DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER SEVEN

In the Matter of:	)	
	)	
CATHERINE E. ABBEY,	)	
	)	Board Docket No. 15-BD-066
Respondent.	)	Bar Docket No. 2012-D370
	)	
A Member of the Bar of the	)	
District of Columbia Court of Appeals	)	
(Bar Registration No. 436925)	)	

REPORT AND RECOMMENDATION
OF THE HEARING COMMITTEE

I. INTRODUCTION

Respondent, Catherine E. Abbey, a member of this Bar since March 12, 1993, is charged with violating two, related Rules of Professional Conduct of the District of Columbia which are designed to ensure the integrity of attorneys in dealing with the assets of clients that attorneys hold in trust: Rule 1.15(a), for engaging in the reckless or intentional misappropriation of entrusted funds; and Rule 1.15(c), for failing to promptly notify and/or deliver funds to third party claimants, in which claimants had an interest. These charges arise from Respondent's representation of Mr. Guy Vouffo in a personal injury matter.

In the proposed findings of fact, conclusions of law and recommendations as to sanction that have been filed by the respective parties, there is agreement that misappropriation in violation of Rule 1.15(a) has occurred to the extent that the balance in Respondent's IOLTA trust account, in which funds obtained in the settlement of Mr. Vouffo's personal injury case were deposited, fell below the amount due to Mr. Vouffo's medical providers. The parties disagree, however, on the

causes of that misappropriation. Disciplinary Counsel[1] asserts that there is clear and convincing evidence that Respondent's misappropriation was the result of her intentional and/or reckless behavior, and that disbarment is warranted. Respondent asserts that the misappropriation was the result of her mere negligence, and that a suspension of no more than six months is appropriate.

With respect to the related Rule 1.15(c) claim, the parties disagree that there has been a failure to notify and deliver funds to third party claimants. Disciplinary Counsel asserts that clear and convincing evidence shows that when Respondent settled Mr. Vouffo's case in January 2012, she failed to promptly notify third parties entitled to receive funds from the proceeds of the settlement, or promptly deliver the funds to them. Respondent asserts that Disciplinary Counsel failed to establish that she was obligated to pay two out of three of the providers in question. She further asserts that a delay of nearly one year did not constitute delayed notification and payment of the third medical provider.

As described herein, this Committee finds clear and convincing evidence that Respondent has committed misappropriation (Rule 1.15(a)) and has failed to both-notify and pay third party claimants (Rule 1.15(c)). Moreover, we find that Respondent's misappropriation resulted from recklessness and indifference to the security of funds entrusted to her from the settlement of Mr. Vouffo's case and not from simple negligence. This Committee also finds that Respondent has failed to make a showing of extraordinary circumstances, which would warrant a departure from the recommendation of disbarment that is presumed in cases of intentional or reckless misappropriation.

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1 Since the evidentiary hearing in this case, the Office of Bar Counsel has been renamed the Office of Disciplinary Counsel.

II. PROCEDURAL HISTORY

Disciplinary Counsel filed a *Petition Instituting Formal Disciplinary Proceedings and a Specification of Charges* in this matter on June 16, 2015, and Respondent was personally served on June 22, 2015. BX B, C and C1.[2] Respondent filed her *Answer* on July 27, 2015. BX D. A prehearing conference in this case was held on July 30, 2015 before the Chairperson of this hearing committee, at which time errors in the original *Specification of Charges* and *Answer* were discussed. Also, deadlines were set for filing an amended specification of charges, answer, witness and exhibit lists as well as a date for the evidentiary hearing. An *Amended Specification of Charges* (hereinafter "*Amended Charge*") was filed on September 1, 2015,[3] *see* BX B1; and an *Answer to Amended Specification of Charges* (hereinafter "*Amended Answer*") was filed on September 9, 2015. BX D1. Also, prior to the evidentiary hearing, Disciplinary Counsel orally changed the *Amended Charge* to reflect minor typographical errors in several of the dollar figures.[4]

Disciplinary Counsel's *Amended Charge* asserts first that Respondent engaged in reckless and/or intentional misappropriation of settlement funds in allowing her trust account to fall below the amount that was due to her client's medical providers in violation of Rule 1.15(a). *See Amended*

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2 "BX" refers to Disciplinary Counsel's Exhibits. "JX" refers to the stipulations of fact, executed by the parties and filed with the Hearing Committee as a joint exhibit on December 1, 2015. "Tr." refers to the transcript of the December 1, 2015 hearing. Respondent did not offer any exhibits for admission. "DC Br." refers to *Disciplinary Counsel's Proposed Findings of Fact and Conclusions of Law and Recommendation as to Sanction*, filed January 8, 2016. "R Br." refers to *Respondent's Proposed Findings of Fact and Conclusions of Law and Recommendation for Appropriate Sanction*, filed February 2, 2016. "DC Reply" refers to *Disciplinary Counsel's Reply To Respondent's Proposed Findings of Fact and Conclusions of Law and Recommendation for Appropriate Sanction* filed February 16, 2016. "FF." refers to our Findings of Fact as stated herein.

3 Disciplinary Counsel originally charged a violation of Rule 1.15(b), which was corrected in the *Amended Charge* to Rule 1.15(c).

4 The changes were to correct a 50¢ error in paragraphs 11, 14, and 15. In paragraphs 11 and 15 a reference to $4,498.33 was amended to $4,498.83. In paragraph 14, a reference to $931.89 was amended to $932.39. Tr. at 5-7.

Charge ¶ 17(a). This is alleged to have occurred on eight occasions between January 5, 2012, the date that Respondent deposited a check for $12,500.00 in her IOLTA account from Liberty Mutual Insurance in settlement of her client's claim against the insured, and November 14, 2012, the date that Respondent made payment to two of her client's medical providers. It is alleged that Respondent was required to maintain at least $4,498.83 in her IOLTA account for Mr. Vouffo's health care providers. *See Amended Charge* ¶¶ 8, 13, 15 and 16. While admitting many of Disciplinary Counsel's factual allegations, Respondent denied intentionally or recklessly violating Rule 1.15(a), *see Amended Answer* ¶ 4; although, as noted, Respondent later clarified to admit to negligent misappropriation in her post evidentiary hearing brief. *See* R Br. at 5-7.

Disciplinary Counsel also asserts that Respondent failed to promptly notify and\or deliver settlement funds due to Mr. Vouffo's medical providers pursuant to the executed Authorization and Assignments ("A&A") with them. *See Amended Charge* ¶¶ 3-6 and 17(b). Respondent is alleged to have kept the funds for ten months before making a payment and to have continued to retain some funds in her IOLTA account that were due medical providers up to the time of the filing of the *Amended Charge*. *See Amended Charge* ¶¶ 13 and 14. Again Respondent denied violating Rule 1.15(c). *See Amended Answer*, BX D1 at ¶ 4.

An evidentiary hearing was held on December 1, 2015, before Hearing Committee Seven (the "Committee"), which is comprised of Thomas J. Keary, Esquire, Chairperson; Mr. Hal Kassoff, public member; and Margaret Hedges, Esquire. Disciplinary Counsel was represented at the hearing by H. Clay Smith, III, Assistant Disciplinary Counsel. Respondent was represented by John O. Iweanoge, II, Esquire.

Before the evidentiary hearing, the parties stipulated in writing to most of the factual allegations contained in the *Amended Charg*e and those fact stipulations were admitted. JX1;

Tr. at 5. Also at the outset of the evidentiary hearing, Disciplinary Counsel submitted Bar Exhibits A-D and 1-17, which were all admitted into evidence without objection by Respondent. Tr. at 65-66. Finally, in the sanctions phase of the evidentiary hearing, the Committee accepted into evidence an informal admonition that was issued to Respondent in 2004. BX 18; Tr. at 111.

Disciplinary Counsel called two witnesses. Mark D. Pappas, the complainant, who testified about his employer, Medtaris Rehabilitation's (hereinafter "Medtaris") claim to the proceeds of settlement of Mr. Vouffo's personal injury case, and of his efforts to secure payment for Medtaris from the proceeds of that settlement; and Kevin O'Connell, Disciplinary Counsel's forensic investigator, who testified about his review of Respondent's bank records relating to the deposit and disposition of Mr. Vouffo's settlement funds. Respondent did not offer any exhibits, but testified on her own behalf.

Upon conclusion of the hearing, the Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the ethical violations set forth in the specification of charges. Tr. at 96-97; *see* Board Rule 11.11. In the sanctions phase of the hearing, Respondent again testified on her own behalf.

III. FINDINGS OF FACT

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on March 12, 1993, and assigned Bar number 436925. JX 1 ¶ 1; BX A; DC Br. 3; R Br. 1. Respondent is also a member of the Pennsylvania Bar, admitted in 1992. Tr. at 68. Respondent is a sole practitioner and practices in the areas of personal injury, incorporation and family law. Tr. at 69, 99. Her office is at 7600 Georgia Ave. NW, Suite 403, Washington, D.C. Tr. at 67.

2. In May 2010, Mr. Guy Vouffo retained Respondent to represent him in connection with injuries he sustained in an automobile accident that occurred on May 11, 2010. The retainer provided that Respondent would receive a contingency fee of thirty-three and one third-percent if the case settled. JX 1 ¶ 2; BX 3A, 3B; DC Br. 3; R Br. 1. The Retainer Agreement also states, "In event of recovery, client agrees that the Attorneys may pay the unpaid bills from the client's share of the recovery." BX 3A at 1.

3. In connection with this automobile accident, Mr. Vouffo received medical treatment from Medtaris, Kaiser Permanente and Doctors Community Hospital. BX 12-14; Tr. at 71-72 (Respondent).

4. On May 12, 2010, Mr. Vouffo executed a document titled "Authorization and Assignment of Benefits (Lien) to Medtaris Rehabilitation" (hereinafter "Medtaris A&A"). The Medtaris A&A provided, *inter alia*:

> ASSIGNMENT OF INSURANCE BENEFITS: I hereby assign Medtaris Rehabilitation the benefits of any and all insurance policies, including HEALTH INSURANCE and PERSONAL INJURY PROTECTION (PIP) to which I may be entitled.
>
> AUTHORIZATION FOR DIRECT PAYMENT: I hereby direct any and all insurance companies to make direct payment to Medtaris Rehabilitation for all services, items and supplies furnished to me or my family members as the case may be. . . . I also authorize and direct my attorney to make prompt payment to Medtaris Rehabilitation any sums, which may be due and owing from the proceeds of any settlement, judgment or insurance payment including services or supplies heretofore supplied and those supplied to the time of settlement, judgment or insurance payments.
>
> I, as the representing attorney, by also signing this Authorization and Assignment of Benefits to Medtaris Rehabilitation agree to follow the aforementioned authorization and direction of my client to pay Medtaris Rehabilitation any sums due and owing from the proceeds of any settlement, judgment or insurance payments.

JX 1 ¶ 3; BX 4; DC Br. 3; R Br. 1.

5. On June 8, 2010, Respondent signed the Medtaris A&A agreement. JX 1 ¶ 4.

6. On May 21, 2010, Doctors Community Hospital sent Mr. Vouffo a bill for $607.83. BX 17. Respondent included this amount in her calculation of Mr. Vouffo's outstanding medical bills. BX 7-9.

7. On June 2, 2010, Mr. Vouffo signed a document titled "Medical Authorization," printed on Respondent's letterhead and addressed to Doctors Community Hospital (hereinafter "DCH MA"). The DCH MA provided, *inter alia*:

> I hereby direct and authorize [Respondent] to pay all unpaid medical and hospital bills presented to her before the distribution of any proceeds to me out of any sums of money received by her to which I may be entitled.

JX 1 ¶ 5; BX 5; DC Br. 3; R Br. 1.

8. Respondent initially calculated the amount her client owed to Kaiser Permanente as $625. BX 8; Tr. at 73-74.

9. Also on June 2, 2010, Mr. Vouffo signed a document titled "Medical Authorization," printed on Respondent's letterhead and addressed to Kaiser (hereinafter "Kaiser MA"). The Kaiser MA provided, *inter alia:*

> I hereby direct and authorize [Respondent] to pay all unpaid medical and hospital bills presented to her before the distribution of any proceeds to me out of any sums of money received by her to which I may be entitled.

JX 1 ¶ 6; BX 6; DC Br. 4; R Br. 1-2.

10. On December 28, 2011, Liberty Mutual Insurance issued a check in the amount of $12,500 payable to Respondent and Mr. Vouffo, in settlement of his claims against the insured. JX 1 ¶ 7; BX 10A, 10B; DC Br. 4; R Br. 2.

11. On January 5, 2012, Respondent deposited the $12,500 settlement check into her Wells Fargo IOLTA account numbered XXXX 7413 ("IOLTA"). JX 1 ¶ 8; BX 15A, 15A1; DC Br. 4; R Br. 2.

12. On January 9, 2012, Respondent spoke with Mark Pappas, a representative of Medtaris, and stated to the effect that her client was not happy with the amount received in the settlement and requested a reduction in their bill from $5,200 to $2,700 for services rendered to Mr. Vouffo. Medtaris agreed to so reduce its bill. JX 1 ¶ 9; BX 1, 13; Tr. at 36-37 (Pappas); DC Br. 4; R Br. 2.

13. On January 10, 2012, Mr. Vouffo executed a release and settlement of his claims against Liberty Mutual's insured. JX 1 ¶ 10; BX 10A; BX 13; Tr. at 15 -16 (Pappas); DC Br. 5; R Br. 2.

14. Also on January 10, 2012, Respondent prepared and both she and Mr. Vouffo signed a settlement distribution sheet that provided, *inter alia*, that Respondent would withhold $4,498.83 to pay Mr. Vouffo's medical providers. Respondent also reduced her attorneys' fee to 30.43% instead of 33 1/3%, collecting $3,803.86 instead of $4,166.67 from the gross recovery. JX 1 ¶ 11; BX 11; Tr. at 43-45 (O'Connell); DC Br. 4; R Br. 2.

15. The $4,498.83 withheld for payment of medical bills represented $2700 for Medtaris, $625 for Kaiser Permanente, $607.83 for Doctors Community Hospital, $487 for Doctors Emergency Physicians and $79 for Diagnostic Imaging. BX 8.

16. Also on January 10, 2012, Respondent issued a check to Mr. Vouffo from her IOLTA account in the amount of $4,003.81, representing his share of the settlement. JX 1 ¶ 12; BX 15A, 15A2; Tr. at 48 (O'Connell); DC Br. 4; R Br. 2.

17. On January 11, 2012, Respondent drafted a fax notification to Doctors Community Hospital. The notification states:

> Our client, Guy Vouffo was involved in a motor vehicle accident on May 15, 2010 and was subsequently treated at Doctor's Community Hospital. The settlement offer is ($12,500). The total medicals are $7,389.92. Please accept $250.00 as full and final payment for all services rendered to Guy Vouffo at Doctor's Community Hospital Emergency Room on this date of service. Please accept by printing your name and signing this for[m] and return via fax. Thank you for your cooperation.

BX 12.

18. Respondent was not able to negotiate a reduction with Doctors Community Hospital. The bill from Doctors Community Hospital remains unpaid. BX 17; Tr. at 95-96 (Respondent).

19. On February 23, 2012, Medtaris' representative spoke with Respondent who told him that there was "a dispute with patient [Mr. Vouffo and] will disburse when possible." Respondent did not inform Medtaris' representative at this time that Mr. Vouffo had endorsed the settlement check, that it had been cashed on January 6, 2012 and that Respondent had the money. Tr. at 15, 18, and 37 (Pappas).

20. Mr. Pappas made subsequent unsuccessful attempts to reach Respondent, leaving messages with the secretary or voice mail. Tr. at 37. Mark Pappas thereupon wrote to Respondent, by registered letter of July 12, 2012 and told Respondent that he learned from "[t]he Liberty Mutual claims adjuster . . . that the settlement check was cashed on 1-16-12, yet Medtaris remains unpaid and no communication from you as to when the bill will be paid." BX 13.[5] Pappas goes on to state

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5 Although this document contains a hearsay statement as to what was said by the insurance adjuster, it was admitted without objection from Respondent. Tr. at 66. Respondent has challenged the date upon which Mr. Pappas first learned of the settlement. Tr. at 15. The Committee, however, credits Pappas' testimony as to the date that he first learned of the cashing of the settlement check from his testimony as supported by contemporaneously recorded telephone logs. Tr. at 36-37.

that "if the bill is not paid by the end of July . . . I will be making a Bar complaint concerning your conduct." *Id.*; Tr. at 17. Respondent received this letter on August 9, 2012. BX 1-2, 13; Tr. at 78 (Respondent).

21. Respondent did not pay Medtaris at this time, and on October 3, 2012, Mr. Pappas filed a complaint with the Office of Disciplinary Counsel against Respondent. BX 1; Tr. at 14-15 (Pappas).

22. On November 13, 2012, Respondent received a letter from the Patient Financial Services Department at Kaiser Permanente. This letter refers to a "final lien balance" of $1,082.99 and states in part:

> In response to your request Kaiser Permanente has agreed to a lien reduction for GUY S. VUOFFO above accident case [sic]. Kaiser will accept $866.44 as full and final payment of the above outstanding lien if payment is received within Thirty (30) days from the state of this settlement.

BX 14.

23. On or about November 14, 2012, Respondent issued two checks from her IOLTA account in connection with the Vouffo matter: one to Medtaris in the amount of $2,700 and one to Kaiser in the amount of $866.44. JX 1 ¶ 13; BX 15K, 15K2, 15K3; Tr. at 49-50 (O'Connell); DC Br. 6; R Br. 3.

24. Respondent has never distributed the remaining $932.39 she had set aside from the proceeds of Mr. Vouffo's settlement for his medical providers. JX ¶ 14; Tr. at 51-52 (O'Connell): Tr. at 95-96 (Respondent); DC Br. 7; R Br. 3.

25. From January 5, 2012 until November 14, 2012, Respondent was required to maintain at least $4,498.83 in her IOLTA, until Mr. Vouffo's health care providers received their share of the recovery from Mr. Vouffo's claim. JX 1 ¶ 15; Tr. at 48-49 (O'Connell); DC Br. 6; R Br. 3.

26. On numerous occasions between January 5 and November 14, 2012, the ending daily balance of Respondent's IOLTA account fell below the amount due to Mr. Vouffo's medical providers. JX 1 ¶ 16; DC Br. 6-7; R Br. 3.

a. On January 12, 2012, the ending daily balance of Respondent's IOLTA account was $2,953.77. JX 1 ¶ 16a; BX 15A; Tr. at 51-52 (O'Connell).

b. From March 30, 2012 through May 21, 2012 Respondent's IOLTA account held $2,923.33. JX 1 ¶ 16b; BX 15C; Tr. at 51-53 (O'Connell).

c. From July 23 through 25, 2012, Respondent's IOLTA account held $2,347.33. JX 1 ¶ 16c; BX 15G; Tr. at 54 (O'Connell).

d. From August 13 through 15, 2012, Respondent's IOLTA account held $3,480.62. JX 1 ¶ 16d; BX 15H; Tr. at 54-55 (O'Connell).

e. From August 20, 2012 through September 6, 2012, Respondent's IOLTA account held $3,257.92. JX 1 ¶ 16e; BX 15I; Tr. at 55-56 (O'Connell).

f. From September 7 through 23, 2012, Respondent's IOLTA account held $2,057.92. JX 1 ¶ 16f; BX 15I; Tr. at 55 (O'Connell).

g. Between October 2 and 31, 2012, Respondent's IOLTA account held $3,141.26 and dropped to $821.26. JX 1 ¶ 16g; BX 15J; Tr. at 56 (O'Connell).

h. On November 1, 2012, the ending balance of Respondent's IOLTA account stood at $621.26. JX 1 ¶ 16h; BX 15K; Tr. at 57 (O'Connell).

27. At no time was Medtaris' representative asked if Respondent or anyone else could borrow or otherwise use the money that belonged to Medtaris. Tr. at 20 (Pappas).

28. During the period when she was required to maintain funds for the medical providers in her trust account, and before paying Medtaris and Kaiser on November 14, 2012,

Respondent signed two $2,000 cash withdrawal slips on her IOLTA account – one on March 22 and one on November 9, 2012. Each withdrawal brought Respondent's IOLTA account below the $4,498.83 she was required to hold in trust for Mr. Vouffo's medical providers. BX 15, 15C1 (Mar. 22, 2012), 15K1 (Nov. 9, 2012); Tr. at 57-58 (O'Connell); DC Br. 7; R Br. 3.

29. Respondent was aware of her responsibility to pay all of Mr. Vouffo's medical providers. Tr. at 94-95 (Respondent); DC Br. 7; R Br. 3.

30. Respondent was specifically aware of her responsibility to maintain $4,498.83 in her IOLTA account to pay the medical providers in the Vouffo matter. Tr. at 91-92 (Respondent); DC Br. 7; R Br. 3.

31. Respondent did not reconcile her IOLTA account records during the time she held Mr. Vouffo's settlement funds in her IOLTA account. Tr. at 79-80 (Respondent); DC Br. 7; R Br. 3. She simply sent all of her records to an accountant at the end of the year. *Id.* The accountant's reconciliation did not identify amounts relating to each individual client. Tr. at 80. Respondent did not keep a ledger. *Id.*

32. Respondent testified that she has occasionally made payments in the past to medical providers from her business account when there were insufficient funds in her IOLTA account to pay these providers. Tr. at 102-03.

33. As of the date of the hearing, Respondent had not attended a continuing legal education course on trust account management. Tr. at 108-09 (Respondent); DC Br. 8; R Br. 4.

IV. CONCLUSIONS OF LAW

A. Rule 1.15(a) (Misappropriation)

Rule 1.15(a) provides that:

> 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, maintained in a financial institution, which is authorized by federal, District of Columbia or state law to do business in the jurisdiction where the account is maintained . . . . Complete records of such account funds shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

D.C. Rule of Professional Conduct 1.15. Comment [1] to this Rule further provides: "[a] lawyer should hold property of others with the care required of a professional fiduciary." And, "[a]ll property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if moneys, in one or more trust accounts maintained with financial institutions meeting the requirements of paragraph (a)." Comment [1] to Rule 1.15.

The District of Columbia Court of Appeals defines misappropriation as "'any unauthorized use of client's funds entrusted to [a lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not [she] derives any personal gain or benefit therefrom.'" *In re Smith*, 70 A.3d 1213, 1216 n. 1 (D.C. 2013) (per curiam) (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)). The Court has long held that misappropriation happens "when the balance in [the attorney's] trust account falls below the amount due to the client[,]" *In re Moore*, 704 A.2d 1187, 1191 (D.C. 1997) (per curiam) (citations omitted), or their client's medical providers. *In re Buckley*, 535 A.2d 863, 865 (D.C. 1987). The Court has further held that the severity of the sanction for misappropriation depends on whether the misappropriation was: (1) intentional or reckless and therefore presumptively warrants disbarment, *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc); or (2) merely negligent and warrants a lesser sanction. *In re Anderson*, 778 A.2d 330, 338 (D.C. 2001).

The *Anderson* court stated that: "[t]he central issue in determining whether a misappropriation is reckless is *how* the attorney handles entrusted funds, whether in a way that suggests the unauthorized use was inadvertent or the result of simple negligence, or in a way that

reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his behavior for the security of the funds." *Id.* at 339 (emphasis in original) (citations omitted).

The *Anderson* court also said that proof that the attorney acted intentionally or deliberately is not required for *Addams* disbarment. Rather, misappropriation that reveals "an unacceptable disregard for the safety and welfare of the entrusted funds – in short that is reckless – will warrant disbarment under *Addams*." *Id.* at 338. Therefore, if the attorney is found to have handled the entrusted funds in a reckless manner, it is unnecessary to reach the question of whether his/her conduct was intentional, as has also been alleged here, for the same sanction of presumptive disbarment applies.

The Court in *Anderson* guides us in the task of distinguishing reckless conduct from mere negligence by setting forth the "hallmarks" of reckless misappropriation. They include: "the indiscriminate commingling of entrusted and personal funds"; a "complete failure to track settlement proceeds"; the "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 finally "the disregard of inquiries concerning the status of funds." *Id.* at 338 (citations omitted). The Court said: "[a]ll of these actions reveal an intent by the attorney 'to deal with and use funds escrowed for clients as his own' or an unacceptable disregard for the security of client funds." *Id*. (citations omitted). However, the *Anderson* court also warns us that recklessness cannot be shown simply by "inadequate record-keeping <u>alone</u> combined with commingling and misappropriation." *Id.* at 340 (emphasis added).

Respondent readily admits that she ". . . did not reconcile her trust account records during the time that she held Mr. Vouffo's settlement funds in her trust account." Rather, she "simply sent

all of her records to the accountant at the end of the year," and "the accountant's reconciliation did not identify amounts relating to each individual client." FF. 31; R Br. 4-5. This amounts in this case to "a complete failure to tract [the] settlement proceeds." *Anderson*, 778 A.2d at 338.

Respondent further testified that she occasionally made payments to her clients' doctors from her business account when her IOLTA account had insufficient funds. FF. 32.

Finally, Respondent admits to having misappropriated trust funds in that she allowed her trust account to fall below the $4,498.83 that she had agreed to set aside for Mr. Vouffo's medical providers on eight occasions: (1) on January 12, 2012 to $2,953.77; (2) on March 30-May 21, 2012 to $2,923.33; (3) on July 23-25, 2012 to $2,347.33; (4) on August 13-15, 2012 to $3,480.62; (5) on August 20-September 6, 2012 to $3,257.92; (6) on September 7-23, 2012 to $2,057.92; (7) on October 2-31, 2012 to $821.26; and (8) on November 1, 2012 to $621.26. FF. 26; R Br. at 4-5. However, Respondent attributes this misappropriation solely to "sloppy accounting practice," without more. R Br. at 6.

Respondent's lack of record keeping, commingling and misappropriation of trust funds were not the only hallmarks of recklessness in this case, however. Here, Respondent intentionally delayed making payment to her client's medical providers over a ten-month period, FF. 12-14, 19-21, 23, during which Respondent was fully aware that the Bar's ethical rules obliged her to keep $4,498.83 in her IOLTA account to pay for her client's medical bills. FF. 29-30. Nevertheless, Respondent recklessly made withdrawals from the trust fund for other purposes with no effort to track the trust fund balance and ensure that she had sufficient trust funds to meet this obligation. FF. 28, 31. Not surprisingly, Respondent misappropriated a portion of the entrusted funds, which she was required to hold on behalf of her client's medical providers. FF. 26.

Moreover, while Respondent did not regularly monitor the balance in her IOLTA account, she nevertheless was aware that there was a problem with her failure to monitor the account because she has had to use funds from her business account to pay doctors' bills in other cases to make up for the low IOLTA balance. FF. 32; Tr. at 102-03. She testified to having on occasion paid doctors "sometimes from [her] office expense account and sometimes from the IOLTA account[.]" Tr. at 102. Notwithstanding this knowledge, Respondent continued to use her IOLTA account for other purposes without changing her practice to insure that sufficient trust funds were there to pay Mr. Vouffo's medical providers. As the Court said in *In re Ahaghotu*, in holding the lawyer's handling of his IOLTA account to be reckless:

> . . . we cannot ignore that Mr. Ahaghotu had been on notice for more than a year that either his internal accounting practices were lacking or that his bank was somehow mishandling the account. His commingling of funds only papered over the problem and, unfortunately, showed a continued lack of interest in tracking what client funds were available at any moment. When he injected personal funds to make up for a low trust account balance, instead of sitting down with the bank to figure out what went wrong, it was likely something would go wrong again. . . . This case is not one of "inadequate record keeping alone.".

75 A.3d 251, 257 (D.C. 2013) (citation omitted).

We conclude, therefore, that Respondent's actions and omissions exhibited a casual indifference to her fiduciary duties and were clear and convincing evidence of her recklessness in the handling of entrusted funds. We now discuss in more detail the evidence in support of the foregoing.

In May 2010, Mr. Guy Vouffo hired Respondent to represent him in a personal injury matter arising from an automobile accident. The retainer provided that Respondent would receive a contingency fee of thirty-three and one third-percent if the case was settled. FF. 2. Mr. Vouffo received medical treatment from Metartis Rehabilitation, Kaiser Permanente and Doctors

Community Hospital for injuries arising from the accident. FF. 3. In connection with that treatment, Mr. Vouffo entered into agreements with these medical providers by which the bills for Mr. Vouffo's treatment would be paid from the proceeds of any recovery and directing Respondent to make payment of any bill presented to her out of the proceeds of any settlement or insurance payment. FF. 2, 4-7, 9.

Respondent settled Mr. Vouffo's personal injury claim. On December 28, 2011, Liberty Mutual issued a check for $12,500.00, payable to Respondent and Mr. Vouffo, and on January 5, 2012, Respondent deposited that check in her IOLTA account. FF. 10-11. Meanwhile, on January 9, 2012, Respondent spoke with Mark Pappas of Medtaris and conveyed to Mr. Pappas that her client was unhappy with the amount received in settlement and requested a reduction. Medtaris agreed to reduce its bill from $5,200 to $2,700. FF. 12. The following day, January 10, 2012, Respondent and her client signed a settlement distribution sheet that provided Respondent would withhold $4,498.83 to pay Mr. Vouffo's medical providers and pay Respondent $3,803.86 in attorney's fees. FF. 14-15. Respondent issued a check to Mr. Vouffo that same day for $4,003.81, his share of the recovery, FF. 16, but she did not pay Medtaris or the other medical providers. FF. 23-24.

Following the agreement to reduce its bill, Medtaris' representatives made repeated efforts to inquire about the status of the payment. On February 23, 2012, Pappas reached Respondent and was told that there was a dispute with Mr. Vouffo and that she would disburse when possible. FF. 19. The record contradicts Respondent's claim of a "dispute," however, as Mr. Vouffo had endorsed the settlement check, signed the release and received a check for $4,003.81 almost a month earlier. *Id.* Mr. Pappas continued his efforts to reach Respondent eventually writing a letter to Respondent informing her that he (Pappas) had learned from Liberty Mutual that the settlement

check had been cashed; and yet, Medtaris remained unpaid. Mr. Pappas demanded payment by the end of July and threatened to file a disciplinary complaint if it remained unpaid. FF. 20. Respondent received the letter on August 9, 2012 but did not make immediate payment. FF. 21. Mr. Pappas filed a complaint with Disciplinary Counsel on October 3, 2012. *Id*. Finally, on November 14, 2012, Respondent paid Medtaris the $2,700 that had been agreed to more than ten months earlier. Respondent also issued a check to Kaiser in the amount of $866.44. FF. 23.

Respondent had acknowledged that throughout the ten-month period from January 5, 2012, when she had cashed the settlement check and presented the disbursement sheet to her client, to November 14, 2012, when she eventually paid Medtaris and Kaiser, she was bound by the ethical rules of this Bar to maintain $4,498.83 in her trust account to pay Medtaris and the remaining medical providers. FF. 29-30; Tr. at 91-92 (Respondent). Yet, Respondent failed to look at the trust fund balance to insure that she maintained those funds in her IOLTA account. FF. 31. Without undertaking this rudimentary task, Respondent made withdrawals from her IOLTA account such that on eight occasions the account fell below the amount due to these medical providers. FF. 26. More specifically, at times in July, 2012 and September through November, 2012, Respondent's trust account did not even have sufficient funds to pay Medtaris the $2,700 Respondent had agreed she owed to them. FF. 26 f-h. Moreover, Respondent had been on notice that there were prior problems with her failure to track the sufficiency of funds in her IOLTA account for she has had to pay doctors from her office account in other cases. FF. 32; Tr. at 102 (Respondent). Despite this, she failed to take steps to change her monitoring of the IOLTA account. FF. 32; Tr. at 102-03 (Respondent).

The Court in *Anderson* again guides us, saying: "it would have been sufficient for Bar Counsel to prove that Anderson failed to pay the [medical provider's] bill despite knowledge that

it remained unpaid, for then the inference would be permitted – indeed compelled – that he had chosen to use client-obligated funds for an unauthorized purpose." 778 A.2d at 339. The Court goes on to say: "[i]f in fact Anderson ignored or willfully blinded himself to such reminders [that the medical bills remained unpaid], then we would have no difficulty sustaining the Committee's determination of recklessness." *Id.* at 341. Therefore, it is "permitted – indeed compelled" to presume here that Respondent recklessly used the trust funds for an unauthorized purpose.

In rebuttal of this presumption, Respondent states that she delayed paying the medical providers for these ten months to wait for all the bills to come in and that Kaiser's bill did not come in until late in that period. Tr. at 89-90 (Respondent). Respondent's alleged failure to make prompt payment is discussed *infra*, pp. 21-24. However, even for the sake of argument that we accept this reasoning, which this Committee does not, particularly in the case of Medtaris, such does not explain Respondent's simultaneous disregard of the status of the trust account into which the settlement proceeds had been placed. This is of particular concern when, aware of her duty to maintain sufficient funds to cover Mr. Vouffo's medical bills, Respondent made repeated withdrawals from her IOLTA account for other purposes. Respondent admits she did not try to reconcile her accounts with each client because; "I thought I was doing the right thing because at the end of the year I put all of my documents . . . receipts together and send them to the accountant." Tr. at 80 (Respondent). However, as Respondent went through this lengthy process of collecting bills and negotiating with her client's medical providers, the fact she failed to check the balance in her IOLTA account is symptomatic of an indifference for the welfare of those entrusted funds.

Respondent argues that her failure to track the settlement funds is offset by her maintaining sufficient funds in her office expense account to cover any deficit in the IOLTA account. Tr. at 102-03, 107 (Respondent). The Court of Appeals has unequivocally rejected this argument. The

Court has held that, by maintaining sufficient funds other than in a trust account to satisfy the requirements of the trust, an attorney does not comply with the duty to segregate funds. *In re Burton*, 472 A.2d 831, 838 (D.C. 1984) (per curiam) (appending Board Report), *cert denied*, 469 U.S. 1071, (1984); *see also In re Pels*, 653 A.2d 388, 394 (D.C. 1995) ("a trust account is a trust account, not one dependent on discretionary infusions of money from another source"). As Comment [1] to Rule 1.15 states: "[a]ll property that is the property of . . . third parties should be kept separate from the lawyer's business and personal property . . . " and protected against the risks posed, such as by the lawyer's creditors.

Respondent's reliance upon *In re Reed*, 679 A.2d 506 (D.C. 1996) (per curiam), is unpersuasive. Although attorney Reed's "accounting practices were practically non-existent and careless at best[,]" *Id.* at 509, the Board and Committee there found mere inadvertence based on Reed's testimony that she thought she had paid her client's medical provider. When Reed received a complaint from Bar Counsel, she checked her account, and upon discovering that the payment had not been made, immediately paid the medical provider. *Id.* at 508. Here, Respondent did not begin to account for her deposits and withdrawals in the IOLTA account even after she was put on notice that there were insufficiencies by having to pay doctors' bills from her business account in the past. The misappropriation here does not flow from a mistaken understanding that the doctor had been paid when he had not. Rather, it is Respondent's indifference to monitoring her IOLTA balance to determine if she had the funds to pay Metaris and the other medical providers that resulted in the misappropriation. Similarly, Respondent's reliance upon *In re Evans*, 578 A.2d 1141 (D.C. 1990) (per curiam) (appending Board Report), is unavailing. There the misappropriation was found to have arisen from the lawyer's mistaken belief that he had a valid side agreement with the heirs of the estate for which he was the administrator and not from

indifference to a recognized duty to safeguard the funds. *Id.* at 1149. Likewise, in *In re Hessler*, 549 A.2d 700 (D.C. 1988), after deducting his fee, the attorney sent a check to the client, but the client never received it. Upon becoming aware of the missing check, the attorney sent the client a new check. The second check cleared, but the balance in the account had fallen below the amount due to the client between the deposit of the settlement check and the issuance of the second check. Thus, the Board concluded that the misappropriation was the result of simple negligence. *Id.* at 701. Finally, in *Anderson*, the lawyer did not pay his clients' medical bills for months following settlement, but the misappropriation arose because the lawyer did not know that the doctor's bill remained outstanding. *Anderson*, 778 A.2d at 330.

B. Rule 1.15(c) (Failure to Notify or Pay Third Party Entitled to Funds)

Rule 1.15(c) states:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive, and upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

Disciplinary Counsel has proven each element of this charge by clear and convincing evidence.

First, it is undisputed that Liberty Mutual issued a check payable to Respondent and her client on December 28, 2011. FF. 10. The parties also agree that Respondent deposited the check into her IOLTA account on January 5, 2012 and her client signed a release five days later. FF. 11, 13. The funds were, therefore, received no later than January 10, 2012.

Next, as discussed above, the parties do not dispute that Medtaris, Doctors Community Hospital and Kaiser Permanente had an interest in the settlement funds received by Mr. Vouffo. FF. 4, 7 and 9. Respondent concedes that her client executed documents that gave his medical

providers an interest in any insurance or settlement proceeds stemming from the accident, and she admits that she was aware of her responsibility to pay the medical providers. FF. 4, 7, and 9. There is also no dispute that Mr. Vouffo signed documents directing Respondent to pay the medical providers before he was paid. FF. 2, 4, 7 and 9.

In her brief, Respondent makes the novel argument that she did not violate Rule 1.15(c) because Disciplinary Counsel did not prove that that Mr. Vouffo's creditors were aware of her agreement to pay them out of the settlement funds. This assertion is unsupported by the facts with regard to two out of the three providers included in the *Amended Charge*. Correspondence from Medtaris to Respondent in July 2012 states, "As you are aware you did sign our lien and that did create a fiduciary responsibility on your part to protect Medtaris Rehab's secured interest in the settlement proceeds." BX 13. The record also contains correspondence between Respondent and Kaiser Permanente in which the two discuss Kaiser Permanente's "lien" and Respondent's responsibility to pay. BX 14.

Moreover, Respondent provides no support whatsoever for her claim that proof of such knowledge is required, and we decline to create a new requirement. Proof that Respondent knew that the bills had to be paid and had agreed to take responsibility for paying them is sufficient. *In re Lee*, 95 A.3d 66, 75-76 (D.C. 2014) (per curiam) ("Importantly, the facts show that respondent was well aware that as a payee on the check, applicable law conferred on [the mortgagee] a just claim to the funds.").

Turning now to the question of prompt notification and payment, there can be little question that Respondent failed to provide what is required by Rule 1.15(c). Respondent testified at the hearing that she never made any payment to Doctors Community Hospital, despite having listed bills of $607.83 on her settlement demand sheet and despite including $607.83 in the amount she

withheld for medical bills when she paid her client from the proceeds of the settlement check. FF. 18; Tr. at 95-96 (Respondent).

With regard to Kaiser Permanente, Respondent initially calculated her client's bills at $625. FF. 15. Ten months after the settlement check was deposited and Mr. Vouffo was paid his share of the settlement, Respondent negotiated a "lien reduction" from $1,082.99 to $866.44. FF. 22. The record reflects that a check was written from Respondent's account to Kaiser Foundation Health Plan for $866.44 on November 14, 2012. FF. 23.

Finally, with regard to the bills from Medtaris, Respondent and Medtaris agreed to a negotiated sum of $2,700 in January 2012. FF. 12. A representative of Medtaris testified at the hearing that Respondent did not pay the negotiated sum for at least ten months despite repeated requests for payment. We give full credit to this testimony. The record shows that a check was eventually written from Respondent's account to Medtaris for $2,700 on November 14, 2012, after a complaint was filed with Disciplinary Counsel. FF. 19-21, 23.

In other similar disciplinary cases, lapses of as little as seven months have been found sufficient to constitute a violation of this rule. *Smith*, 70 A.3d at 1215. Respondent does not argue otherwise. That she held on to funds in which she knew that third parties had an interest for at least ten months, and that she still holds those funds in some cases, is sufficient evidence of a violation of Rule 1.15(c). In fact, Respondent's complete failure to disgorge the remaining funds to which medical providers or her client are entitled supports our finding of recklessness. *Id.* at 1217; *In re Cloud*, 939 A.2d 653, 661 (D.C. 2008).

Respondent did testify at the hearing that she was holding on to the settlement funds because she wanted to make sure that there were enough funds to pay all of the providers before she paid any of the providers. This argument is undermined by the fact that Respondent paid her

client an amount that she deemed to be his share of the settlement in January 2012, well before she paid any of the medical bills. FF. 16, 23. In addition, the total amount that was paid to Medtaris was the same amount agreed to in January 2012, and there was no evidence introduced of any additional negotiations during the ensuing ten months. Furthermore, Respondent eventually paid Medtaris and Kaiser Permanente, but still has not resolved the outstanding bills of other medical providers. Accordingly, we find that Disciplinary Counsel has proven by clear and convincing evidence that Respondent's conduct violated Rule 1.15(c).

V. RECOMMENDED SANCTION

Given that the Committee recommends a holding that Respondent's misappropriation of trust funds was reckless, disbarment is the presumptive sanction unless "extraordinary circumstances" justify a less severe sanction. *Addams*, 579 A.2d at 91. In *In re Hewitt*, 11 A.3d 279 (D.C. 2011), the Court said the following about the circumstances that might warrant a lesser sanction:

> Previously we have found "extraordinary circumstances" only where the respondent's misconduct was shown to be caused by a disabling addiction, such as chronic alcoholism, *see In re Kersey*, 520 A.2d 321, 326-27 (D.C. 1987), or depression, *see In re Verra*, 932 A.2d 503, 505 (D.C. 2007). We have not otherwise defined what will constitute "extraordinary circumstances," but have noted that: "it is appropriate for the court to consider the surrounding circumstances regarding the misconduct and to evaluate whether the mitigating factors are highly significant and [whether] they substantially outweigh any aggravating factors such that the presumption of disbarment is rebutted." *Addams*, 579 A.2d at 195.

Id. at 286. Respondent does not assert a disability of the type recognized by the Court in *Kersey* or *Verra*. *Hewitt* is the only instance where this Court has found mitigating factors, of a type not recognized in *Kersey*, which are sufficient to rebut the presumption of disbarment. There, the Court said: "mitigating factors of the 'usual sort' will suffice to overcome the presumption only if they are especially strong and, where there are aggravating factors, they substantially outweigh the

aggravating factors as well." *Id.* at 286-87 (citation omitted). The *Hewitt* court also said that the extraordinary circumstances exception should be construed narrowly, emphasizing that "[o]nly the most stringent of extenuating circumstances would justify a lesser disciplinary action . . . ." *Id.* at 286 (citation omitted).

In mitigation, Respondent has submitted that: (1) she was a sole practitioner and did not have support staff; (2) she was not familiar with the rules and practices as they relate to her IOLTA account; (3) that this was a single incident; (4) there was no harm to Respondent's client; (4) she has fully cooperated with Disciplinary Counsel; and (5) she has undertaken steps to correct the misappropriation. R Br. at 8. In aggravation, Disciplinary Counsel has submitted a letter of informal admonition to Respondent for failing to promptly notify Kaiser Permanente of the receipt of settlement funds in violation of Rule 1.15(b). BX 18.

The mitigating factors that have been submitted by Respondent are of the "usual sort,"[6] which the Court has not found to be sufficiently strong or compelling as to overcome the presumption of disbarment for intentional or reckless misappropriation. The *Ahaghotu* court, for example, found the fact that no one was hurt to be insufficient to overcome the presumption. *Ahaghotu*, 75 A.3d at 258-59. Similarly, the Court in *In re Brown*, 112 A.3d 913 found, *inter alia*, that although the lawyer had acknowledged her mistake in misappropriating trust funds and had eventually paid the doctors, this was insufficient mitigation to warrant departure from the presumptive sanction. Likewise, the Court in *Pels* found that although the misappropriation had occurred only once and the client was not ultimately disadvantaged, these factors were not so extraordinary as to overcome the presumed sanction. 653 A.2d at 397-98.

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6 The "usual sort" of mitigating factors include: (i) an admission of wrongdoing, (ii) full cooperation with disciplinary authorities, (iii) prompt return of the disputed funds and (iv) an unblemished disciplinary record. *In re Pierson*, 690 A.2d 941, 950 (D.C. 1997) (citing *In re Reback*, 513 A.2d 226, 233 (D.C. 1986) (en banc)).

Respondent also asserts in mitigation that she was not familiar with the rules and practices as they relate to her IOLTA account but is becoming acquainted with the Rules, especially those dealing with the escrow account. R Br. at 8. With respect to her understanding of Rule 1.15, Respondent testified that she was aware that the Rule imposed upon her the duty to keep sufficient funds in her IOLTA account to pay the medical bills incurred by her clients; and, in this case, she had to keep $4,498.83 in the IOLTA account to pay Mr. Vouffo's medical charges. Tr. at 91-92. However, she also testified that she did not know whether or not keeping sufficient funds in her business account for this purpose also complied with this Rule. Tr. at 107-08. Although Rule 1.15(a) clearly states that "[a] lawyer shall hold the property of the clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property," if Respondent was truly uncertain, it was incumbent on her to clarify her understanding. Yet, she has failed to get the training to correct this deficit. In the year since she became aware of Disciplinary Counsel's Specification of Charges, she has not attended a continuing a legal education course on trust account management. FF. 33. And it is unclear what steps Respondent has taken since the filing of the *Amended Charge* to bring her accounting practices into compliance with the Rule. She testified that she now "puts the checks together . . . [a]nd I make sure I have correct amounts of what I'm taking and so I put them together and then, I still send it to the accountant at the end of the year." Tr. at 81. Respondent did not, for example, testify that she is holding client or third person funds in an account that is separate from her own, that she monitors deposits and withdrawals on a client-by-client basis or how frequently she attempts to reconcile her IOLTA account. Therefore, we cannot find that Respondent has taken the reasonable steps necessary to prevent future misappropriation.

It is clear that the factors in mitigation advanced by Respondent do not rise to the same level as those found in *Hewitt*, where, in addition to mitigating factors of the usual sort, the Court

also found that, although the respondent had intentionally misappropriated trust funds, he had acted with his ward's best interests in mind and that the intentional misappropriation was intended and in fact did benefit the client. *Hewitt*, 11 A.3d at 287. The *Hewitt* court ultimately found that where "the motivation for the misappropriation was protection of the client's interest – [this] present[ed] the type of 'extraordinary circumstances' in which disbarment is not the appropriate sanction" for intentional misappropriation. *Id.* at 290. There is no assertion here that Respondent failed to keep sufficient funds in her IOLTA account to help her client. Respondent has not presented extraordinary circumstances to rebut the presumed sanction. Therefore, we must recommend that she be disbarred.

VI. CONCLUSION

Based on the foregoing, the Committee finds that Respondent violated Rule 1.15(a) (misappropriation) and Rule 1.15(c) (failure to promptly notify and disburse client funds). We also conclude that the misappropriation in violation of Rule 1.15(a) was reckless. We thus recommend that Respondent be disbarred. We further recommend that the period of disbarment run for purposes of reinstatement from the filing of the affidavit required by D.C. Bar R. XI, § 14(g).

HEARING COMMITTEE NUMBER SEVEN

/TJK/
Thomas J. Keary, Chairperson

/HK
Hal Kassoff, Public Member

/MH/
Margaret Hedges, Attorney Member

Dated: March 29, 2016