewed the withdrawal of funds for the payment of fees in administering an *established* estate to be "administrative expenses" that did not require pre-approval by the Probate Court (unlike the withdrawal of funds for the payment of fees *to establish* the estate). FF 32-33, 48. All these years later, the Hearing Committee, on what I believe was insufficient evidence adduced by Disciplinary Counsel, rejected this as a "post hoc rationalization." HC Rpt. at 23.

To be sure, Respondent argues a fine distinction. Respondent paid herself attorney's fees for her work in establishing the guardianship estate account and was subsequently advised by a court employee that the fees required court approval. She followed the court employee's advice and filed the Second Accounting, which noted

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denial until a few months later, on September 16, 2002, when informed by Disciplinary Counsel. FF 42.

the erroneous payment and the necessity of reimbursing the estate, which Respondent did. FF 17, 18. A few years later, Respondent and her client signed a check for payment for work completed in the administration of the estate for five years. She reported the payment in the Sixth Accounting and did not hide her conduct. FF 26. Respondent argues that she made a distinction between the earlier payments and the latter payment, and that any error on her part was due to her negligence.

All these years later, I am not able to say that Respondent's stated belief in this pre-estate/estate distinction is not accurate. The Hearing Committee found it "plausible" that she held this belief, and, in light of the distinction between the status of the estate at the times of the payments, I suggest that she made a second good-faith mistake and that any error was negligent and not reckless. Indeed, the Hearing Committee's finding of recklessness comes over the objection of Disciplinary Counsel, who thoroughly investigated this matter at a time much closer to the occurrence of the events. Although findings of fact are within the purview of the Hearing Committee and the Board, after so many years, I accord significant weight to Disciplinary Counsel's determination.

Moreover, the Hearing Committee itself expresses doubt as to its findings. It accepted her "mistaken *belief* [that her 1999 fees] were administrative expenses." HC Rpt. at 23 (emphasis added). The Hearing Committee further found that "Respondent's explanation is *not implausible*" and "that she was trying to reconstruct facts about what happened many years ago," but that her recollection

"was *likely* wrong." *Id*. (emphases added). Mr. Bernius also acknowledges how the Hearing Committee found Respondent to be honest but mistaken. *See* Separate Statement of Mr. Bernius at 11. Such findings, as filled with doubt as they are, cannot amount to clear and convincing evidence of wrongdoing at the level of being reckless.

I disagree with Mr. Bernius's argument that the facts of this case are closely analogous to those in *In re Utley*, 698 A.2d 446 (D.C. 1997), in which the Court found an *experienced* attorney to have acted recklessly in taking estate funds in large part because of his defiant delay in repayment. Separate Statement of Mr. Bernius at 17-18. We cannot apply such a general factual overview to this case. As to the delay in repaying the 1999 withdrawal, the Hearing Committee found that it was unclear whether Respondent did not reimburse the estate sooner "because of a mistaken belief that her Request for Compensation had stayed the court's order, or because she was financially unable to do so by that time." FF 36; *see also* Oral Argument Tr. 11-12 (Respondent counsel's explaining: "Disciplinary Counsel agreed with us that she repaid the funds as soon as she was able to")[5]; ODC Br. at 10 ("as she told Disciplinary Counsel in 2003, she could not obtain the funds [for an earlier repayment] because she had been through 'a long period of unemployment'").

[5] "Oral Argument Tr." refers to the transcribed argument before the Board on October 6, 2016. The attorneys presenting oral argument were Abraham Blitzer, Esquire, Counsel for Respondent and Wallace Eugene Shipp, Jr., Esquire, Disciplinary Counsel, for the Office of Disciplinary Counsel.

In fact, the Hearing Committee has not suggested anything untoward in the manner in which the $2,250 was later reimbursed to the estate. *See* HC Rpt. at 24-27 (analysis without any suggestion of undue delay in repayment). As the Court of Appeals noted in *Fair*, 780 A.2d at 1111, we should not "put excessive weight on *Utley*" when a respondent is not recalcitrant or defiant.

The Respondent in this case offered a plausible explanation for her misunderstanding and honest belief (again, the Hearing Committee found that it was "not implausible"). And, since the ruling in *Utley*, the Court of Appeals has further defined the state of mind of a person who is deemed to be reckless. In determining the recklessness of misappropriation, the Court looks to whether the attorney showed a conscious indifference for the security of the funds. *In re Anderson*, 778 A.2d 330, 339 (D.C. 2001). "[R]ecklessness is a 'state of mind in which a person does not care about the consequences of his or her action.'" *Id.* at 338 (quoting *Black's Law Dictionary* 1277 (7th ed. 1999)). And where an attorney "*should* have known, but did not in fact know" of the need for prior court approval before using the estate funds, the Court has recognized the negligent nature of the misappropriation. *See Fair*, 780 A.2d at 1112 (emphasis added); *see also In re Berryman*, 764 A.2d 760, 770-72 (D.C. 2000) (examining negligent misappropriation cases decided after *Addams* that resulted in sanction of suspension instead of disbarment).

Mr. Bernius also argues that Respondent "consistently acted" indifferently to the welfare of the estate. *See* Separate Statement of Mr. Bernius at 13. I disagree. Respondent did not consciously disregard the risk that the funds would be used for

unauthorized purposes. She had the consent and participation of the cousin, the Estate's guardian, regarding the payment of fees. *See Berryman*, 764 A.2d at 773 ("'Respondent's actions in obtaining the consents of the heirs and filing those consents with the Court, we believe support a finding that he was not reckless . . . .'" (quoting Hearing Committee Report in *Travers*)). And she so informed the Probate Court, ultimately repaying the fees when she was able to do so. (At this point, the estate was reimbursed more than thirteen years ago.) This does not suggest an unacceptable disregard for the welfare of the funds, but more likely a mistake as to how she should have handled them.

Moreover, as explained by the Court in *In re Edwards*, 808 A.2d 476 (D.C. 2002) (remanding to Board where record insufficient to establish reckless misappropriation), recklessness proven through a Respondent's "pattern and course of conduct" necessitates a more extensive record than misappropriation and poor recordkeeping:

> Although [Respondent] did engage in some instances of commingling, and although her record-keeping was slipshod, to say the least, we do not have before us sufficient proof of a *pattern* of misconduct that rises to a level requiring the sanction of disbarment. "[O]ur decisions, by clear implication, have rejected the proposition that recklessness can be shown by inadequate record-keeping alone combined with commingling and misappropriation." *In re Anderson*, 778 A.2d at 340 (citing *In re Reed*, 679 A.2d 506, 509 (D.C. 1996), and *In re Choroszej*, 624 A.2d 434, 436 (D.C. 1992)).

808 A.2d at 485 (emphasis in original).

As noted, the difference between the Respondent's distinction between the pre-estate and post-estate handling of funds is a fine one, but it nevertheless is a

distinction worthy of consideration, especially in light of the Hearing Committee's finding that Respondent was both truthful and cooperative. *See* FF 48 ("She was forthright in her explanations of her conduct as far as she remembered, clear on the gaps in her memory, and did not appear to us to be evasive in any way."). Indeed, the Hearing Committee recognized that, in taking the 1999 payment, "Respondent mistakenly distinguished administrative expenses from expenditures for the maintenance and care of the minor, which she understood required prior court approval." FF 32.[6] As the Court has noted, the "distinguishing characteristic of our cases involving simple negligence (as opposed to intentional misappropriation) is that the attorneys were acting 'pursuant to a truly held, albeit inaccurate, understanding' of [their] right to withdraw the funds . . . ." *In re Pierson*, 690 A.2d 941, 949 (D.C. 1997) (citations omitted).

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[6] In its Brief of Exceptions, Disciplinary Counsel cites to the supplemented record (BX 3 at 215-220, 269-286, 271-74) to document the subsequent administrative expenses that did not require prior court approval:

> A review of the docket sheet in the guardianship matter reflects that . . . [a]fter Respondent left the case, no other requests for advance approval for any form of disbursement, other than attorneys' fees, occurred, even though thousands of dollars were expended . . . . During that time, neither Angela Fulwood [the guardian] nor successor counsel . . . requested prior court approval for more than *$11,000 in bond fees, bank costs, or tax payments* . . . .They simply disclosed the expenses as administrative expenditures in the 11th accounting. BX 3 at 271, 274.

ODC Br. at 11-12 (emphasis in original).

C. Sanction

1. An Informal Admonition is an Appropriate Sanction for the Single Proven Violation—the Recordkeeping Charge.

In determining the proper sanction to impose, the Court has considered the following factors: (1) seriousness of the misconduct; (2) prejudice, if any, to the client; (3) whether the conduct involves dishonesty and/or misrepresentation; (4) violations of any other disciplinary rules; (5) whether the attorney had a previous disciplinary history; (6) whether the attorney acknowledges the wrongful conduct; and (7) circumstances in mitigation and aggravation. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Vohra*, 68 A.3d 766, 771 (D.C. 2013).

We begin by pointing out that Mr. Bernius's portrayal of Respondent's remorse and reimbursement to the estate is quite different from that provided by Disciplinary Counsel at the hearing: "I want to be explicit on this record that the Respondent has been extremely cooperative with Bar Counsel and has always taken full responsibility for the conduct that she engaged in and was always very forthcoming." Tr. 67-68 (Assistant Disciplinary Counsel's statement at the contested hearing). From the onset, Disciplinary Counsel has, in fact, taken the consistent position that the timing of Respondent's repayment of the 1999 withdrawal was not

an aggravating factor, and it was satisfied that she repaid the estate when she was able to. *See* Oral Argument Tr. 11-12.[7]

The recordkeeping violation here was not severe. Respondent did forward to Disciplinary Counsel a significant volume of documents related to the account, but they were not complete as conceded by Respondent. In its briefing to the Board, Disciplinary Counsel adds, however, that "in her own filings, the actual documents show care being taken to explain and document the use of the money." ODC Br. at 18. The prejudice to Ms. Fulwood was not appreciable, and no allegation was made that Respondent had not protected Ms. Fulwood's interests when the representation ended or when Respondent forwarded records to successor counsel. A majority of the Board finds that no other rule violation has been proven.

In mitigation, Respondent has no prior discipline history, and her prior supervisor, James J. Sandman, Esquire, a former General Counsel of the D.C. public school system and former D.C. Bar President, has submitted a letter for the record that strongly commends both Respondent's legal work as a Managing Attorney General and her integrity as a lawyer. *See* Respondent's Exhibit ("RX") 1. Respondent was sincerely remorseful in the view of both the Hearing Committee and Disciplinary Counsel. Finally, the conduct did not involve dishonesty or

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[7] In their joint stipulations, the parties also asserted:

> Once Respondent obtained the funds, she reimbursed to the estate the $2,250 on December 8, 2003. Respondent did not receive any compensation in connection with her representation of the guardian, Ms. Fulwood.

Stip. ¶ 20.

misrepresentation, and the Hearing Committee found Respondent's testimony to be credible.

Accordingly, an informal admonition is the appropriate sanction for Respondent's violation of the recordkeeping rules. *See generally* Board Report at 40-41.

2. If the Court Finds a Misappropriation, Negligent or Reckless, the Typical Sanction Should Not Apply.

If the Court disagrees with the majority and determines that the *Travers* issue was waived, we believe that any brief suspension should be stayed in light of the age of this case and the harmlessness of the error.[8] Given that it was Respondent's single representation of a family member in Probate Court (in the past more than fifteen years), that Respondent now has worked as a managing attorney for the D.C. public school system since 2002, and that her former supervisor vouches for both her reputation for honesty and her lengthy successful tenure as a government attorney representing the public school system, *see* RX 1, we believe that the entire suspensory period should be stayed. *See, e.g.*, *In re Mance*, 869 A.2d 339, 342 (D.C. 2005) (per curiam) (finding that in staying the entire suspensory period, the Board properly "invokes the principle that a sanction should be designed to protect the courts, the public, and the legal profession 'not only' from a respondent's

[8] Although Disciplinary Counsel noted several mitigating factors, only Respondent recommended that the entire six-month suspension be stayed with the condition that Respondent (1) attend a general continuing legal education class and provide proof of attendance to Disciplinary Counsel; and (2) consult with the D.C. Bar's Practice Management Advisory Service in the event that she decides to enter private practice. R Br. at 10.

misconduct but also from 'any unnecessary damage that may be caused by removing an otherwise valuable member of the bar from practice'").

In addition, even if the Court were to decide Respondent has recklessly misappropriated the funds in question, we recommend that she not be disbarred on the unique facts of this case. The presumptive sanction of disbarment is the appropriate sanction for reckless misappropriation, absent extenuating circumstances. *Addams*, 579 A.2d at 193. Such extenuating circumstances exist here for the following reasons.

In its recommendation for sanction in its Proposed Findings of Fact and Recommendations, Disciplinary Counsel noted the following unique mitigating factors: "Respondent (1) was not a court-appointed fiduciary who represented that she was familiar with the probate court's rules; (2) reluctantly undertook the matter at the behest of a family member; (3) had never practiced before the Probate Division; (4) did not have exclusive control of the funds in question; and (5) withdrew the funds with the complete and contemporaneous approval—even urging—of her client, Ms. Fulwood." ODC PFF at 27-28 & n.14 (footnotes omitted) (citing *Travers*, 764 A.2d at 249-250 and *In re Mudd*, Bar Docket No. 472-92 (BPR Nov. 13, 1995)).

Disciplinary Counsel's notice of the fact that Respondent was not a court-appointed fiduciary familiar with the probate court is significant. This is Respondent's first and only trusts-and-estates matter. Neither Respondent nor her cousin, the guardian, were appointed by the court to represent the interests of an

incapacitated adult or neglected ward of the court (*see* D.C. Code § 21-2047) where the need for a sanction to protect the public and to deter offenders is the greatest. *See, e.g.*, *In re Pleshaw*, 2 A.3d 169, 174 n.20 (D.C. 2010) (as opposed to retained counsel, "fact that conservators are appointed for wards of the court precisely because there is no one else to guard and manage their funds mandates strict oversight by the court of these relationships"); *In re Bach*, 966 A.2d 350, 350 (D.C. 2009) (court-appointed conservator of a ninety-two year-old); *Utley*, 698 A.2d at 447 (court-appointed conservator of estate and person).[9] In addition, Respondent was counsel *for* the fiduciary; Respondent's client was the fiduciary-guardian and not the estate. *See* D.C. Bar Ethics Op. 259 (noting "settled law in the District of

[9] At oral argument, Disciplinary Counsel addressed the question of protection of the public:

> BOARD MEMBER: Just a quick one, as a public member I obviously look at things my own perspective. Given the situation could you speak to the issue of whether the public is in any way potentially adversely affected by the actions of the Respondent?
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> MR. SHIPP: No, we don't have a Complainant here. Normally we would have you know, if somebody had stolen the money the Guardian would be in here being our Complainant. This is generated by the Court saying to us and we talked to the Court all of the time.
>
> You don't have the time to look at this and figure it all out then send it to us because we do. This is generated by the Court saying take a look at this practitioner and see if they are an *Addams* practitioner, see if we have a thief on our hands, see if we got someone we really need to pay attention to and that's the kind of analysis that we undertook in this case.
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> And no, I don't think the public is harmed in any way by us taking a hard look at this case and coming to a conclusion.

Oral Argument Tr. 30-31.

Columbia" is that "the client of a lawyer representing an estate is the fiduciary . . . and not the estate") (citing *Poe v. Noble*, 525 A.2d 190, 193 (D.C. 1987) and *Hopkins v. Akins*, 637 A.2d 424, 428 (D.C. 1993)).

We also note that Disciplinary Counsel's mention of *Travers* as a mitigating factor for sanction (instead of briefed as a basis for not finding the elements of a misappropriation in the first place) highlights the uniqueness of the fact that Respondent never had *exclusive* control of the estate accounts, but could only withdraw funds with the approval and participation of her client. *Cf. In re Pels*, 653 A.2d 388 (D.C. 1995) (commingling of client funds); *Addams*, 579 A.2d at 190 (taking money from escrow account without client's permission); *In re Hines*, 482 A.2d 378 (using funds escrowed for a client). The Hearing Committee found no aggravating factors such as dishonesty, *see* HC Rpt. at 27-30, that could outweigh such unique mitigating factors. Accordingly, absent is the "breach of trust" that is "so reprehensible, striking at the core of the attorney-client relationship" and, instead, present are "'the most stringent of extenuating circumstances [that] justify a lesser disciplinary sanction'" than disbarment. *Bach*, 966 A.2d at 351 (quoting *In re Pennington*, 921 A.2d 135, 141 (D.C. 2007) and *Addams*, 579 A.2d at 193, 198-99). Here, if the Court were to find a reckless misappropriation, a sanction of a suspension is clearly consistent with the goal of "preservation of public confidence in the legal profession." *Hewett*, 11 A.3d at 290; *see also Addams*, 579 A.2d at 191 ("eschewing a *per se* rule" of disbarment).

Finally, the over fifteen-year delay in the disciplinary process is, as the Hearing Committee described, "by any measure . . . significant and troubling," *see* HC Rpt. at 30, and I believe "unique and compelling." *See In re Fowler*, 642 A.2d 1327, 1331 (D.C. 1994). As the Hearing Committee noted: "The exact nature of Respondent's error in 1999 is difficult to reconstruct, not least as a result of the lapse of time since it occurred." HC Rpt. at 21.[10] The Committee also acknowledged that although Respondent was both sincere and credible, her testimony on what she was thinking in 1999 was limited by the passage of time ("'I don't really know what I was thinking at that point,'" HC Rpt. at 23 (quoting Tr. 35)), and the documentation of her actual thinking in 1999 lacks the requisite clarity ("what Respondent wrote at the time is itself somewhat conflicting," HC Rpt. at 21). What is clear is that close to fifteen years have passed since the Superior Court made the initial referral to Disciplinary Counsel, and, during that time, Respondent has represented the District of Columbia Public School system with distinction. While the Hearing Committee Report cites to *Fowler*, *see* HC Rpt. at 30, the Report does not explain (1) why the delay here is not sufficiently "unique and compelling" as to justify a mitigated sanction of a six-month suspension, or (2) how Respondent's *subsequent* conduct in

[10] Similarly, Disciplinary Counsel observed:

> By 2011 when the Court expressed its desire for a contested hearing to assess Respondent's credibility, the case was over ten years old. As the second Hearing Committee found [in 2016], it had only become more difficult to know Respondent's actual thoughts when she withdrew her fees in 1999.

ODC Br. at 23 (citing HC Rpt. at 21-23).

the past several years should, or should not, be weighed when considering the mitigating effect of the delay.[11] *See, e.g.*, *In re Schneider*, 553 A.2d 206, 212 (D.C. 1989) (reduced sanction where six-year delay in disciplinary process and "otherwise unblemished record over a considerable period of professional life subsequent to the event"); *In re Miller*, 553 A.2d 201, 206 (D.C. 1989) (delay mitigates the sanction where Respondent's six years of practicing law with no subsequent incident, "'gives some confidence that [respondent] is not likely to repeat her misconduct'").[12]

Respondent takes full responsibility for her misconduct in this case. And she has worked successfully as a Managing Attorney General for the District of Columbia's public school system for many years since, with an unblemished record. *See* RX 1 (Letter by former General Counsel of the District of Columbia Public Schools and Past President of the District of Columbia Bar, James J. Sandman, Esq., July 29, 2015) ("She is honest as the day is long . . . . She is a careful, highly

[11] The final paragraph of the Hearing Committee Report states, "And even where the *misconduct* is serious, the Court of Appeals has held that delay will not mitigate the sanction otherwise necessary to protect the public. *See Howes*, 39 A.3d 1, 19 n.24 (D.C. 2012)." HC Rpt. at 30 (emphasis added). The Committee most likely intended to address delay rather than misconduct (making the Report read, "where the *delay* is serious"), and such a reading is consistent with the noted citation. *Id.*

[12] Mr. Bernius argues that Respondent has waived the delay issue. *See* Separate Statement of Mr. Bernius at 21-22. Respondent's counsel did not argue that the delay in this case has violated due process, thereby warranting a dismissal. *See, e.g.*, *In re Saint-Louis*, 147 A.3d 1135, 1148 (D.C. 2016) (undue delay and a showing of prejudice required for a dismissal). However, Respondent's counsel did argue in mitigation of sanction that "during the *sixteen years that have elapsed since* Respondent wrote the last check to herself in this matter, Respondent has become a respected member of our legal community," Respondent's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction at 9 and R. Br. at 10 (emphasis added), and her counsel produced the letter from Respondent's former supervisor, James Sandman, who vouched for her practice of law since the conduct at issue. *See* RX 1.

competent, and scrupulous lawyer . . . a dedicated public servant who has managed some of DCPS's most challenging and important legal work successfully and well for many years . . . a credit to the District of Columbia Bar"). Disbarring her would not benefit the public, but rather hurt it.

We recognize that bright-line rules have their beneficial place, but here, unique extraordinary circumstances exist, which the Hearing Committee specifically found ("she reluctantly undertook the representation at the behest of a family member, . . . she did not have exclusive control of the funds in question, and . . . she withdrew the funds with the complete and contemporaneous approval—even urging—of her client, Ms. Fulwood [her cousin and the guardian of the son's estate] . . . [and] this was Respondent's only probate representation"). HC Rpt. at 27-28. *Addams* cautioned against a *per se* disbarment rule; it cannot be that *Hewett* is the only respondent who falls inside the bright-line rule.

CONCLUSION

We recommend that that the Court impose a sanction of an informal admonition for the proven recordkeeping violation. We conclude that the Hearing Committee's finding of reckless misappropriation is incorrect as a matter of law.

In the alternative, if the Court declines to adopt the majority Board's position, we believe Disciplinary Counsel has proven, at most, a negligent misappropriation so that Respondent should be sanctioned with a six-month suspension, but we recommend that the entire six months be stayed with the conditions that Respondent (1) attend a general continuing legal education class and provide proof of attendance

to Disciplinary Counsel; and (2) consult with the D.C. Bar's Practice Management Advisory Service in the event that she decides to enter private practice. *See* R Br. at 10. Even if the Court were to find a reckless misappropriation, we believe that the fact that the alleged misconduct occurred in 1999 and Respondent's exemplary practice of law over the past more than fifteen years warrants due consideration in mitigation of sanction. *See Schneider*, 553 A.2d at 212; *Miller*, 553 A.2d at 206. Moreover, extenuating circumstances, as described *supra*, exist that warrant a lesser sanction than disbarment. *See Addams*, 579 A.2d at 193; *see also Hewett*, 11 A.3d at 290 (extraordinary mitigating circumstances).

By: /JEC/
Jason E. Carter

Dated: July 28, 2017

Vice Chair Ms. Butler and Mr. Bundy concur with the Separate Statement.