THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
January 31, 2023

In the Matter of:	:	
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GEORGE A. TEITELBAUM,	:	
	:	D.C. App. No. 22-BG-906
Respondent.	:	Board Docket No. 21-ND-002
	:	Disciplinary Docket No. 2019-D161
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 370926)	:	

REPORT AND RECOMMENDATION OF
THE BOARD ON PROFESSIONAL RESPONSIBILITY

Hearing Committee Number Ten recommended that the Court of Appeals approve the parties' agreed-upon resolution of this matter: that Respondent failed to maintain complete records of his handling of entrusted funds in violation of Rule 1.15(a), and should be suspended for thirty days with proof of fitness prior to reinstatement, all stayed in favor of probation. On January 3, 2023, the Court requested "the Board's views . . . on the appropriateness of the proposed sanction in light of this [C]ourt's precedents." The Court explained that "the Hearing Committee expressed reservations as to whether the proposed sanction was justified because respondent's misconduct may have constituted misappropriation (deeming it a 'close question')."

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

We have reviewed the stipulated facts set forth in the Hearing Committee Report and we conclude that the Hearing Committee's reservations were well-founded. The Board recommends that the Court reject the parties' negotiated disposition because the stipulated facts support the conclusion that Respondent engaged in misappropriation in addition to the stipulated record-keeping charge. Because the parties believed that Respondent's conduct did not involve misappropriation, consideration of the sanction requires further factual development, including facts regarding Respondent's state of mind or intent. *See* Hearing Committee's Report and Recommendation at 4 n.2 ("[O]ur consideration of this Petition would be different if Respondent engaged in misappropriation.").

Relevant Facts

The D.C. Superior Court appointed Respondent to serve as a co-personal representative with Jose Morgan of the *Estate of Ora Lee Workman*. Respondent attempted to obtain monthly bank statements, but was unable to do so, and stopped trying. Respondent was unconcerned that funds might be improperly disbursed because he retained control of the Estate's checkbook. However, he did not know that bank fees were being withdrawn from the Estate account, and he did not obtain the bank statements, which reflected these fees.

After Respondent filed a final accounting approved by the Superior Court and paid all of the legatees, Mr. Morgan received notice that the Estate account was overdrawn by $256.81. Respondent was unable to explain the reason for the overdraft.

The account was overdrawn, in part, because Respondent did not factor in the withdrawn bank fees when calculating the distribution of the Estate funds to the legatees. But the bank fees do not explain the total shortfall.[1] Despite the overdraft, the bank paid the check, and then closed the account. Thus, all of the legatees received the amounts due to them.

The parties agreed that Respondent had violated Rule 1.15(a) by failing to maintain sufficient records of his handling of entrusted funds. Disciplinary Counsel represented that its investigation did not reveal evidence that the overdraft involved misappropriation.

Hearing Committee Proceedings

The Hearing Committee agreed with the parties that Respondent had violated the record-keeping provision of Rule 1.15(a), but had not engaged in misappropriation. It agreed that the recommended sanction was not unduly lenient, and recommended that the Court suspend Respondent for thirty days, with proof of fitness prior to reinstatement, all stayed in favor of one year of probation with conditions.

The Hearing Committee recognized "that whether Respondent's overdraft from the estate account involved misappropriation depends on the application of the law to" the agreed-upon facts, and that this issue presented a close question. Hearing Committee's Report and Recommendation at 4 n.2. The Hearing

[1] *See* Confidential Appendix to the Hearing Committee's Report and Recommendation at 14 n.9.

Committee included a Confidential Appendix that discussed in detail the information obtained during its *in camera* review of Disciplinary Counsel's investigative file and *ex parte* discussion with Disciplinary Counsel. We commend the Hearing Committee for its thorough and thoughtful analysis of the issues presented to it. The Hearing Committee's comprehensive discussion has greatly aided the Board's review.

Discussion

A. The Stipulated Facts Support the Conclusion that Respondent Engaged in Misappropriation.

The Court defines "misappropriation as 'any unauthorized use of client's 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 Anderson*, 778 A.2d 330, 335 (D.C. 2001) (bracket in original) (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)). "An attorney commits misappropriation when the balance of the attorney's account holding client funds drops below the amount the attorney owes to the client and/or owes to third parties on the client's behalf." *In re Ekekwe-Kauffman*, 267 A.3d 1074, 1080 (D.C. 2022); *see also In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013). "Misappropriation in such situations is essentially a per se offense; proof of improper intent is not required." *Anderson*, 778 A.2d at 335 (quoting *In re Micheel*, 610 A.2d

231, 233 (D.C. 1992)).[2] Because Respondent did not know the amount in the account, he overpaid each of the legatees. These overpayments were unauthorized and as a result, the balance in the account fell below the amount due to the last legatee before she presented her check for payment (as evidenced by the resulting overdraft). Thus, the agreed-upon facts meet the definition of misappropriation.

We recognize that no legatee was harmed by Respondent's failure to account for the bank fees withdrawn from the account. But proof of "injury in fact" is not an element of a misappropriation charge. *See, e.g.*, *In re Smith*, 817 A.2d 196, 200-02 (D.C. 2003) (respondent disbarred because reckless misappropriation occurred when the balance in a commingled account fell below the amount due to third-parties, even though the third-parties were paid when their checks were presented); *see also In re Ahaghotu*, 75 A.3d at 258-59 (respondent disbarred following reckless misappropriation, even though no one was harmed). Moreover, the last legatee avoided injury only because the bank honored her check, even though the account did not have sufficient funds. The availability of "discretionary infusions of money from another source" does not excuse allowing the balance in the account to fall below the entrusted amount. *See In re Pels*, 653 A.2d 388, 394 (D.C. 1995); *see*

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[2] These funds were not held in Respondent's trust account, but the definition of misappropriation applies where, as here, the respondent is acting as a court-appointed fiduciary to an estate. *See, e.g.*, *In re Smith*, Board Docket. No. 18-BD-012, at 9-11 (BPR Dec. 17, 2020), *recommendation approved where no exceptions filed*, 252 A.3d 889 (D.C. 2021) (per curiam). Moreover, Respondent has admitted that he "was responsible for the estate funds" (Amended Pet. at ¶ 5), and he agrees that Rule 1.15 applies to his handling of Estate funds.

also In re Burton, 472 A.2d 831, 838 (D.C. 1984) (per curiam) ("Restitution is not a defense to the charge of having misappropriated trust funds.").

We also recognize that Respondent did not convert Estate funds to his own use, or otherwise benefit from the misappropriation. However, misappropriation does not require proof of conversion, and occurs even if the respondent does not benefit from the unauthorized use.

> This court has reiterated on many occasions that misappropriation is defined as any unauthorized use by an attorney of a client's funds entrusted to him or her, *whether or not temporary or for personal gain or benefit*. Misappropriation occurs when the balance in the account where entrusted funds are deposited falls below the amount that the attorney is required to hold on behalf of the client and/or third party. Improper intent need not be shown.

In re Bailey, 883 A.2d 106, 121 (D.C. 2005) (emphasis added) (internal quotation and citations omitted); *see In re Green*, Board Docket No. 13-BD-020, at 8-11 (BPR Aug. 5, 2015) (payment to third parties in violation of escrow instructions constituted misappropriation), *recommendation adopted without discussion*, 136 A.3d 699, 700-01 (D.C. 2016) (per curiam).

In *In re Hollingsworth*, a recent negotiated discipline case, the Court agreed with the Hearing Committee's recommendation that the respondent had engaged in misappropriation, even though all payees were ultimately paid, and even though the respondent did not convert the entrusted funds, and did not benefit from their unauthorized use. *In re Hollingsworth*, Board Docket No. 18-ND-005 (HC Rpt. May 13, 2019), *recommendation approved*, D.C. App. No. 19-BG-414, 2019 WL 2464475 (D.C. June 13, 2019) (per curiam) (respondent suspended for six months,

with three months stayed, in favor of one-year unsupervised probation). Hollingsworth settled three cases, forgot to deposit the settlement checks, and then wrote checks disbursing the settlement funds. Because Hollingsworth had not deposited the settlement proceeds, the account was overdrawn before the final payee was paid. Following the overdraft, Hollingsworth deposited the settlement funds, all payees were paid, and the account balance was zero. In considering whether a misappropriation occurred, these facts are not meaningfully different than those presented here.

B. Further Factual Development is Necessary to Ensure that the Agreed-Upon Sanction is Not Unduly Lenient.

In re Johnson instructs that when reviewing a negotiated disposition, "some consideration may be given to what charges might have been brought, but only to ensure that [Disciplinary] Counsel is not offering an unduly lenient sanction—the ultimate focus must be on the propriety of the sanction itself." 984 A.2d 176, 181 (D.C. 2009) (per curiam). Having determined that the agreed-upon facts support the conclusion that Respondent engaged in misappropriation, we thus look to the sanction that may have been imposed in a contested case, to ensure that the sanction here is not unduly lenient. *See In re Mensah*, 262 A.3d 1100, 1104 (D.C. 2021) (per curiam) (explaining that the test in negotiated-discipline cases "is whether the agreed-upon sanction is 'justified'" which "suggests some flexibility in comparing what would be required in contested-discipline cases," and that the sanctions in contested-discipline cases are relevant to that analysis).

In contested cases, "the ordinary sanction for negligent misappropriation would not exceed suspension for six months." *In re Kline*, 11 A.3d 261, 265 (D.C. 2011) (citing *In re Fair*, 780 A.2d 1106, 1115 (D.C. 2001)); *see also Anderson*, 778 A.2d at 332). And absent "extraordinary circumstances," disbarment is the presumptive sanction for intentional or reckless misappropriation. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc). Because the parties did not believe that Respondent engaged in misappropriation, the record is silent as to whether Respondent's conduct was negligent, or worse. We leave that issue to be developed in subsequent proceedings, either in a contested case or a negotiated disposition. *See, e.g.*, *Mensah*, 262 A.3d 1100 (approving a three-year suspension with reinstatement conditioned on a showing of fitness in a negotiated discipline case involving reckless misappropriation); *Hollingsworth*, 2019 WL 2464475 (approving a six-month suspension with three months stayed in a negotiated discipline case involving negligent misappropriation). We express no view on whether, on a fully developed record, it may be established that Respondent's misappropriation resulted from anything more than simple negligence. *See In re Abbey*, 169 A.3d 865, 872 (D.C. 2017) (defining negligent misappropriation as "an attorney's non-intentional, non-deliberate, non-reckless misuse of entrusted funds or an attorney's non-intentional, non-deliberate, non-reckless failure to retain the proper balance of entrusted funds").

However, because the current record has not been fully developed on the misappropriation issue, we cannot be sure that Disciplinary Counsel has not offered an unduly lenient sanction.

Conclusion

For the foregoing reasons, we recommend that the Court reject the Hearing Committee's recommendation.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Lucy Pittman
Chair

All members of the Board concur in this Report and Recommendation.