

**DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD OF PROFESSIONAL RESPONSIBILITY**

In the Matter of:)	
)	
ANDREW J. KLINE, ESQ.,)	
)	
Respondent.)	Bar Docket No. 407-05
)	
A Member of the Bar of the)	
District of Columbia Court of Appeals.)	
Bar Registration No. 358547)	
Date of Admission: December 18, 1981)	

REPORT OF AD HOC HEARING COMMITTEE

I. INTRODUCTION

Respondent Andrew J. Kline (“Kline”) is charged by Bar Counsel with violation of the following provisions of the District of Columbia Rules of Profession Conduct (“Rules”):

Rule 1.2(a) -- failing to abide by a client’s decision concerning the objective of the representation;

Rule 1.3(a) -- failing to represent a client zealously and diligently within the bounds of the law;

Rule 1.3(b)(1) -- failing to seek the lawful objectives of a client;

Rule 1.3(b)(2) -- intentionally prejudicing or damaging a client during the course of the professional relationship;

Rule 1.3(c) -- failing to act with reasonable promptness in representing a client;

Rule 1.4(a) -- failing to keep a client reasonably informed about the status of a matter;

Rule 1.4(b) -- failing to explain a matter to a client to the extent reasonably necessary to keep the client informed about the status of the matter;

Rule 1.4(c) -- failing to inform a client about the substance of an offer of

settlement in a civil case;

Rule 8.4(b) -- committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness;

Rule 8.4(d) -- engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

Rule 1.15(a) and Rule XI §19(f) -- failing to maintain complete records of the handling, maintaining and disposition of entrusted funds;

Rule 1.15(a) -- failing to hold property of clients that was in the lawyer's possession separate from the lawyer's own property (commingling); and

Rule 1.15(a) -- intentionally or recklessly misappropriating entrusted funds.

Respondent has admitted to all of the foregoing charges except the commingling and misappropriation charges.

The Hearing Committee has unanimously concluded that Bar Counsel has established by clear and convincing evidence that Respondent has committed all of the foregoing violations except the alleged violation of intentionally or recklessly misappropriating entrusted funds. With respect to the misappropriation charge, the Hearing Committee has unanimously concluded that Bar Counsel has established by clear and convincing evidence that Respondent negligently misappropriated entrusted funds but has not established by clear and convincing evidence that the misappropriation was intentional or reckless.

The Hearing Committee unanimously recommends that Respondent should be suspended from the practice of law for eighteen months. The Hearing Committee has also concluded that Bar Counsel has not shown by clear and convincing evidence that Respondent should be required to demonstrate his fitness to practice law before being reinstated to membership in the Bar. However, the Hearing Committee believes that, upon resumption of his practice of law, Respondent should be required to consult with and comply with the recommendations of the D.C. Bar Practice Management Advisory Service. The Hearing

Committee has also unanimously concluded that Respondent has not established that he is eligible for mitigation of the recommended sanction on account of a disability under the principles set forth in *In re Kersey*, 520 A.2d 321 (D.C. 1987).

II. PROCEDURAL HISTORY

In a Specification of Charges approved for filing on March 26, 2008, Respondent was charged with violating the following District of Columbia Rules of Professional Conduct (the "Rules"): Rule 1.3(a), in that Respondent failed to represent his client zealously and diligently within the bounds of the law; Rule 1.3(b)(1), in that Respondent intentionally failed to seek the lawful objectives of his client; Rule 1.3(b)(2), in that Respondent intentionally prejudiced or damaged his client during the course of the professional relationship; Rule 1.3(c), in that Respondent failed to act with reasonable promptness in representing his client; Rule 1.4(a), in that Respondent failed to keep his client reasonably informed about the status of a matter; Rule 1.4(b), in that Respondent failed to explain a matter to his client to the extent reasonably necessary to make informed decisions about the representation; Rule 1.4(c), in that Respondent received an offer of settlement in a civil case and failed to inform his client about the substance of the communication; Rule 1.2(a), in that Respondent failed to abide by his client's decision concerning the objective of the representation; Rule 8.4(b), in that Respondent committed a criminal act (forgery) that reflects adversely on the lawyer's honesty, trustworthiness, or fitness; Rule 8.4(c), in that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; and Rule 1.15(a) and D.C. Bar Rule XI, § 19(f), in that Respondent failed to maintain complete records of his handling, maintenance and disposition of entrusted funds. Bar Exhibit ("BX") B.

Respondent filed an Answer on April 11, 2008, admitting most of the factual allegations in the Specification of Charges and asserting that he had "sought therapeutic help in an effort to

understand the root cause of his conduct now under consideration." BX D.

On May 14, 2008, Respondent filed a Motion to Treat in Mitigation Respondent's Disability and Waiver Under Rule 7.6(d) of the Board Rules, stating his intention to raise a claim in mitigation of sanction that his misconduct was the result of Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive Type. In its filing of May 15, 2008, Bar Counsel stated that it did not oppose the late filing of Respondent's motion. On June 17, 2008, the Board on Professional Responsibility ("Board") entered an order granting Respondent's motion and allowing him to raise a claim of alleged disability in mitigation.

On June 20, 2008, Respondent and Bar Counsel executed Joint Stipulations of Fact ("JX") by which Respondent admitted most of the factual allegations in the Specification of Charges, as discussed more fully hereinafter. JX 1.

On July 3, 2008, Respondent, through counsel, filed a "Trial Memorandum" stating that there was only one disputed fact, setting forth his argument on why the sanction for his misconduct should be mitigated on account of a disability, requesting that the Hearing Committee find Respondent eligible for *Kersey* mitigation and, applying that doctrine, proposing a sanction of a six-month suspension to be stayed in favor of two years of probation with monitoring.

A hearing was held on July 8 and 9, 2008, before an Ad Hoc Hearing Committee (the "Hearing Committee"), composed of Warren A. Fitch, Esquire, Chair; Tesa Leon, public member; and Rima Sirota, Esquire. Bar Counsel was represented at the hearing by H. Clay Smith, III, Assistant Bar Counsel.

Respondent was represented at the hearing by Jacob A. Stein, Esquire, and George A. Fisher, Esquire.

The hearing was bifurcated. Phase I of the hearing addressed Bar Counsel's allegations that Respondent had engaged in conduct that violates the Rules. Phase II of the hearing addressed

Respondent's contention that the sanction for his violations should be mitigated under the *Kersey* doctrine.

Prior to the July 8, 2008, hearing date, Bar Counsel submitted BX A-D and 1-32; all of these exhibits were received into evidence without objection. Tr. I at 8-9. Respondent offered Respondent's Exhibits ("RX ") 1-19, which were also received into evidence without objection. Tr. I at 90-91. The Joint Stipulations of Fact executed by Respondent and Bar Counsel prior to the hearing were received into evidence. JX 1; Tr. I at 9. During the hearing, Bar Counsel offered BX 33, which was received into evidence without objection. Tr. I at 8-9.

Bar Counsel called Charles Anderson as a witness during its case in chief. Tr. I at 20-58. Respondent testified on his own behalf during Phase I of the proceedings, Tr. I at 83-118, and called as character witnesses Frederick D. Cooke, Esquire (Tr. I at 58-65), Mark London, Esquire (Tr. I at 65-76), and Dimitri P. Mallios, Esquire (Tr. I at 76-82).

At the close of Phase I of the proceedings, Bar Counsel, pursuant to Board Rule 7.19, moved to amend the charges against Respondent to include two additional violations of Rule 1.15(a), contending that Respondent's testimony established that he had engaged in commingling and reckless or negligent misappropriation of entrusted funds. Tr. I at 118-120. Respondent's counsel stated that he objected to the amendment, but "want[ed] to move ahead with the case" and did not request a continuance. Tr. I at 122. The Hearing Committee granted Bar Counsel's motion. Tr. I at 122.

At the conclusion of Phase I, the Hearing Committee determined that Bar Counsel had proven by clear and convincing evidence one or more of its charges against Respondent. Tr. I at 124.

During Phase II of the proceedings, Respondent put on evidence in mitigation of his misconduct. Respondent testified again on his own behalf (Tr. I at 196-236). Respondent also

called Dr. Richard Ratner (Tr. I at 126-195) and offered RX 20, Dr. Ratner's report, which was received into evidence without objection. Tr. II at 130. In rebuttal of Respondent's mitigating evidence, Bar Counsel called Dr. Neil H. Blumberg, Tr. II at 271-344, and offered BX 34 (Dr. Blumberg's report) and BX 35, which were received into evidence without objection. Tr. II at 281-282. Finally, the Hearing Committee entered into evidence Hearing Committee's Exhibit ("HCX") 1 (an excerpt from the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Diseases, Fourth Edition Text Revision (2000) ("DSM-IV-TR")). Tr. II at 345-346.

III. FINDINGS OF FACT -- PHASE I¹

1. Andrew J. Kline ("Respondent") is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by examination on December 18, 1981, and assigned Bar Number 358547. JX ¶1; BX A.

2. On or about July 20, 2004, Respondent was retained by The Ad Agency, Inc. ("The Ad Agency" and/or the "client") to prosecute a breach of contract claim against Savino Savino and Savino's Restaurant (collectively, "Savino"). JX 1, ¶2; BX 2. Respondent was in private practice at the time, and had working for him one associate, a legal assistant/licensed administrator, and a secretary and personal assistant. Tr. I at 107-108.

3. On or about August 12, 2004, Respondent filed an action in the Superior Court for the District of Columbia styled *The Ad Agency, Inc. v. Savino Savino, et al.*, Case No. 04CA006202, alleging breach of contract and claiming damages of \$7,500. JX 1, ¶ 3; BX 3, 4.

4. On or about November 1, 2004, counsel for Savino filed an answer to the civil complaint and a counterclaim asserting claims for breach of contract, disparagement and interference with economic relations and seeking damages of \$250,000. JX 1, ¶ 4; BX 3, 5.

¹ Hereinafter cited as "FF I, ___."

5. On or about November 23, 2004, Respondent filed an Answer to Savino's Counterclaim. JX 1, ¶5; BX 3, 6.

6. On or about November 23, 2004, Respondent also filed a pleading styled "Plaintiff's Motion to Dismiss Defendant's Counterclaim." JX 1, ¶ 6; BX 3.

7. On or about December 27, 2004, counsel for Savino served upon Respondent discovery requests for his client. JX 1, ¶ 7; BX 3.

8. Respondent did not file on behalf of his client responses to the discovery requests. JX 1, ¶ 8.

9. On or about February 17, 2005, counsel for Savino filed a Motion to Compel Discovery. Respondent did not submit a response to the motion. JX 1, ¶9; BX 3, 7.

10. On February 23, 2005, the court issued an order dismissing Savino's counterclaim with leave to file an amended counterclaim. On that same date, Savino filed "Defendant's First Amended Counterclaim." JX 1, ¶10; BX 3, 8.

11. Respondent did not file an answer to Savino's first amended counterclaim. JX 1, ¶11; BX 3.

12. On or about March 15, 2005, the court issued an order granting Savino's motion to compel discovery. In the order granting Savino's motion, the court awarded Savino \$250 for attorney's fees incurred in preparing the Interrogatories and Motion to Compel, and further ordered that it would "consider imposition of additional sanctions on motion of Defendant, which may include dismissal of the Complaint, default on the counterclaim or both." Respondent was directed to file the discovery responses on behalf of his client within 10 days of his receipt of the court's order. JX 1, ¶12; BX 3, 9.

13. Respondent did not file responses to Savino's discovery requests as ordered by the court. JX 1, ¶13.

14. On or about April 5, 2005, Savino filed a Motion for Sanctions, and requested that the Court issue an order dismissing The Ad Agency's claims and enter a default judgment in favor of Savino on his counterclaim. Respondent did not file a response to the motion. JX 1, ¶14; BX 3, 10.

15. On or about May 10, 2005, the court entered an order granting Savino's Motion for Sanctions, *inter alia*, dismissing The Ad Agency's Complaint and entering a default judgment in favor of Savino's counterclaim. The court further scheduled an *ex parte* hearing for Savino to offer evidence of its damages. JX 1 ¶15; BX 3, 11.

16. Respondent did not inform his client, The Ad Agency, of his failure to respond to Savino's discovery requests, or of his failure to submit an answer to the First Amended Counterclaim. Respondent also did not inform his client that Savino had filed a Motion for Sanctions or of his failure to respond to that motion. Further, Respondent did not inform his client of the court's dismissal of its complaint, nor of the entry of a default judgment in favor of Savino. JX 1, ¶16; BX 19.

17. Respondent contacted Savino's counsel and negotiated a settlement of Savino's claim. The terms of the proposed settlement included, *inter alia*, that each party was to dismiss its lawsuit against the other, that the agreement would include a non-disclosure provision and a non-disparagement clause with liquidated damages of \$10,000 for each breach of the settlement agreement, and that Savino would be paid \$50,000. JX 1, ¶17; BX 12, 13, and 19.

18. Respondent advised his client that he had negotiated a "settlement" wherein the parties would agree to mutually dismiss all actions with prejudice. Respondent did not inform his client that Savino would be paid \$50,000. JX 1, ¶18; BX 19.

19. On or about July 12, 2005, Savino's attorney forwarded to Respondent a settlement agreement which included the terms described in paragraph 17. The document had

20. On or about July 13, 2005, Respondent issued check number 2289, drawn on Respondent's trust account at Bank of America ("Bank"), to Savino's counsel in the amount of \$50,000, purportedly as payment from his client, The Ad Agency, in settlement of Savino's claim against it. The funds in Respondent's trust account which Respondent used to pay Savino did not belong to The Ad Agency. JX 1, ¶20; BX 16; BX 33 at 11, 53.

21. On or about July 15, 2005, the Bank honored check number 2289, written by Respondent in the amount of \$50,000 to fund the Savino settlement. BX 33 at 11, 53.

22. Thereafter, Respondent prepared for his client a settlement agreement different from the settlement agreement forwarded to him from Savino's attorney. The document Respondent prepared for his client did not include the provision requiring a payment of \$50,000 to Savino in settlement of his claims against The Ad Agency. Respondent forwarded the purported settlement agreement to his client for its review and execution. JX 1, ¶ 21; BX 19.

23. Although Respondent's client was not aware that the original settlement agreement required a payment of \$50,000, it nonetheless declined to execute the purported settlement agreement presented to it by Respondent, and requested that Respondent negotiate other changes to the agreement. JX 1, ¶ 22; BX 19.

24. Respondent did not abide by his client's direction to negotiate changes to the purported settlement agreement. Instead, Respondent continued to request that his client execute the purported settlement agreement he had prepared. Respondent's client refused to agree to the purported settlement agreement prepared by Respondent. JX 1, ¶ 23; BX 19.

25. On or about September 26, 2005, Respondent forged the signature of The Ad Agency's Chief Executive Officer and President upon the original settlement agreement executed by Savino on July 12, 2005. Respondent did not have the authority to execute the

settlement agreement on behalf of his client and did not advise his client that he had done so. JX 1, ¶24; BX 17, 19.

26. Thereafter, The Ad Agency retained new counsel to represent it in connection with the matter. Successor counsel learned that Respondent had settled The Ad Agency's claim against Savino and reported Respondent's conduct to The Ad Agency and to Bar Counsel. JX 1, ¶25; BX 19.

27. In connection with its investigation of the matter, Bar Counsel subpoenaed and received copies of Respondent's trust account records from the Bank for the period beginning January 1 through December 2005, which include copies of the monthly statements for the account, copies of items deposited into the account, and checks drawn on the account. Tr. I at 24-25 (Anderson); BX 33.

28. On July 15, 2005, after Respondent wrote and the Bank honored his check to Savino in the amount of \$50,000, Respondent's trust account had a balance of \$9,671.33. On October 26, 2005, the balance in Respondent's trust account still stood at \$9,671.33. BX 33 at 14; Tr. I at 53-55 (Anderson); *see also*, FF I 20, 21.

29. On or about October 26, 2005, Respondent wrote check number 2290 against the trust account, payable to C&D Incorporated, in the amount of \$5,500. BX 33 at p. 54. A notation on the check states, "Funds held in escrow for tax clearance." *Id* ; Tr. I at 56 (Anderson).

30. On or about October 26, 2005, Respondent wrote check number 2291 against the trust account, payable to Cholock Incorporated, in the amount of \$8,513.86. BX 33 at p. 55. A notation on the check states, "Rebate of funds in escrow/tax clearance." *Id*; Tr. I. at 56-57 (Anderson).

31. The two checks which Respondent wrote on October 25, 2005 to C & D Incorporated and Cholock Incorporated totaled \$14,013.86. Thus, at the time that Respondent

wrote these two checks, his trust account did not have the full amount of the funds which he was required to be holding in trust for those two clients. BX 33 at 54 & 55; Tr. I at 103-105

(Respondent).

32. Respondent did not have the permission of either C&D Incorporated or Cholock Incorporated to make use of their funds. Tr. I at 104-105 (Respondent).

33. On October 28, 2005, Respondent deposited into his trust account \$5,000, raising the balance in the account to \$14,671.33. BX 33 at p. 14; Tr. I at 55-56 (Anderson). Bar Counsel was unable to determine the source of the \$5,000 deposit from the records provided by Respondent or from the Bank. Tr. I at 30, 52-53, 55 (Anderson).

34. On November 7, 2005, the Bank honored check number 2290 to C & D Incorporated in the amount of \$5,500. On November 8, 2005, the Bank honored check number 2291 to Cholock Incorporated in the amount of \$8,513.86. BX 33 at p. 15; Tr. I at 56-57 (Anderson). After these two checks were honored, the balance in the trust account dropped to \$657.47. BX 33 at p. 15.

35. Had Respondent not deposited \$5,000 into his trust account on October 28, 2005, there would have been insufficient funds in that account to cover check numbers 2290 and 2291. Tr. I at 28 and 57 (Anderson); Tr. I at 104-105, 116 (Respondent).

36. Based upon a review of Respondent's trust account records by Bar Counsel's investigator, Bar Counsel could not determine whether the \$50,000 drawn from the trust account through check number 2289 issued by Respondent on July 13, 2005, and honored by the Bank on July 15, 2005, to satisfy the Savino settlement, were funds belonging to Respondent or to Respondent's clients. BX 33 at pp. 1-11 and 53; Tr. I at 27-28, 49-51 (Anderson). Respondent produced no ledger or other such record to identify the source of funds received and how the funds in the account were disbursed. Tr. I at 44-45 (Anderson). Further, checks Respondent

issued on his trust account, both to himself and others, frequently did not bear any notation as to the purpose of the check. *See, e.g.*, BX 33 at 31-41; Tr. I at 42-43 (Anderson).

37. In response to Bar Counsel's inquiry prior to the hearing concerning Respondent's use of funds in his trust account to fund the Savino settlement, Respondent represented on June 15, 2006, that the funds contained in the trust account that were used to fund the settlement belonged to Respondent. BX 22; Tr. I at 96 (Respondent).

38. Based upon his review of Respondent's trust account records, Bar Counsel's investigator could not confirm Respondent's representation that the funds contained in his trust account that were used to pay the Savino settlement belonged to Respondent. Tr. I at 28, 51 (Anderson).

39. In a letter dated August 21, 2006, Bar Counsel asked Respondent to explain, in detail, the basis for [his] representation that the funds used by [him] to fund the Savino settlement belonged to him, and provide copies of all documents that refer or reflect upon [his] statement.

BX 23. Bar Counsel's letter further requested that Respondent

explain, in detail, the source of the October 28, 2005, \$5,000 deposit and provide copies of any documents that refer or reflect upon [his] explanation.

Id. Finally, Bar Counsel requested that Respondent

explain, in detail, why [his] trust account did not contain funds sufficient to release to C&D Incorporated and Cholock Incorporated the funds held "in escrow for tax clearance" prior to the October 28, 2005, \$5,000 deposit.

Id.

40. On or about November 7, 2006, following several requests for extensions of time, Bar Counsel's delivery to Respondent of copies of Respondent's trust account records it had received from the Bank, and the review of those and other records by a certified public accountant ("CPA") retained by Respondent, Respondent, through counsel, replied to Bar

Counsel's request for information stating,

There are records missing which affect our response to your August 21, 2006, letter.

It is becoming clear that the disability identified in Dr. Ratner's May 3, 2006 report is the problem.

BX 31; *see also* BX 24, 25, 26, 27, 28, 29, 30, and 32; RX 13, 15, 16, 17, 18 and 19; Tr. I at 102-103 (Respondent).

41. Respondent personally maintained all of the firm's financial records. Tr. I at 108-109 (Respondent). The transactions in the firm's accounts were automatically downloaded from the Bank into his Quicken software program, and Respondent would then insert information in the memo section. Tr. I at 112 (Respondent).

42. Respondent testified that he could not produce to Bar Counsel the records it had requested concerning the handling, maintenance, and disposition of entrusted funds because the hard drive on his laptop computer, which contained such records, had crashed at the end of February or the beginning of March 2005, Tr. I at 83-86, 92, 113 (Respondent), and he had kept no backup of the data on his computer. Tr. I at 92 (Respondent). Further, although Respondent claimed he had worked with a CPA in an attempt to reconstruct the records, he was unable to do so and, "at the end of the day, [Respondent] finally just sort of threw up [his] hands." Tr. I at 116 (Respondent); *see also* Tr. I at 89.

43. Bar Counsel requested Respondent's records on August 21, 2006. BX 23. The "Trial Memorandum of Respondent Andrew J. Kline" filed in this matter on July 3, 2008, immediately before the start of the hearing, was the first time that Respondent represented that his records had been destroyed by a computer crash. During the nearly two years following Bar Counsel's request for the records, Respondent sought extensions of time to respond to the request and represented to Bar Counsel that he had retained the assistance of a CPA to respond to the

inquiry. BX 24, 25, 26, 27, 28, 29, 30, 32; Tr. I at 101-102, 115-116 (Respondent). In none of Respondent's submissions to Bar Counsel in response to its inquiries about his trust account records did Respondent represent that his records had been lost because of a computer crash. BX 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32; RX 13, 15, 16, 17, 18 and 19; Tr. I at 94-95, 99-103, 117 (Respondent).

44. Respondent testified that when the computer crashed, he sent it to his technology service provider who arranged for a data recovery firm to try to recover the information that was on the hard drive, but that they were unable to do so. Tr. I at 85, 92 (Respondent). Respondent had no contract with the data recovery firm, there was no fee because the service was to be paid only if they recovered the data, and Respondent could not recall whether he had any receipts or anything that would corroborate the transaction. Tr. I at 93-94 (Respondent). *See also*, FF I, 47.

45. From January 1, 2005, until November 8, 2005, Respondent's trust account contained funds belonging to his clients. BX 33 at p. 1-55; Tr. I at 110-116 (Respondent). Respondent claimed in his testimony that from at least January 1, 2005, through July 15, 2005, his trust account also contained approximately \$50,000 belonging to him as earned legal fees that he had failed to remove from his trust account because he "just hadn't gotten around to" transferring the funds to his personal or operating account. Tr. I at 86, 97, 110-113 (Respondent); *see* BX 33 at pp. 2-11. Respondent claimed that he would be the only person who could categorize and describe the \$51,000 that was in the trust account in at the beginning of 2005, Tr. I at 115-116, but offered no evidence to support his representations concerning the exact amount of money in the account that belonged to him. Indeed, he acknowledged that the CPA he had retained was unable to confirm through his review of the same records Respondent had provided to Bar Counsel that the \$50,000 Respondent used to fund the Savino settlement were funds belonging to Respondent. Tr. I at 101-102 (Respondent). Respondent claimed, however, that he had

independent knowledge of the funds that he had earned that were in his trust account on January 1, 2005, but which had not yet been withdrawn. Tr. I at 113-114 (Respondent). Respondent acknowledged the contradiction between his claim and his alleged inability to reconstruct the account: "I have the time and billing records in terms of fees that were due, and basically I know what fees were paid, or I believe I know with some degree of certainty, not with precision, if I did then the account would have been able to be reconstructed, all of what generally was due to me at the time." Tr. I at 113-114 (Respondent). *See also*, FF I, 47.

46. Respondent testified that he was uncertain after the computer crash what escrowed funds were still due clients from his trust account, and thus he set up a new trust account at a different bank "and didn't put any more money in the [old trust] account and didn't do anything with the account for several months ... to confirm that understanding [i.e., that the funds remaining in the account were his]. If someone had come to [him] and said I am due money, then [he] would have realized that there was a claim, and indeed that did happen in October or November of 2005. Since then [he hadn't] had any request from any client with respect to fees that were due from the trust account prior to February of 2005 when [he] set up the new account" Tr. I at 114 (Respondent). Respondent testified that as of the date of the hearing he still had about \$1,000 in the account, and was "not exactly sure what to do with the money at this point, so [he had] not closed it out." Tr. I at 84-85 (Respondent). *See also* FF I, 47.

47. Based upon the facts set forth in FF I, 36-43, Bar Counsel contends that Respondent's assertions about the loss of and inability to reconstruct his trust account records, as set forth in FF I 44-46, are not credible. The Committee has carefully considered the facts which Bar Counsel has adduced in this regard and which the Committee has found to be established, as set forth in FF I, 36-43, *supra*. The Committee recognizes that the credibility issue presented by the facts which the Hearing Committee has found to be established as set forth in FF I, 36-43 and

by Respondent's testimony as set forth in FF I, 44-46, is a close question (and that is why the Hearing Committee has set forth in FF I, 36-46 all of the evidence adduced by Bar Counsel which the Hearing Committee has found to be established as facts). The Hearing Committee has considered carefully Bar Counsel's contention that the facts as set forth in FF I, 36-43 undermine Respondent's testimony as set forth in FF I, 44-46. However, the Hearing Committee has concluded that the facts relied upon by Bar Counsel and found by the Committee, FF I, 36-43, are not inherently inconsistent with Respondent's testimony. In addition, the Committee had the opportunity to observe Respondent's demeanor and evaluate his credibility on two occasions, since he testified in both phases of the hearing. The Hearing Committee has also taken into consideration the testimony of three character witnesses, all respected members of the Bar who have had professional or business relationships with Respondent over an extended period of time, regarding Respondent's truthfulness and trustworthiness. Tr. I, 58-82. For the foregoing reasons, the Hearing Committee credits Respondent's testimony as set forth in FF I, 44-46 and adopts as a finding of fact each component of the testimony set forth in FF I, 44-46.

IV. RECOMMENDED CONCLUSIONS OF LAW -- PHASE I

A. RESPONDENT FAILED TO REPRESENT HIS CLIENT WITH DILIGENCE AND ZEAL AND THEREBY VIOLATED RULE 1.3(a).

Rule 1.3(a) provides:

A lawyer shall represent a client zealously and diligently within the bounds of the law.

Respondent failed, in connection with his representation of The Ad Agency, to respond to discovery that was served upon him in December 2004. FF I, 7 & 8. Thereafter, Respondent failed to respond to a motion to compel discovery filed by Savino. FF I, 9. The court granted Savino's motion to compel and warned Respondent that it would consider additional sanctions if he did not comply with the discovery requests. FF I, 12. Respondent failed to comply with the

court's order compelling discovery and Savino filed a motion for sanctions. FF I, 13 & 14. Respondent did not submit a response thereto. FF I, 14. Thereafter, on May 10, 2005, the court entered an order dismissing his client's complaint and entered a default judgment in favor of Savino's counter-claim. FF I, 15. Thus, from December 2004 through May 2005, Respondent failed on numerous occasions to preserve or protect his client's interests in the Ad Agency case.

Bar Counsel has proven by clear and convincing evidence that Respondent failed to represent his client zealously and diligently within the bounds of the law. *See In re Ukwu*, 926 A.2d 1106 (D.C. 2007) (attorney violated Rule 1.3(a) by consistently failing to prepare his client for hearings, neglecting important filings, and appearing at important meetings unprepared); *In re Outlaw*, 917 A.2d 684 (D.C. 2007) (attorney violated Rule 1.3(a) by failing to follow-up with insurance company on personal injury claim and failing to realize that statute of limitations had expired until receiving notification from insurance company); *In re Bernstein*, 707 A.2d 371 (D.C. 1998) (attorney violated Rule 1.3(a), by failing to pursue client's personal injury claim for five years, resulting in dismissal of the claim).

B. RESPONDENT INTENTIONALLY FAILED TO SEEK THE LAWFUL OBJECTIVES OF HIS CLIENT, INTENTIONALLY PREJUDICED OR DAMAGED HIS CLIENT, AND THEREBY VIOLATED RULES 1.3(b)(1) AND (2).

Rule 1.3(b) provides:

A lawyer shall not intentionally:

- (1) Fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or
- (2) Prejudice or damage a client during the course of the professional relationship.

Intent can be found when the attorney is shown to be demonstrably aware of his neglect. *In re Reback*, 487 A.2d 235, 240 (D.C. 1985) (*per curiam*), *vacated*, 492 A.2d 267, *adopted in pertinent part en banc*, 513 A.2d 226, 229 (D.C. 1986) (*en banc*). Intent may also be inferred

where the neglect is "so pervasive that the lawyer must [have been] aware of it." *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (lawyer abandoned his client in a federal criminal matter); *see also In re Ukwu, supra*, 926 A.2d at 1116 (attorney intentionally neglected immigration matters of five clients). *See also* n. 2, *supra*.

As noted in Section III.A. above, from December 2004 through May 2005, Respondent failed to do anything to preserve or protect his client's interests in this matter. *See* FF I, 7-15.

Bar Counsel has proven, by clear and convincing evidence, that Respondent violated Rule 1.3(b)(1), in that Respondent was "demonstrably aware" that he had failed to pursue his client's lawful objectives of prosecuting its claim for breach of contract against Savino and defending it against Savino's counterclaim. *See In re Drew*, 693 A.2d 1127, 1133 (D.C. 1997) (lawyer found to have violated Rule 1.3(b)(1) for failure to follow his clients' instructions and appeal their criminal convictions).²

Similarly, Bar Counsel has proven, by clear and convincing evidence, that Respondent violated Rule 1.3(b)(2), in that Respondent intentionally damaged and prejudiced his client by knowingly allowing the dismissal of its claim and a default judgment to be entered against it. *See In re Ukwu, supra*.

C. RESPONDENT FAILED TO ACT WITH REASONABLE PROMPTNESS IN REPRESENTING HIS CLIENT AND THEREBY VIOLATED RULE 1.3(c).

Rule 1.3(c) provides:

A lawyer shall act with reasonable promptness in representing a client.

Comment [7] to the Rule provides, in pertinent part:

Perhaps no professional shortcoming is more widely resented by clients than procrastination. A client's interests often can be adversely affected by the

² During Phase II of the proceedings, Respondent testified that he was actually aware of his neglect of his client's case, but consciously chose not to pursue or protect his client's interests because he was uncomfortable dealing with the allegations in the counterclaim. *See* Tr. I at 199-201, 205-206 (Respondent); PFF 11, *supra*; PFF II 1 & 2, *infra*, at pp. 40-41. Respondent told Dr. Blumberg that the client denied the allegations set forth in Savino's counterclaim. *See* BX 34 (Blumberg report) at p. 11.

passage of time or the change of conditions; . . . the client's legal position may be destroyed.

In this matter, Respondent failed to answer discovery, failed to respond to a motion compelling such discovery, and failed to respond to a motion for sanctions due to his failure to comply with an order compelling discovery. FF I, 7-15.

Bar Counsel has proven, by clear and convincing evidence, that Respondent violated Rule 1.3(c), in that Respondent failed to act with reasonable promptness in representing and protecting the interests of his client. *See In re Ukwu, supra* (attorney's failure to act promptly prejudiced the interests of five immigration clients); *In re Avery*, 926 A.2d 719 (D.C. 2006) (*per curiam*); *In re Rogers*, 902 A.2d 103 (D.C. 2006) (*per curiam*). Respondent's violations are particularly egregious in that they were intentional.

D. RESPONDENT FAILED TO COMMUNICATE WITH HIS CLIENT AND THEREBY VIOLATED RULES 1.4(a), (b) AND (c).

Rule 1.4 provides:

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

Rule 1.4(a). Respondent did not inform his client of his failure to respond to discovery, or of his failure to submit an answer to Savino's motion to compel discovery. FF I, 16. Respondent also did not inform his client that Savino had filed a motion for sanctions or of his failure to respond to that motion. *Id.* Further, Respondent did not inform his client of the court's dismissal of its complaint, nor of the entry of a default judgment in favor of Savino. *Id.* Thereafter, Respondent negotiated and executed a settlement of his client's claim without the client's knowledge or consent. PFF 17-23.

Bar Counsel has proven, by clear and convincing evidence, that Respondent violated Rule 1.4(a) in that he failed to keep his client reasonably informed about the status of its claim. *See In re Outlaw, supra*, 917 A.2d at 688 (attorney failed to inform client that attorney had allowed the statute of limitations to expire on claim); *In re Lewis, supra*, 689 A.2d at 565 (attorney failed to inform client about his intent to abandon the representation); *In re Sumner*, 665 A.2d 986, 989 (D.C. 1995) (attorney had obligation to alert client he had not filed an appellate brief thereby jeopardizing the appeal).

Rule 1.4(b). As is more fully set forth above, Respondent failed to inform his client that its complaint had been dismissed and that a default judgment had been entered against it. FF I, 16. Respondent also failed to inform his client that he had negotiated a settlement with Savino and that Savino would receive, *inter alia*, \$50,000. FF I, 17-18. Instead, Respondent falsely advised his client that he had negotiated a settlement with Savino, wherein the parties would agree to mutually dismiss all actions with prejudice, and then prepared for his client's review a bogus document purporting to be a settlement agreement which contained the terms he had falsely advised his client he had negotiated. FF I, 18-21.

Bar Counsel has proven, by clear and convincing evidence, that Respondent violated Rule 1.4(b) in that Respondent advised his client to settle its claim without explaining the circumstances of the case to the extent reasonably necessary for the client to make an informed decision regarding the representation. *See In re Outlaw, supra*, 917 A.2d at 685-687 (attorney in discussing with client the futility of pursuing her claim, failed to inform client that her case was barred by statute of limitations due to the attorney's failure to timely file a lawsuit).

Rule 1.4(c). Respondent received from Savino an offer to settle its claim against his client for, *inter alia*, \$50,000, but failed to inform his client of the offer. FF I, 17. Bar Counsel has proven, by clear and convincing evidence, that Respondent violated Rule 1.4(c) in that he

failed to promptly inform his client of the substance of the settlement offer. *See In re Thyden*, 877 A.2d 129, 143-144 (D.C. 2005) (attorney dishonestly asserted that he represented a party without obtaining that party's consent and failed to communicate with client regarding settlement offer in a bankruptcy proceeding); *In re Steele*, 868 A.2d 146 (D.C. 2005) (attorney engaged in misconduct involving five clients including failure to inform one client of a settlement offer in an employment discrimination case); *In re Corizzi*, 803 A.2d 438 (D.C. 2002) (attorney made false statements to the court and failed to advise his client of two settlement offers until after he had rejected them).

E. RESPONDENT FAILED TO ABIDE BY HIS CLIENT'S DECISION CONCERNING THE OBJECTIVES OF THE REPRESENTATION AND THEREBY VIOLATED RULE 1.2(a).

Rule 1.2(a) provides, in pertinent part:

A lawyer shall abide by a client's decisions concerning the objectives of representation A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter... .

Unbeknownst to Respondent's client, on July 13, 2005, Respondent issued a \$50,000 check to Savino's counsel in settlement of its claim against his client. PFF 20. Thereafter, Respondent prepared and sent to his client a bogus agreement which purported to settle the claim between the client and Savino. FF I, 21. Although the client was not aware that Respondent had already negotiated a settlement agreement with Savino, it nevertheless declined to execute the purported agreement presented to it by Respondent, and requested that Respondent negotiate other terms with Savino. FF I, 22. Respondent did not abide by his client's directions, but instead continued to request that the client execute the bogus settlement agreement. FF I, 23. Notwithstanding the client's decision not to settle the case, Respondent forged the client's signature to a settlement agreement with Savino without his client's knowledge or consent, and contrary to his client's directions. FF I, 18, 19, 23 & 24.

Bar Counsel has proven, by clear and convincing evidence, that Respondent violated

Rule 1.2(a), in that he failed to abide by his client's decision not to settle its claim with Savino. *See In re Elgin*, 918 A.2d 362, 375 (D.C. 2007) (attorney settled client's action on terms which he negotiated and did not disclose to his client); *In re Wright*, 885 A.2d 315 (D.C. 2005) (*per curiam*) (attorney settled clients' personal injury cases without their knowledge or consent); *In re Hager*, 812 A.2d 904, 917-919 (D.C. 2002) (attorney withheld material terms of a settlement offer from his clients).

F. RESPONDENT COMMITTED THE CRIMINAL ACT OF FORGERY, A CRIME THAT REFLECTS ADVERSELY ON RESPONDENT'S HONESTY AND TRUSTWORTHINESS, AND THEREBY VIOLATED RULE 8.4(b).

Rule 8.4(b) provides:

It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

D.C. Code § 22-3241 provides pertinently:

(a) For the purposes of this subchapter, the term:

(1) "Forged written instrument" means any written instrument that purports to be genuine but which is not because it:

(A) Has been falsely made, altered, signed or endorsed.

...

(b) A person commits the offense of forgery if that person makes, draws or utters a forged written instrument with the intent to defraud or injure another.

As more fully set forth above, Respondent was not able to persuade his client to execute the bogus settlement agreement he had asked it to agree to; instead, the client requested that he continue to negotiate with Savino. FF I, 21-23. On September 26, 2005, Respondent forged the signature of his client upon the Savino settlement agreement. FF I, 24. Respondent did not have the authority to execute the settlement agreement on behalf of his client and did not advise his client that he had done so. *Id.*

Bar Counsel has proven by clear and convincing evidence that Respondent violated Rule

8.4(b), in that he engaged in the criminal act of forgery, an act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer. See *In re Slaughter*, 929 A.2d 433, 444-445 (D.C. 2007) (attorney forged his client's signature on a contingency fee agreement, when no such arrangement had been agreed to); *In re Asher*, 772 A.2d 1161 (D.C. 2001) (attorney forged his clients' signatures on release forms and checks).

G. RESPONDENT ENGAGED IN CONDUCT INVOLVING DISHONESTY, DECEIT AND MISREPRESENTATION AND THEREBY VIOLATED RULE 8.4(c).

Rule 8.4(c) provides:

It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Dishonesty "encompasses conduct evincing a lack of honesty, probity, or integrity in principle; [a] lack of fairness and straightforwardness" *In re Shorter*, 570 A.2d 760, 768 (D.C. 1990).

"Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation." *In re Reback, supra*, 487 A.2d at 239-40 (citation omitted); *In re Outlaw, supra*, 917 A.2d at 688.

"Deceit is the active suppression of facts by one bound to disclose them, or the giving of 'information of other facts which are likely to mislead for want of communication of that fact.'" *In re Slattery*, 767 A.2d 203, 213 (D.C. 2001) (citation omitted).

Respondent engaged in numerous acts of dishonesty and deceit. He concealed from his client that he had allowed its claim to be dismissed and that a default judgment had been entered against it. FF I, 16. Respondent further concealed from his client that he had settled Savino's claim against it for \$50,000. Instead, Respondent attempted to persuade the client to execute a settlement agreement that was materially different from the one he had in fact agreed to with Savino, by creating and delivering to his client an altered version of that agreement that did not

include the \$50,000 pay off. FF I, 17, 18 & 21. Then, after failing to persuade his client to sign the bogus settlement agreement, Respondent forged his client's signature upon the original settlement agreement that had previously been signed by Savino. FF I, 24.

Bar Counsel has proven by clear and convincing evidence that Respondent violated Rule 8.4(c), in that he concealed from his client material facts relevant to the representation and further dishonestly attempted to persuade his client to sign a bogus settlement agreement. *See In re Outlaw, supra*, 917 A.2d at 688. Further, Bar Counsel has proven by clear and convincing evidence that Respondent violated Rule 8.4(c), in that Respondent forged his client's signature to the settlement agreement and dishonestly and deceitfully misrepresented to Savino that his client had settled the claim Savino had asserted against it. *See In re Shorter, supra; In re Slattery, supra*.

H. RESPONDENT FAILED TO MAINTAIN AND PRESERVE COMPLETE RECORDS OF HIS HANDLING OF ENTRUSTED FUNDS AND THEREBY VIOLATED RULE 1.15(a) AND D.C. BAR RULE XI, § 19(f).

Rule 1.15(a) provides, in pertinent part:

Complete records of such [trust] account funds and other property shall be kept by the lawyer and shall, be preserved for a period of five years after termination of the representation.

D.C. Bar Rule XI, § 19(f) provides:

Required records. 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, or to a corporation, association, partnership, or other entity, 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.

In *In re Clower*, 831 A.2d 1030 (D.C. 2003), the Court quoted with approval the Board's report in the matter:

The purpose of maintaining "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 the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled. Financial documents are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained. The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Bar Counsel can be completed even if the attorney or the client, or both, are not available.

Id. at 1034.

In a recent filing with the Court, the Board summarized prior Court decisions on the issue and declared that "[t]he Court has consistently treated violations of the 'complete records' requirement as the breach of a fiduciary obligation and a per se offense." Response of the Board on Professional Responsibility to Bar Counsel's Petition for Rehearing ("Bd. Response to Pet. for Rhg."), filed Feb. 29, 2008, in *In re Eric Cloud*, D.C. App. No. 01-BG-1001, at 3. The Board noted that the Court has not required proof of improper intent, and "has found misconduct even where the loss was unintentional." *Id.* The Board elaborated:

For example, in *In re Choroszej*, 624 A.2d 434, 436 (D.C. 1992) (per curiam), the respondent was unable to produce a ledger of checks showing how he had handled the settlement proceeds. The respondent in *Choroszej* . . . claimed that his ledger was lost during an office move. *Id.* The Court adopted the analysis of the Hearing Committee that "[a]lthough this fact may explain, it does not excuse [R]espondent's failure to keep records." *Id.* (quoting H.C. Rpt. at 19). The Court thus found a violation of former DR 9-103(B)(3), noting that "[w]hile insufficient to defeat the charges, negligent conduct may temper the sanction imposed." *Id.* at 436 (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)). See also *In re Clower*, 831 A.2d 1030, 1033-35 (D.C. 2003) (per curiam) (finding a violation where respondent maintained partial, but not complete records showing disbursements of settlement proceeds approved by the client); *In re Stone*, 672 A.2d 1032 (D.C. 1995) (per curiam) (finding a violation where respondent testified that files were lost); *In re Cooper*, 591 A.2d 1292, 1296 (D.C. 1991) (finding a violation where respondent offered that documents had "disappeared"); *In re Jones*, 521 A.2d 1119, 1122 (D.C. 1986) (finding a violation where respondent "admitted that she could not present the proper documentation for . . . disputed disbursements, as required by her fiduciary position" because some records were lost in office moves).

In re Cloud, Bd. Response to Pet. for Rhg. at 3-4.

The Board recommended that the Court adopt the following formula in analyzing such cases:

To establish a *prima facie* violation, Bar Counsel must first prove by clear and convincing evidence that required records were not maintained or preserved. The Board may then weigh, together with all the other evidence, the attorney's explanation or inability to explain satisfactorily, the failure to produce records. An attorney's explanation that records were lost through negligence would not be adequate because the attorneys state of mind or level of intent is not at issue (though, per *Choroszej*, it may well be relevant to sanction). But if, for example, the attorney demonstrates that the records were properly safeguarded pursuant to fiduciary standards but were nonetheless destroyed by events beyond the attorney's control, there would be no violation. . . . However, absent evidence that the attorney handled the records with the care of a fiduciary, this failure or inability to produce the records, without more, establishes the violation.

Id. at 7-8 (footnote and citation omitted).

Here, it is undisputed that Respondent did not maintain or preserve, and failed to produce in response to Bar Counsel's subpoena, complete records of the handling of funds contained in his trust account (PFF 34-40); thus, a *prima facie* violation of Rule 1.15(a) and D.C. Bar Rule XI, § 19(f), is established. Respondent, even with the help of a CPA, was unable to reconstruct the records of the account. PFF 39, 41. Further, neither Bar Counsel's investigator nor a CPA hired by Respondent to review his records could corroborate Respondent's representations concerning the nature of the funds in his trust account or explain apparent irregularities in the account. PFF 31, 34, 39-43.

Respondent acknowledges he did not preserve the records. Respondent failed to exercise the care of a fiduciary with respect to his record-keeping obligation. Respondent failed in many instances to make a contemporaneous record of the purpose for which he issued a check on his trust account (see PFF 34); maintained no ledger of the financial transactions, but relied exclusively on a software program on his laptop computer into which he inserted the relevant information at a later date, after he downloaded the transactions from his Bank (PFF 34, 39); failed to keep a backup or

hard copy of the computerized information (PFF 39); failed to attempt to reconstruct his financial records until more than a year and a half after the computer crash, even though he admittedly was uncertain whether his trust account contained client funds or only his own funds (PFF 40-42); and acknowledged that the remaining records of the financial transactions in his trust account were inadequate to reconstruct the transactions, even with the help of a CPA (PFF 39, 41-42). The dangers of losing records maintained on a laptop computer to a computer crash, an inadvertent loss, or theft are too great to rely on it as the sole method of recordkeeping, with no backup system. Such a method of record keeping does not satisfy the standard of care of a fiduciary entrusted with the safekeeping of funds of clients and third parties.

In sum, Respondent's handling of the records of his trust account did not meet the standard of care expected of a fiduciary. *See, e.g., In re Choroszej, supra; In re Clower, supra; In re Stone, supra; In re Cooper, supra; In re Jones, supra.* Bar Counsel has proven by clear and convincing evidence that Respondent violated Rule 1.15(a) and D.C. Bar XI, § 19(f), in that he failed to maintain and preserve complete records relating to the funds contained in his trust account.

I. RESPONDENT ENGAGED IN COMMINGLING AND THEREBY VIOLATED RULE 1.15(a).

Rule 1.15(a) provides, in pertinent part:

A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account. . . .

The Rule requires the attorney to preserve the identity of client or third-party funds by placing them in a separate and identifiable bank account, and prohibits the attorney from maintaining client funds in an account containing his own funds. "The rule against commingling was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of the client's money." *In re Hessler*, 549 A.2d 700, 702 (D.C. 1988) (citation omitted).

Respondent testified that from at least January 1 through July 15, 2005, he failed to remove from his trust account approximately \$50,000 in legal fees he had earned. FF I, 41. In as much as Respondent allowed his personal funds to be commingled with client funds for at least seven months, Bar Counsel has proven, by clear and convincing evidence, that Respondent violated Rule 1.15(a).

Intentional commingling of earned legal fees with entrusted funds violates the specific language of Rule 1.15(a), which requires that an attorney "shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." "Commingling occurs whenever a lawyer fails to segregate his or her own funds from those of a client, or when the lawyer is unable to identify the lawyer's funds from those of a client." *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (*per curiam*) (adopted Board report); *see also In re Rivlin*, 856 A.2d 1086, 1095 (D.C. 2004) (*per curiam*) (adopted Board report) ("Respondent's defense [to commingling charge] that he used this trust account as a 'triage account' into which all incoming funds were deposited for a short period of time before being redeposited into a more appropriate account . . . fails as a defense to commingling ..."). As noted in *Rivlin*: "The rule against commingling has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client funds might be taken by the attorney's creditors, and most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally or inadvertently." *Id.* at 1095 (citations omitted). As the instant case demonstrates, when an attorney commingles his own funds with those of his clients, the danger of misappropriation is great. Further, as the Court observed in *In re Hessler, supra*, "By commingling client funds with the attorney's own, the client's funds become more difficult to trace and are subject to the risk that they may be taken by creditors of the attorney." 549 A.2d at 702. The Court further warned that "[a] garnishment of the account could lead to prolonged delay in the client's receiving the funds, if indeed he could assert a priority right to them at all." *Id.* Thus, if an attorney's creditors learned that the attorney kept his personal funds in his

trust account, the creditors could "pierce the shield" of the trust account and thereby place properly deposited entrusted funds at risk.

Here, Respondent failed to keep his own funds separate from those of his clients, indiscriminately commingling his own funds with those of clients in his trust account with the admitted result that he was unable to tell his own funds from those of his clients. FF 20, 37, 44; BX 22; Tr. I at 96, 113-114. Bar Counsel has proven by clear and convincing evidence that Respondent's failure to remove his earned fees from his trust account for seven months constituted a prohibited commingling of funds in violation of Rule 1.15(a). *See In re Chang, supra*, 694 A.2d at 880; *In re Rivlin, supra*, 856 A.2d at 1095.

J. RESPONDENT NEGLIGENTLY MISAPPROPRIATED ENTRUSTED FUNDS IN HIS TRUST ACCOUNT AND THEREBY VIOLATED RULE 1.15(a).

As set forth more fully above, Rule 1.15(a) requires the attorney to preserve the identity of client funds, by keeping such funds separate from the lawyer's own funds. Misappropriation of entrusted funds is defined as

“any unauthorized use of client funds entrusted to [the lawyer], including not only stealing but also *unauthorized temporary use for the lawyer’s own purpose*, whether or not he derives any personal gain or benefit therefrom.”

In re Harrison, 461 A.2d 1034, 1036 (D.C. 1983) (citation omitted) (emphasis added); *see also In re Pels*, 653 A.2d 388, 393-394 (D.C. 1995); *In re Pierson*, 690 A.2d 941, 947 (D.C. 1997).

Misappropriation is essentially *a per se* violation; improper intent is not an element of the violation. *In re Harrison, supra*, 461 A.2d at 1036; *In re Choroszej, supra*, 624 A.2d at 436.

Misappropriation may be proven by examining the account records of the financial institution in which the attorney has deposited the entrusted funds. Once the balance in the account falls below the amount held in trust, misappropriation occurs. *In re Harrison, supra*, 461 A.2d 1036; *In re Pels, supra*, 653 A.2d at 394; *In re Micheel*, 610 A.2d 231, 233 (D.C. 1992).

From at least July 15 until November 8, 2005, Respondent was required to maintain in his trust account a total of \$14,013.86 belonging to C & D Incorporated (\$5,500) and Cholock Incorporated (\$8,513.86). FF I, 29-31, 35. However, on or about July 13, 2005, Respondent wrote a check against his trust account in the amount of \$50,000 to Savino in satisfaction of the settlement he had secretly arranged to cover up his neglect and abandonment of his client's case. FF I, 20-21. Consequently, on July 15, 2005, the balance in Respondent's trust account dropped to \$9,671.33, some \$4,342.53 *less* than Respondent was required to maintain for C & D and Cholock. FF I, 28, 31. Respondent's trust account remained below the amount he was required to hold in trust until October 28, 2005, when Respondent deposited \$5,000 into the account, raising the balance to \$14,671.33. FF I, 28, 33. Respondent did not have the permission of either C & D or Cholock to make use of their funds. FF I, 33. On October 28, 2005, Respondent wrote checks totaling \$14,013.86 to C & D (\$5,500) and Cholock (\$8,513.86), as reimbursements for "funds held in escrow" in connection with a "tax clearance," leaving a balance in the account of \$657.47. FF I, 29-31, 34. These checks written to C & D and Cholock would not have been honored but for Respondent depositing \$5,000 into his trust account on October 28, 2005. FF I, 31. Clearly, Respondent misappropriated funds of C & D and Cholock when he issued the \$50,000 check to Savino on July 13, 2005.

Proof of intentional misappropriation requires evidence that the attorney deliberately or knowingly used entrusted funds as if they were his own. *In re Berryman*, 764 A.2d 760, 768-770 (D.C. 2000). Proof of a reckless misappropriation is based upon "how the attorney handles entrusted funds, whether 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). In *Anderson*, the Court stated:

The hallmarks of [reckless misappropriation] revealed by our cases include: the indiscriminate commingling of entrusted and personal funds; a complete failure to track settlement proceeds; total disregard of the status of accounts into which entrusted funds were placed,

resulting in a repeated overdraft condition; the indiscriminate movement of monies between accounts; and the disregard of inquiries concerning the status of funds.

Id. at 338 (citations omitted) (emphasis added).

Bar Counsel contends that the facts established by Bar Counsel as set forth in FF I, 36-43, demonstrate that Respondent's assertions about the loss of and inability to reconstruct his trust account records, as set forth in FF I, 44-46, are not credible and therefore that Bar Counsel has established by clear and convincing evidence that Respondent's failure to maintain in his trust account all of the funds which he was holding in trust for his clients C&D Incorporated and Cholok Incorporated constituted reckless or intentional misappropriation.

The Hearing Committee, as discussed above, credits Respondent's testimony, as found in FF I, 44-46, for the reasons set forth in FF I, 47. In particular, the Hearing Committee finds that Respondent believed at the time that the money that he used to fund the secret Savino settlement consisted of earned legal fees which he had not removed from the trust account. FF I, 45; Tr. I at 86, 97, 110-113. Consequently, the Hearing Committee has concluded that Bar Counsel has not proven by clear and convincing evidence that Respondent intentionally misappropriated funds entrusted to him by and belonging to his clients C&D Incorporated and Cholock Incorporated. The Hearing Committee has also concluded that Bar Counsel has not proven by clear and convincing evidence that Respondent recklessly misappropriated the entrusted funds because the Hearing Committee does not find present in this matter any of the indicia of recklessness set forth in *Anderson*.

V. RECOMMENDED SANCTION -- PHASE I

Bar Counsel sought Respondent's disbarment in the event that the Hearing Committee found his misappropriation of client funds to be intentional or reckless. Bar Counsel's Brief at 31-32. As discussed above, the Hearing Committee has concluded that Bar Counsel has not proven intentional or reckless misappropriation by clear and convincing evidence. Consequently, Bar Counsel seeks a

three-year suspension with a fitness requirement. *Id.* at 32. As noted in the Procedural History section of this Report, *supra*, Respondent argued in his “Trial Memorandum” that he is eligible for *Kersey* mitigation and that application of that doctrine should result in a sanction of a six-month suspension to be stayed in favor of two years of probation with monitoring; Respondent has not made a specific sanctions proposal apart from his *Kersey* contention.

In the remainder of this Section of this Report, the Hearing Committee considers the appropriate sanction for Respondent’s misconduct absent any mitigation under the *Kersey* doctrine. Thereafter, in Sections VI, VII and VIII of this Report, the Committee sets forth its Findings of Fact pertaining to the *Kersey*-mitigation issue, its recommended Conclusions of Law in that regard, and its Recommended Sanction taking into account its Findings of Fact and Recommended Conclusions of law regarding the *Kersey* analysis.

For the reasons stated below, the Hearing Committee recommends that, unless the *Kersey* doctrine is applicable, Respondent should be suspended from the practice of law for eighteen months. The Hearing Committee has also concluded that Bar Counsel has not shown by clear and convincing evidence that Respondent should be required to demonstrate his fitness to practice law before being reinstated to membership in the Bar. However, the Hearing Committee believes that, upon his resumption of the practice of law, Respondent should be required to consult with and comply with the recommendations of the D.C. Bar Practice Management Advisory Service.

A. FACTORS TO BE CONSIDERED

In determining the appropriate sanction, the factors to be considered include: (1) the seriousness of the misconduct; (2) the presence of misrepresentation or dishonesty; (3) Respondent's attitude toward the underlying misconduct; (4) prior disciplinary violations; and (5) mitigating circumstances, (6) whether counterpart provisions of the Rules of Professional Conduct were violated, and (7) prejudice to the client. *In re Peek*, 565 A.2d 627, 632 (D.C. 1989) (citations

omitted); *In re Jackson*, 650 A.2d 675, 678 (D.C. 1994); *In re Hill*, 619 A.2d 936, 939 (D.C. 1993); *In re Knox*, 441 A.2d 265 (D.C. 1982).

1. Seriousness of the Misconduct

Respondent engaged in serious misconduct including intentional neglect, commingling, negligent misappropriation of funds, the criminal act of forgery, and acts of dishonesty, deceit, and misrepresentation.

2. Misrepresentation or Dishonesty

Respondent engaged in dishonesty in his dealings with both his client and opposing counsel in the Ad Agency litigation, and committed a criminal act, forging his client's signature on a settlement agreement.

3. Respondent's Attitude Toward Underlying Misconduct

The Hearing Committee carefully observed Respondent's demeanor during the two-day hearing in this matter and has carefully considered his own appraisal of his misconduct. The Committee has credited Respondent's testimony and is convinced that he is sincerely and unreservedly remorseful about his conduct. Thus the Committee does not find any "significant aggravating factor" with respect to sanction. *See, In re Cleaver-Bascombe*, 892 A.2d 396, 411 (D.C. 2006).

4. Prior Discipline

Respondent has incurred no prior discipline during his 27 years of practice.

5. Mitigating Circumstances

In addition to Respondent's remorse and the absence of any disciplinary history, Respondent presented the testimony of three members of the Bar who credibly attested to Respondent's honesty and trustworthiness and stated that they would still refer clients to Respondent, even knowing that he had engaged in the misconduct to which he has stipulated. Tr. I at

61-65 (Cook), 70-71 (London), 82 (Malios). Thus, the record “demonstrate[s] that [Respondent] has the ability to ethically and professionally represent clients. . . .” *In re Steele*, 868 A.2d 146, 154 (D.C. 2005) (quoting Report of the Board on Professional Responsibility).

6. Prejudice to the Client

Respondent’s client The Ad Agency was prejudiced by his misconduct because the client lost the right to decide for itself whether the case should be pursued or settled and, if so, on what terms.

7. Violations of Multiple Rules

Respondent has violated twelve different provisions of the Rules of Professional Conduct as well as D.C. Bar Rule XI, § 19(f).

B. RECOMMENDED SANCTION

The ordinary sanction for negligent misappropriation appears to be suspension from the practice of law for six months. *In re Anderson, supra*, 778 A.2d at 332; *In re Fair*, 780 A.2d 1106, 1112 (D.C. 2001); *In re Chang*, 694 A.2d 877, 880 (D.C. 1997); *In re Reed*, 679 A.2d 506 (D.C. 1996). Here, however, Respondent also engaged in other serious misconduct including dishonest and deceitful conduct toward both his client and opposing counsel to cover up his intentional neglect and abandonment of his client's case, the criminal act of forgery, the deliberate failure to communicate with his client about the status and direction of the case, and the deliberate frustration of the client's objective by settling the case without the client's permission. Unfortunately, notwithstanding the requirement for consistency in disciplinary sanctions (Rule XI, §9(g)(1)), it is difficult to find complete consistency in the reported cases involving dishonesty and violations of the criminal law.

Some of the misconduct in the instant case is a similar to that of the attorney in *In re Sheehy*, 454 A.2d 1360 (D.C. 1983) (*en banc*). In *Sheehy*, the attorney, who had a prior private reprimand and informal admonition, neglected the client's matter with the result that it was barred by the statute of limitations. He later falsely represented that the case had been settled and paid her with

his own funds. Subsequently, he lied to Bar Counsel about the matter, although he eventually told Bar Counsel the truth. The Court imposed a two-year suspension, which at that time included a fitness requirement. Here, Respondent's misconduct is more serious in some respects, as he also committed the criminal act of forgery, commingled and misappropriated entrusted funds, and failed to maintain and preserve required records of entrusted funds. On the other hand, Respondent has been truthful with and has cooperated with Bar counsel throughout this matter and has no prior disciplinary history.

The Court recently relied on *Sheehy* in imposing a two-year suspension with a fitness requirement in *In re Pennington*, 921 A.2d 135 (D.C. 2007), a reciprocal disciplinary case originating in Maryland with facts similar in some respects to the instant case. In *Pennington*, due to an error in the court clerk's office, a complaint the attorney had proffered for filing was not file-stamped and the check for the filing fee was never negotiated. 921 A.2d at 137. The attorney did not realize the court's error until after the statute of limitations on the clients' claims had expired. *Id.* Thereafter, the case was dismissed with prejudice. *Id.* at 138. The attorney did not advise her clients of the error that occurred with respect to the filing of their case, of the fact that the statute of limitations had run, of the dismissal of the case with prejudice, or of the fact that they might have a malpractice claim against her. *Id.* at 139. Instead, after obtaining from a friend a legal opinion that she could do so, she decided to tell her clients that the case had been settled for \$10,000, an amount the clients had previously agreed would be a satisfactory settlement, and to use her own money to fund the settlement without disclosing that fact to her clients. *Id.* at 138-139. She presented her clients with a Statement of Settlement indicating that the case had settled, deducting her fees and expenses from the \$10,000. *Id.* at 139. She also misrepresented to the client's medical provider that the case had settled, requesting a reduction on the invoice so that the client could receive some recovery. *Id.* On these facts, the Maryland Court of Appeals disbarred Pennington for dishonesty and conduct

prejudicial to the administration of justice. *Id.* Our Court declined to disbar Pennington, instead imposing a two-year suspension with a fitness requirement which, it concluded, was the sanction that would have been imposed in an original case here. *Id.* at 140-144.

Again, Respondent's misconduct here is arguably more serious than that in *Pennington* because, *inter alia*, Respondent committed misappropriation and the criminal act of forgery. Moreover, the client here had not indicated a willingness to settle the case, Respondent overrode his client's objective, and Respondent also engaged in commingling and other rule violations.

The misconduct in the instant case also bears some similarity to the misconduct of the attorney in *In re Slaughter, supra*, 929 A.2d 433, where the attorney's dishonesty and commission of forgery were found to warrant a three-year suspension with a fitness requirement. There, the attorney misrepresented to his firm that the State of Arkansas had hired the firm on a contingency fee basis in an environmental lawsuit, and he forged a contingency fee agreement purportedly signed by the State's Assistant Attorney General. Respondent's misconduct here is more serious than *Slaughter's* in some respects because it also involved misappropriation of entrusted funds, commingling, and intentional neglect and prejudice to the client's interests. However, *Slaughter's* misconduct extended over a three-year period, 929 A.2d at 447, he appears not to have cooperated with Bar Counsel and "raised unfounded procedural objections," *id.* at 448, he showed no remorse for his conduct, *id.*, and he does not seem to have undertaken any of the remedial and preventive measures that Respondent has implemented. *See also In re Steele*, 868 A.2d 146 (D.C. 2005) (three-year suspension with fitness requirement for repeated instances amounting to "a pattern of aggravated neglect of several clients, seriously prejudicing those clients, misleading several clients as to the status of their cases over a period of several years, and fabricating a subpoena, thereby "rais[ing] severe and unavoidable concerns about dishonesty").

On the other hand, cases with less similar facts but seemingly involving equally serious

misconduct have resulted in less serious sanctions. *See e.g. In re Wright*, 885 A.2d 315 (D.C. 2005) (one-year suspension with fitness requirement for dishonesty in making false statements to creditors of client); *In re Parshall*, 878 A.2d 1253 (D.C. 2005) (18-month suspension for filing status report to Court which contained intentional false statements and fabricated documents, followed by denial of the infractions and alteration of his computer files); *In re Lenoir*, 585 A.2d 771 (D.C. 1991) (18-month suspension with fitness requirement for forging third-party's signature on a pleading and intentionally misleading client as to status of case); *In re Uchendu*, 812 A.2d 933 (D.C. 2002) (30-day suspension for repeated filings of documents with forged signatures and questionable remorse); *In re Hager*, 812 A.2d 904 D.C. 2002) (one-year suspension for hiding from clients settlement of class action and receipt of substantial legal fees, described as misconduct "strik[ing] at the heart of the attorney-client relationship" and "affecting an unusually large number of clients," with no showing of remorse); *In re Owens*, 806 A.2d 1230 (D.C. 2002) (30-day suspension for dishonesty in making false statements to administrative law judge); *In re Bernstein*, 774 A.2d 309 (D.C. 2001) (9-month suspension with conditions for concealing from client administrative agency's award of additional legal fees, with no showing of remorse); *In re Phillips*, 705 A.2d 690 (D.C. 1998) (60-day suspension for false statements in court filing); *In re Bikoff*, 748 A.2d 915 (D.C. 1995) (60-day suspension for falsifying more than \$100,000 on client bills, described as "extremely serious misconduct and prejudice to the client); *In re Reback*, 513 A.2d 226 (D.C. 1986) (6-month suspension for concealing from client that case had been dismissed and falsely signing and notarizing a pleading).

In sum, assuring that the sanction in this matter will be consistent with sanctions imposed for similar conduct in other proceedings is neither a simple nor a mechanical task. The Hearing Committee cannot ignore Respondent's series of dishonest actions, and it notes that his misconduct constitutes the violation of a significant number of disciplinary Rules. On the other hand, the

Hearing Committee has found that Respondent is truly remorseful for his actions; there is no evidence in the record that the prejudice to the client, albeit tangible, was devastating monetarily or otherwise; Respondent has no prior disciplinary history; and the Hearing Committee has credited the testimony of Respondent's character witnesses that Respondent is basically an honest and trustworthy attorney. Thus, the primary purpose of a sanction in this matter appears to be that of deterring other attorneys from similar misconduct. Taking into account all of these considerations, attempting to be as consistent as possible with preceding cases, and believing that the recommended sanction for an essentially honest and well-regarded attorney whom clients can depend upon and who has no prior disciplinary history will serve as notice to other attorneys that misconduct of this nature will result in very serious sanctions, the Hearing Committee, recognizing that its recommended sanction might otherwise be considered to be on the lenient side for such cases (especially *In re Slaughter, supra*), recommends that Respondent be suspended from the practice of law for a period of eighteen months.

In deciding whether Respondent should be required to demonstrate his fitness to practice law before he is reinstated at the end of his suspension, the Hearing Committee, as required by the Court of Appeals' decision in *In re Cater*, 887 A.2d 1 (D.C. 2005), has considered the so-called *Roundtree* factors:

- (1) the nature and circumstances of the misconduct for which the attorney was disciplined;
- (2) whether the attorney recognizes the seriousness of the misconduct;
- (3) the attorney's conduct since the discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;
- (4) the attorney's present character; and
- (5) the attorney's present qualifications and fitness to practice law.

In re Roundtree, 503 A.2d 115, 1217 (D.C. 1985).

As discussed already, Respondent has committed a significant number of serious ethical violations, including some involving dishonesty, deceit and criminality. This circumstance, in and of itself, gives the Hearing Committee pause as to whether Respondent should be allowed to resume the practice of law at the end of his suspension without demonstrating his fitness to do so. However, the facts in this matter pertaining to all of the other *Roundtree* factors have convinced the Hearing Committee that Respondent will be fit to resume the practice of law at the end of his suspension and that, therefore, Bar Counsel has not established by clear and convincing evidence “serious doubt” as to Respondent’s fitness to resume the practice of law. *In re Cater, supra*, 887 A.2d at 24. The Hearing Committee bases this conclusion on Respondent’s recognition of the seriousness of his misconduct and his remorse therefor (factor 2), on Respondent’s present character as established by the testimony of the character witnesses (factor 4), on the fact that Respondent apparently has continued to practice law without incident since being charged in this matter in late 2005 (BX 19) (factor 5), and on the measures which Respondent has implemented in his practice to prevent the reoccurrence of the problems and circumstances leading to this proceeding (TR. I, at 207-214) (factor 3). Accordingly, in lieu of a fitness requirement, and in light especially of the prophylactic steps which Respondent has taken as they pertain to *Roundtree* factor 3, the Hearing Committee recommends that, at the end of the period of his suspension and upon his resumption of the practice of law, Respondent should be required (1) to obtain from the Bar’s Practice Management Advisory Service a Practice Management Assessment which evaluates the measures which Respondent has recently adopted (or similar measures which he adopts upon resuming the practice of law) with respect to whether those measures adequately and permanently address the problems and circumstances which led to this proceeding and (2) to comply with any recommendations which the Practice Management Advisory Service makes in its Practice Management Assessment.

In sum, the Hearing Committee recommends that, unless the *Kersey* doctrine is applicable, Respondent should be suspended from the practice of law for a period of eighteen months, that he should be allowed to resume the practice of law at the end of his suspension without further demonstrating his fitness to practice law, and that he should be required to consult with, and then implement, adhere to and maintain the recommendations of, the Bar's Practice Management Advisory Service.

VI. FINDINGS OF FACT -- PHASE II³

1. Respondent did not file responses to Savino's discovery requests as ordered by the court. Tr. I at 200, 202 (Respondent). He did not respond to Savino's Motion for Sanctions and request that the Court issue an order dismissing Plaintiff The Ad Agency's claims and to enter a default judgment in favor of Defendant Savino on its counterclaim. Tr. I at 202 (Respondent). Respondent did not inform his client, The Ad Agency, of his failure to respond to Savino's discovery requests, or of his failure to submit an answer to the First Amended Counterclaim. Respondent also did not inform his client that Savino had filed a Motion for Sanctions or of his failure to respond to that motion. Further, Respondent did not inform his client of the court's dismissal of its complaint, nor of the entry of a default judgment in favor of Savino. Tr. I at 203, 222-223 (Respondent).

2. Respondent consciously chose not to pursue or protect his client's interest because he did not want to deal with the issues raised in the counterclaim. Tr. I at 199-201, 205-206 (Respondent). Respondent had agreed to represent The Ad Agency in "a pretty simple collection matter," involving collection of \$7,500 due The Ad Agency for promotional work for a restaurant. Tr. I at 199; see BX 2 (fee agreement). After he filed suit on behalf of his client, however, Savino filed a counterclaim seeking \$250,000 in damages and alleging, *inter alia*, that a principal of The Ad Agency had been in the restaurant with her male assistant on the nights of the promotions, became intoxicated, made

³ Hereinafter cited as "FF II, ___."

advances toward restaurant patrons and employees, and solicited drugs from a restaurant employee. BX 5 at p.5; *see also* Tr. I at 199-200 (Respondent). The client denied the allegations in the counterclaim. *See* BX 34 (Blumberg report) at p. 11.

Respondent had not contemplated the possibility of a counterclaim when he undertook the representation, and the "insinuations" in the counterclaim were "far removed from anything that [he had] dealt with in [his] office of a day-to-day basis." Tr. I at 201, 205-206. He "had a very hard time coming to grips with the client on this case, in doing what needed to be done, which was either insisting that the client execute a retainer agreement to defend the Counterclaim or withdraw, and [he] did not do either of these things." Tr. I at 206. His associate was involved in the early stages of the representation, but Respondent had assumed the responsibility to deal with the client on the counterclaim. Tr. I at 215-216. Respondent attempted in two or three telephone conversations to get the client to agree to drop its claim for payment of the \$7,500 in return for the restaurant dropping its counterclaim, but the client never agreed to do so. Tr. I at 220-221. Respondent "couldn't do what needed to be done, which was to say look, it is one of these alternatives, we either walk away, you pay us hourly to defend the Counterclaim, which is likely to quickly exceed the \$7,500 that you are seeking, or we are going to have to withdraw." Tr. I at 222.

3. Dr. Richard Ratner was asked by Respondent's counsel to evaluate Respondent "in order to discover whether there were any psychiatric reasons for his having behaved as he did in this matter." RX 20 (Dr. Ratner's report of May 3, 2006) at 2. Respondent was 49 years old at the time. *See* RX 20 at 1. Respondent had previously "had two episodes of psychotherapy in his life, both of which seem to have been precipitated by career issues" RX 20 at 3. Respondent saw a psychiatrist on a weekly basis for about a year in 1983-1984 when he was considering whether to move on from his job with a solo practitioner but was uncertain what he should do. BX 34 (Dr. Blumberg's report) at 3; RX 20 at 2-3. Respondent eventually decided to leave his job for another one. RX 20 at 3.

Respondent was not prescribed any psychotropic medication at that time. From about 1990 to 1992, Respondent saw a psychologist and discussed issues concerning parental separation and procrastination in the workplace. RX 20 at 3; BX 34 at 3. The course of treatment culminated in a decision to leave his then current job with a law firm and open a solo practice. RX 20 at 1-3; Tr. I at 131 (Ratner).

4. In the course of his evaluation of Respondent, Dr. Ratner met with Respondent on seven occasions for a total of nine hours and administered psychological tests, issuing his report on May 3, 2006. RX 20 at 2, 5-6. He also reviewed a questionnaire completed by Respondent's office manager. RX 20 at 2, 6; Tr. I at 133. Dr. Ratner did not have the benefit of an interview with or any third-party observations from Respondent's wife because Respondent did not want his wife to know about the disciplinary charges. Tr. I at 193-194 (Ratner).

5. During his first few sessions with Respondent, Dr. Ratner "really could see nothing that was particularly explanatory or mitigatory in [Respondent's] behavior [T]here was nothing that was obvious." Tr. I at 136 (Ratner); *see also* Tr. I at 133. Dr. Ratner ultimately diagnosed Respondent as "suffering from ADHD, Attention Deficit Hyperactivity Disorder predominantly inattentive type, or combined type, as they say, with some inattentiveness and some hyperactivity/impulsivity." Tr. I at 133, 161; RX 20 at 8. He also made a secondary diagnosis of adjustment disorder with anxiety, based on Respondent's anxiety about the disciplinary proceedings. Tr. I at 132, 159-160; RX 20 at 8. Dr. Ratner focused on the possibility of a diagnosis of ADHD only in a later session when Respondent mentioned that his daughter had been diagnosed with ADHD. Tr. I at 133, 136, 183. Respondent had also reported to Dr. Ratner that he had been a procrastinator throughout his life. Tr. I at 133-134.

6. Dr. Neil Blumberg evaluated Respondent at the request of Bar Counsel. Tr. II at 282-283. Dr. Blumberg is board certified in both general psychiatry and forensic psychiatry, and was

accepted as an expert in these fields. Tr. II at 273-281. In conducting his forensic psychiatric evaluation of Respondent, Dr. Blumberg reviewed the Specification of Charges, the report of Dr. Ratner, and the results of tests administered in connection with Dr. Ratner's evaluation of Respondent. BX 34 at 1; Tr. II at 289, 293-298. He interviewed Respondent on November 29, 2007, and administered three hours of additional psychological testing. BX 34 at p. 1; Tr. II at 287, 289-292. Respondent reported to Dr. Blumberg that he has a history of procrastination, failed to complete a paper on time in law school, and did not file his tax returns between 2000 and 2004 although he made quarterly tax payments. BX 34 at 11.

7. Dr. Blumberg disagreed with Dr. Ratner's diagnosis, finding no convincing evidence that Respondent suffered from ADHD/Combined Type. BX 34 at 21. There was evidence on all of the tests, however, that Respondent had maladaptive personality traits including a tendency to be somewhat avoidant and passive-aggressive. Tr. II at 293-294, 312. In Dr. Blumberg's opinion, respondent suffered from a personality disorder or a disturbance in his character formation as a result of his dysfunctional upbringing. BX 34 at 19-20; Tr. II at 306, 312-313, 324-325. Dr. Blumberg cited Respondent's refusal to tell his wife about his current disciplinary charges as an example of his "character pathology." Tr. II at 314, 329. At the time of Dr. Blumberg's evaluation, Respondent also appeared to be suffering from anxiety and depression due to the stress of "his current disciplinary difficulties." BX 34 at 20.

8. ADHD is a psychological disorder which begins in childhood and involves impairment in a number of areas including attention difficulties, hyperactivity problems, and impulsivity. Tr. I at 133, 135, 144 (Ratner); Tr. II at 283-284 (Blumberg); HCX 1 (excerpt from DSM-IV TR). Adult ADHD is not recognized in the current Diagnostic Statistical Manual (DSM-IV); however, there is a growing body of scholarly literature concerning adult ADHD.

9. A diagnosis of ADHD is a clinical diagnosis based on history and observations; there

is no evidence of structural defects in the brain and it is not diagnosed adequately through objective psychological measures. Tr. I at 135 (Ratner); Tr. II at 337, 342-343 (Blumberg). It "is probably found maybe in 5 percent of the population, at least" Tr. I at 135 (Ratner). In Dr. Ratner's view, "adults with ADHD, do conduct their lives, they have jobs, they have professions, it is not something that is disabling, totally disabling, and is certainly not grounds for a lack of criminal responsibility or anything like that. But it is a factor that affects sometimes how people do their jobs." Tr. I at 137 (Ratner).

10. Persons having difficulty with attention will procrastinate, become easily distracted, and exhibit poor concentration and poor time management. Tr. I at 133 (Ratner); Tr. II at 286 (Blumberg). As Dr. Ratner recognized, however, "we all procrastinate to a greater or lesser degree, maybe more so with regard to things that we really don't want to look at." Tr. I at 165 (Ratner). Respondent did not report to Dr. Blumberg any instances in his work history in which his procrastination had led to problems other than the present situation. Tr. II at 302-303, 338-339, 343 (Blumberg).

11. Examples of hyperactivity are excessive physical activity (fidgeting) and/or excessive talking. Tr. I at 157-158 (Ratner); Tr. II at 286, 304-305 (Blumberg).

12. Impulsivity is the act of doing something without thinking of the consequences. Tr. I at 158, 163 (Ratner). In children, impulsivity is marked by blurting answers out of turn, interrupting or intruding on others, or having difficulty waiting their turn. Tr. I at 158-159 (Ratner). Impulsivity in adults is marked by driving too fast, involvement in traffic accidents, or changing jobs. Tr. I at 158, 172 (Ratner); Tr. II at 286 (Blumberg).

13. A proper diagnosis of adult ADHD requires proof that the disorder manifested itself in early childhood, before the age of seven. HCX 1 (Diagnostic criteria B); Tr. I at 180-182 (Ratner); Tr. II at 283-284, 341 (Blumberg). This condition "is usually evident by the early elementary school

years. Generally, the symptoms of ADHD, if present, resolve by mid to late adolescence." BX 34, at

21. As Dr. Blumberg elaborated in his testimony:

The disorder always begins in childhood, it doesn't just miraculously appear sometime in later adulthood. Generally the disorder wanes and often disappears by mid adolescence. The thinking is that the condition is due to immaturity of the central nervous system, and that with a delayed maturation these symptoms generally abate, or there are a certain number of cases in which an adult may have persistent symptoms or that meet the full criteria of ADHD or just some of those symptoms that seem to linger.

Tr. II at 283-284 (Blumberg). While there is "some literature now that has attempted to translate the symptoms into sort of an adult form" (Tr. II at 285 (Blumberg)), "it is not generally accepted by the scientific community at this point" and "you have to have some credible evidence that these problems existed during childhood and into adolescence . . ." (Tr. II at 341-342 (Blumberg)).

14. Neither Dr. Ratner nor Dr. Blumberg found evidence of any symptoms of ADHD in Respondent's early childhood. Tr. I at 180-182 (Ratner). Tr. II at 305-307 (Blumberg).

15. In Dr. Blumberg's view, Respondent does not suffer from adult ADHD. Tr. II at 302-307 (Blumberg). During his examination by Dr. Blumberg, Respondent did not exhibit any difficulties with his attention or concentration that would be indicative of ADHD. Tr. II at 303 (Blumberg). Respondent did not exhibit any fidgety or hyperactive behavior indicative of ADHD. Tr. II at 304 (Blumberg). Nor did Respondent exhibit any tendencies towards impulsivity indicative of ADHD in the examination or in his work history. Tr. II at 304-305 (Blumberg). As Dr. Blumberg stated in his report:

The fact that [Respondent] was able to be successful academically during his grade school years, college and law school and successfully run his own law practice is inconsistent with a diagnosis of ADHD. . . . Furthermore, a diagnosis of ADHD does not equate with any clinically significant impairment in [Respondent's] ability to either appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law."

BX 34 at 21; see also Tr. II at 305.

16. In Dr. Ratner's view, when Respondent engaged in forgery, the misuse of his trust

account, and the concealment from his client, he made "a series of snap decisions under pressure without really thinking very far ahead, or ahead at all." Tr. I at 148; *see also* Tr. I at 163. Dr. Ratner opined that although Respondent may have had an extended period of time during the course of conduct to reflect upon what he was going to do, he perhaps procrastinated until the last minute and then did something to make the problem go away. Tr. I at 166-168 (Ratner).

17. Dr. Blumberg opined that dishonesty and/or the criminal act of forgery are not symptoms of ADHD, inasmuch as the disorder does not lead "to someone acting in a deliberately deceitful way, especially, and it doesn't impact on one's ability to appreciate that what they are doing is wrong, or control themselves in terms of the kinds of behavior that [Respondent] engaged in." Tr. II at 301 (Blumberg); *see also* Tr. I at 162 (Ratner) (Dr. Ratner agrees that the criteria for ADHD do not include anything that would suggest behavior such as forgery or dishonesty in dealings with others). Dr. Blumberg stated in his report: "[E]ven if one assumed that [Respondent] did, in fact, suffer from ADHD and that his procrastination in the current matter was the result of this condition, [Respondent's] hiding his failures from his client and ultimately forging a settlement document, as well as his other illegal and unethical conduct, are not characteristics of ADHD." BX 34 at 21; *see also* Tr. II at 301, 338 (Blumberg).

18. Remedial measures to assist persons with adult ADHD include the use of medication and/or psychotherapy. Tr. I at 189-191 (Ratner); Tr. II at 307-308 (Blumberg); *see also* RX 20 at 8-9.

19. Respondent has declined to take any medication and the record is not clear regarding whether or to what extent he has availed himself of psychotherapy. Tr. I at 212, 217 (Respondent); Tr. I at 152-153, 190-192 (Ratner).

VII. RECOMMENDED CONCLUSIONS OF LAW -- PHASE II

Respondent asks that the sanction imposed against him be mitigated under the principles enunciated in *In re Kersey, supra*, and its progeny. In *Kersey*, the Court stayed the disbarment of an

attorney for, *inter alia*, misappropriation in light of his showing that (i) he suffered from the disease of alcoholism; (ii) a nexus existed between his alcoholism and his misconduct; and (iii) he had been substantially rehabilitated from his alcoholic condition. 520 A.2d at 326-327. Subsequent cases have established that the attorney seeking mitigation on grounds of disability has the burden of proving (i) by clear and convincing evidence that he has a disability, (ii) by a preponderance of the evidence that the misconduct was substantially affected by the disability (nexus); and (iii) by clear and convincing evidence that he is substantially rehabilitated. *In re Appler*, 669 A.2d 731, 737 (D.C. 1995); *In re Temple*, 596 A.2d 585 (D.C. 1991); *In re Miller*, 553 A.2d 201 (D.C. 1989); *see* Board Rule 11.11(a). The Hearing Committee's conclusion of law that Respondent is not eligible for *Kersey* mitigation is based on the preceding findings of fact and on the following conclusions of law.

A. RESPONDENT HAS NOT ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT HE SUFFERS FROM A DISABILITY

Respondent claims that he suffers from adult ADHD. The Court of Appeals has recognized depression and dysthymia, for example, as *Kersey*-type mitigating factors. *In re Peek*, 656 A.2d 627 (D.C. 1989); *cf. In re Robinson*, 736 A.2d 983 (D.C. 1999) (attorney not entitled to *Kersey*-style mitigation where she failed to prove rehabilitation from psychological disorder); *In re Appler*, *supra* (same). As of the submission of this Report, the Court has not recognized ADHD as a disability that might give rise to *Kersey*-style mitigation. In light of the following findings and conclusions, the Hearing Committee does not need to address that threshold issue.

A majority of the Hearing Committee has concluded that Respondent has not proven by clear and convincing evidence that he suffers from ADHD. Proper diagnosis of adult ADHD requires proof that the disorder manifested itself in early childhood, before the age of seven. FF II, 8, 13. Neither Respondent's expert witness, Dr. Richard Ratner, nor Bar Counsel's expert witness, Dr. Neil Blumberg, identified any specific information indicating that Respondent exhibited any symptoms of

ADHD as a child. FF II, 14. Moreover, Respondent, who has declined to take any medication for ADHD, does not exhibit any of the characteristics of ADHD, such as a lack of concentration, fidgetiness, hyperactivity or impulsivity. FF II, 11-12, 15, 18-19. Further, there is no evidence that Respondent's tendency to procrastinate has created a significant problem in his work other than in the instant case, or is any different from the procrastination that many individuals occasionally indulge. *See* FF II, 10, 15. Consequently, Respondent did not prove, by clear and convincing evidence, that he suffers from adult ADHD.⁴

B. RESPONDENT HAS NOT ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE THAT HIS MISCONDUCT WAS SUBSTANTIALLY CAUSED BY A DISABILITY

In order to prove, by a preponderance of the evidence, a nexus between the misconduct and the proffered mitigating factor, "the attorney must show that the factor was sufficiently determinative of his conduct that its removal can be expected to end the misconduct." *In re Temple, supra*, 596 A.2d at 690. The Hearing Committee has unanimously concluded that Respondent has not proved by a preponderance of the evidence that ADHD was a determinative cause of his conduct.

Assuming, *arguendo*, that Respondent suffers from adult ADHD, such a condition would explain, at most, only Respondent's inattention to or neglect of his client The Ad Agency's case (*i.e.*, the Rule 1.3 and 1.4 violations). There is no evidence in this proceeding that ADHD leads a person to act in a deliberately dishonest way, to fail to appreciate the wrongfulness of an act, or to fail to control his conduct, FF II, 17, and Respondent has not shown even by a preponderance of the evidence that his intentional acts of neglect, his dishonesty, his criminal act of forgery, and his commingling and misappropriation are attributable to ADHD. *Id.*

First, even with respect to the Rule 1.3 and 1.4 violations, Respondent's neglect of his

⁴ While Bar Counsel's expert opined that Respondent suffers from a personality disorder, the Board has previously held that a personality disorder does not qualify as a disability for purposes of *Kersey*-style mitigation, and the Court has "not reached] the issue whether a personality disorder, standing alone, could serve as a basis for a mitigated sanction." *In re Drury*, 683 A.2d 465, 468 & n.5 (D.C. 1996); *see also In re Appler, supra*, 669 A.2d at 736 n.10, 738; *In re Woodard, supra*, 636 A.2d at 970 & n.2.

client's case cannot be explained by adult ADHD because the condition is not a "client specific disorder." Tr. II at 302 (Blumberg). Bar Counsel's prosecution did not include companion cases, Respondent has no prior misconduct, and there is no evidence from Respondent of a pattern -- or even other instances -- of neglecting client matters. On this record, the Hearing Committee cannot find that ADHD caused Respondent to neglect the Ad Agency case. *See* FF II, 10, 15; BX 34 at 21; Tr. II at 302-303, 338-339, 343 (Blumberg).

Second, Respondent's expert opined that perhaps Respondent's dishonest and criminal acts were impulsive acts which were a by-product of ADHD. FF II, 16; Tr. I at 139-140, 148, 163, 167-170 (Ratner). He acknowledged, however, that Respondent likely had an extended period of time during the course of the conduct to reflect on what he was going to do. Tr. I at 166-168 (Ratner). Further, he agreed that the criteria for ADHD do not suggest anything that would be consistent with conduct such as forgery or other dishonesty. Tr. I at 162 (Ratner). In any event, "impulsivity," as it is manifested in adult ADHD, is marked by conduct such as poor driving habits or frequent job changes, not by lying, manufacturing false documents, or forgery. FF II, 12, 17.

Finally, Respondent produced no evidence that there is any connection between his alleged adult ADHD and his commingling and misappropriation of entrusted funds. During the hearing, Respondent's expert witness was asked:

Q. There has been an allegation made that [Respondent] misused his trust account. I believe you have been in the court room and heard some of that. How do you deal with that? Do you see a connection between her [*sic*] diagnosis and that element?

A. Yes. I think I have a different view, different scenario for his behavior than Dr. Blumberg has as I read in his report. Dr. Blumberg talks about a plan suggesting there was premeditation, and I don't see it that way.

I see his behavior as a series of individual somewhat impulsive, well let me just do what I need to do right now and I will worry about it later, except, he didn't really worry about it later

Tr. I at 139-140 (Ratner).

This is the only evidence in the record pertaining to the issue of a nexus *vel non* between ADHD and Respondent's commingling and misappropriation of entrusted funds. This does not provide any evidence of a link of any nature between a purported affliction with ADHD and the commingling and misappropriation, and nothing else in Dr. Ratner's testimony linked Respondent's alleged ADHD to his commingling and misappropriation.

Accordingly, Respondent has not proven by a preponderance of the evidence that there is a nexus between adult ADHD and his misconduct. *Cf. In re Stanback*, 681 A.2d 1109 (D.C. 1996) (Court upheld Hearing Committee finding that although the attorney suffered from alcoholism and depression, he did not prove that he suffered from those disabilities at the time he engaged in the misappropriation of client funds); *In re Cooper*, 591 A.2d 1292 (D.C.1991) (attorney could not prove nexus between alleged addiction to cocaine and misappropriation where his professional performance was effective but he exercised poor personal judgment).

C. EVEN IF RESPONDENT HAD ESTABLISHED THAT HE HAD A DISABILITY AND THAT IT SUBSTANTIALLY CAUSED OR AFFECTED HIS MISCONDUCT, HE DID NOT ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT HE IS SUBSTANTIALLY REHABILITATED WITH RESPECT TO THAT DISABILITY

Remedial measures to assist persons suffering with adult ADHD include the use of medication and/or psychotherapy. FF II, 19. Respondent's expert witness, in his report concerning his evaluation of Respondent, suggested that Respondent was an appropriate candidate for medication and psychotherapy. RX 20 at 8-9. Respondent, however, has declined to take any medication, and the record is unclear regarding his involvement in psychotherapy. FF II, 20. Consequently, even if Respondent had established the other elements of *Kersey* mitigation, he has not established, by clear and convincing evidence, that he has been substantially rehabilitated from any such putative disability.

**VIII. RECOMMENDED KERSEY FINDING --
RESPONDENT IS NOT ELIGIBLE FOR MITIGATION OF THE
RECOMMENDED SANCTION ON THE BASIS OF A DISABILITY**

In light of the Findings of Fact set forth in Section VI, *supra*, and the Recommended Conclusions of Law set forth in Section VII, *supra*, the Committee recommends a finding that Respondent is not eligible for mitigation of the sanction recommended in Section V, *supra*.

IX. CONCLUSION

Based on its findings of fact and its legal analysis in this bifurcated proceeding, the Hearing Committee has concluded, as discussed more fully hereinabove:

that Respondent has violated Rules 1.2(a), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.3(c), 1.4(a), 1.4(b), 1.4(c), 1.15(a) -- first and second sentences, 1.15(a) - - fourth sentence, 8.4(b) and 8.4(c) of the District of Columbia Rules of Professional Conduct and Rule XI, §19 of the Rules of the District of Columbia Bar;

that Respondent should be suspended from the practice of law for a period of eighteen months, that he should be allowed to resume the practice of law at the end of his suspension without further demonstrating his fitness to practice law, and that, upon his resumption of the practice of law, he should be required to consult with, and then implement and adhere to the recommendations of, the Bar's Practice Management Advisory Service; and,

that Respondent has not established that he is eligible for mitigation of the recommended sanction under the principles of *In re Kersey, supra*.

November 25, 2008

Respectfully submitted,

/S/
Warren Anthony Fitch, Chair

/S/
Tesa Leon

/S/
Rima Sirota

Separate Statement by Ms. Leon

This case was particularly difficult because, though I believe that Mr. Kline has attention deficit/hyperactivity disorder (“ADHD”) and that he has taken efforts to avoid dealing with difficult clients and thereby to prevent any repeat of his egregious conduct, the *Kersey* test was just not adequate for the issue presented in this case. Alcoholism, such as that at issue in the *Kersey* case, has criteria that are easier to diagnose initially and to reliably measure during the rehabilitation phase than mental disorders, such as ADHD. ADHD and other mental disorders are not as easily diagnosed, and the remediation is done on a more case-by-case basis. In addition, ADHD has only recently been accepted as an adult disorder and the diagnostic and treatment methods and criteria are still being developed. Currently, there is no objective test for ADHD. Yet more people are being diagnosed with ADD and ADHD. It is only reasonable to expect that more cases dealing with ADHD will arise before the Board, and the Board and the Court will need in the appropriate cases to provide some guidelines for analyzing the question of what constitutes rehabilitation of ADD and ADHD.