THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of:	:	
	:	
CATHERINE R. MACK,	:	
	:	Board Docket No. 22-ND-001
Respondent.	:	Disc. Docket No. 2018-D053
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 204149)	:	
	:	

REPORT AND RECOMMENDATION
OF THE AD HOC HEARING COMMITTEE
APPROVING PETITION FOR NEGOTIATED DISCIPLINE

I. PROCEDURAL HISTORY

This matter came before an Ad Hoc Hearing Committee on February 24, 2023, for a limited hearing on a Petition for Negotiated Discipline, as amended (the "Petition"). The members of the Hearing Committee are Jeffrey Dill, Esquire, Chair; George Hager, Public Member; and Rebecca Goldfrank, Esquire, Attorney Member. The Office of Disciplinary Counsel was represented by Assistant Disciplinary Counsel Traci Tait, Esquire. Respondent was represented by Daniel Schumack, Esquire, and was present throughout the limited hearing.

The Hearing Committee has carefully considered the Petition, which has been signed by Disciplinary Counsel, Respondent and Respondent's Counsel, the supporting affidavit submitted by Respondent (the "Affidavit"), and the

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

representations during the limited hearing made by Respondent, Respondent's Counsel and Disciplinary Counsel taken pursuant to Board Rule 17.4. The Hearing Committee also fully considered its *in camera* review of Disciplinary Counsel's files and records and *ex parte* communications with Disciplinary Counsel. For the reasons set forth below, we approve the Petition, find that the following negotiated discipline is justified, and recommend that the following be imposed by the Court:

(1) a public censure by the Court;

(2) one year's unsupervised probation, on the condition that Respondent not be the subject of a disciplinary complaint that results in a finding that she violated the disciplinary rules of any jurisdiction in which she is licensed to practice during the probationary period;

(3) that Respondent will (a) take the new admittees continuing legal education (CLE) course at any time before the Court acts on this Petition but not later than 30 days following entry of the Court's acceptance of this Petition, and (b) provide Disciplinary Counsel proof of attendance at the CLE within 30 days;

(4) that Respondent will notify Disciplinary Counsel promptly of any ethics complaint against her and its disposition;

(5) that Respondent will consult with Dan Mills, Esquire, and the D.C. Bar's Practice Management Advisory Service to conduct a review of her practices surrounding how to handle – and document processing of – entrusted funds, waive confidentiality regarding all aspects of that review, and may do so at any time before the Court acts on this Petition but not later than 30 days following entry of the Court's acceptance of this Petition; and

(6) that within 30 days of the Court's order of public censure, Respondent will notify Disciplinary Counsel in writing of all jurisdictions in which she is or has been licensed to practice.

II. FINDINGS PURSUANT TO D.C. BAR R. XI, § 12.1(c) AND BOARD RULE 17.5

The Hearing Committee, after full and careful consideration, finds that:

1. The Petition and Affidavit are full, complete and in proper order.

2. Respondent is aware that there is currently pending against her an investigation involving allegations of misconduct. Tr. at 18; Affidavit at ¶ 5.

3. The allegations that were brought to the attention of Disciplinary Counsel are that Respondent violated Rule 1.15(a). Petition at II, ¶ 8.

4. Respondent has freely and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true. Tr. at 20-21; Affidavit at ¶ 4. Specifically, Respondent acknowledges that:

A. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on January 10, 1975, and assigned Bar number 204149.

B. On October 23, 2017, Disciplinary Counsel received notification, dated October 11, 2017, that Respondent's Wells Fargo Interest on Lawyer's Trust Account ("IOLTA") had failed to honor a check because the account contained insufficient funds to pay it.[1] Petition at II, ¶ 1.

C. The following transactions occurred in Respondent's IOLTA account before the overdraft: as of September 14, 2017, Respondent's account contained $962.10, which belonged to a client (Client 1); that day Respondent deposited $5,000 in entrusted funds for a different client (Client 2), raising the IOLTA balance to $5,962.10; on September 27, 2017, Respondent transferred $3,000 in earned fees out of her IOLTA to her personal checking account, leaving an IOLTA balance of $2,962.10; in early October 2017, Respondent wrote herself a check for $3,693.75 from her IOLTA in connection with Client 2's case; on October 11, 2017, the bank did not honor but returned the check because the IOLTA had insufficient funds to cover that amount by $731.65; the bank notified the Office of Disciplinary Counsel.

[1] The Ad Hoc Hearing Committee has included a Confidential Appendix for the Court's benefit on this issue.

D. On October 12, 2017, the bank assessed a $35 overdraft fee, leaving an IOLTA balance of $2,927.10.

E. On October 16, 2017, Respondent transferred $3,000 online from her operating account into her IOLTA, raising the balance to $5,927.10.

F. On October 18, 2017, Respondent deposited $5,000 in entrusted funds for a client (Client 3), raising the IOLTA balance to $10,927.10; the IOLTA still contained more than $2,200 of Respondent's own funds.

G. Respondent did not immediately undertake a full accounting to discern the reason for the overdraft. The IOLTA continued to hold hundreds of Respondent's own funds and entrusted funds until at least early November 2017.

H. Between November 28, 2017 and January 24, 2018, Respondent performed $2,625 worth of services for Client 3, but she did not remove the funds she had been entrusted with even though they had been earned. During that time, Respondent was holding funds in trust for several other clients, along with the amount she had earned from Client 3.

I. Respondent's bookkeeper had retired by October 2016, but at the time of the overdraft notification in October 2017, Respondent had not yet hired her replacement. In the interim, she obtained bookkeeping services intermittently but was operating without a bookkeeper providing monthly services, including reconciliation of her trust account.

J. In her own recordkeeping, Respondent misattributed at least one IOLTA withdrawal to work done for Client 2 even though the total amount of funds Respondent claimed she paid herself in connection with that client exceeded the amount she had received from him in that case. Respondent had no explanation or records to explain how she came to attribute this IOLTA disbursement to the wrong client.

K. Respondent has hired a new bookkeeper. Respondent asserts that she has undertaken a "thorough review of [her] bank records and reflected carefully on the procedures" used to manage her IOLTA, and concluded that she "need[ed] to change those procedures . . . ." Respondent provided Disciplinary Counsel with a statement of her revised entrusted funds-handling procedures. She states that, rather than rely exclusively on her own accounting, she now "carefully review[s] each month[,] her [bookkeeper's] reconciliation of the IOLTA bank account on the spreadsheet" prepared by her bookkeeper.

5. Respondent is agreeing to the disposition because Respondent believes that she cannot successfully defend against discipline based on the stipulated misconduct. Affidavit at ¶ 7.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition for Negotiated Discipline. Affidavit at ¶ 4. Those promises and inducements are that in connection with the Petition for Negotiated Discipline, Disciplinary Counsel agrees not to pursue any charges arising out of the conduct described in the Petition, other than those set forth therein, or any sanction for that misconduct other than as set forth therein. Petition at 5. Respondent confirmed during the limited hearing that there have been no other promises or inducements other than those set forth in the Petition. Tr. at 20.

7. Respondent has conferred with her counsel. Tr. at 10.

8. Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction set forth therein. Tr. at 21-22; Affidavit at ¶ 16.

9. Respondent is not being subjected to coercion or duress. Tr. at 21; Affidavit at ¶ 4 .

10. Respondent is competent and was not under the influence of any substance or medication at the limited hearing. Tr. at 10-11.

11. Respondent is fully aware of the implications of the disposition being entered into, including, but not limited to, the following:

A. She has the right to assistance of counsel if Respondent is unable to afford counsel;

B. She will waive her right to cross-examine adverse witnesses and to compel witnesses to appear on her behalf;

C. She will waive her right to have Disciplinary Counsel prove each and every charge by clear and convincing evidence;

D. She will waive her right to file exceptions to reports and recommendations with the Board and with the Court;

E. The negotiated disposition, if approved, may affect her present and future ability to practice law;

F. The negotiated disposition, if approved, may affect her bar memberships in other jurisdictions; and

G. Any sworn statement by Respondent in her affidavit or any statements made by Respondent during the proceeding may be used to impeach her testimony if there is a subsequent hearing on the merits.

Tr. at 10, 13-16; Affidavit at ¶¶ 2, 11, 13 .

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be: (1) a public censure by the Court; (2) one year's unsupervised probation, on the conditions that:

(a) Respondent not be the subject of a disciplinary complaint that results in a finding that she violated the disciplinary rules of any jurisdiction in which she is licensed to practice during the probationary period;

(b) Respondent will

(i) take the new admittees continuing legal education (CLE) course at any time before the Court acts on this Petition but not later than 30 days following entry of the Court's acceptance of this Petition, and

(ii) provide Disciplinary Counsel proof of attendance at the CLE within 30 days;

(c) Respondent will notify Disciplinary Counsel promptly of any ethics complaint against her and its disposition;

(d) Respondent will consult with Dan Mills, Esquire, and the D.C. Bar's Practice Management Advisory Service to conduct a review of her practices surrounding how to handle – and document processing of – entrusted funds, waive confidentiality regarding all aspects of that review, and may do so at any time before the Court acts on this Petition but not later than 30 days following entry of the Court's acceptance of this Petition; and

(e) within 30 days of the Court's order of public censure, Respondent will notify Disciplinary Counsel in writing of all jurisdictions in which she is or has been licensed to practice. Tr. at 20, 24-26; Petition at 5-7.

Respondent understands that if she fails to satisfy any of these conditions it may result in her probation being revoked and that the Office of Disciplinary Counsel may docket an investigation into whether she has seriously interfered with the administration of justice in violation of Rule 8.4(d). Petition at 7; Tr. 26.

13. Respondent and Disciplinary Counsel have stipulated to the following circumstances in mitigation:

> Respondent (1) has taken responsibility for her misconduct in that she acknowledges that she violated the Rules as set forth above, (2) has cooperated with Disciplinary Counsel's investigation, (3) has not prejudiced her clients by her mishandling of her IOLTA, and 4) has agreed to undertake the specified corrective measures to ensure that she

> does not continue to make such errors in the future, and (5) has no prior discipline.

Petition at 8; Tr. at 21-22.

14. There are no circumstances in aggravation. Tr. at 23.

15. There were no complainants to notify of the limited hearing. Tr. at 8.

III. DISCUSSION

The Hearing Committee shall recommend approval of an agreed-upon petition for negotiated discipline if it finds that:

> (1) The attorney has knowingly and voluntarily acknowledged the facts and misconduct reflected in the petition and agreed to the sanction therein;
>
> (2) The facts set forth in the petition or as shown at the hearing support the [attorney's] admission of misconduct and the agreed upon sanction; and
>
> (3) The sanction agreed upon is justified.

D.C. Bar R. XI, § 12.1(c); *see also* Board Rule 17.5 (a)(i)-(iii).

A. Respondent Has Knowingly and Voluntarily Acknowledged the Facts and Misconduct and Agreed to the Stipulated Sanction.

The Hearing Committee finds that Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction therein. Respondent, after being placed under oath, admitted the stipulated facts and charges set forth in the Petition, and denied that she was under duress or has been coerced into entering into this disposition. Tr. at 10, 18-21. Respondent understands the implications and consequences of entering into this negotiated discipline. Tr. at 13-20.

Respondent has acknowledged that any promises that have been made to her by Disciplinary Counsel as part of this negotiated discipline are set forth in writing in the Petition and that there are no other promises or inducements that have been made to her. Tr. at 20; Affidavit at ¶ 4.

B. The Stipulated Facts Support the Admissions of Misconduct and the Agreed-Upon Sanction.

The Hearing Committee has carefully reviewed the facts set forth in the Petition and established during the hearing, and we conclude that they support the admission of misconduct and the agreed-upon sanction.[2] Moreover, Respondent is agreeing to this negotiated discipline because she believes that she could not successfully defend against the misconduct described in the Petition. Affidavit at ¶ 7.

With regard to the second factor, the Petition states that Respondent violated Rule of Professional Conduct 1.15(a). The evidence supports Respondent's admission that she violated Rule 1.15(a) in that the stipulated facts describe how she committed commingling and a failure to maintain records.

C. The Agreed-Upon Sanction is Justified.

The most complicated factor the Hearing Committee must consider is whether the sanction agreed upon is justified. *See* D.C. Bar R. XI, §12.1(c); Board Rule 17.5 (a) (iii) (explaining that hearing committees should consider "the record as a whole, including the nature of the misconduct, any charges or investigations that

[2] *See also*, the Confidential Appendix.

Disciplinary Counsel has agreed not to pursue, the strengths or weaknesses of Disciplinary Counsel's evidence, any circumstances in aggravation and mitigation (including respondent's cooperation with Disciplinary Counsel and acceptance of responsibility), and relevant precedent"); *In re Johnson*, 984 A.2d 176, 181 (D.C. 2009) (per curiam) (providing that a negotiated sanction may not be "unduly lenient"). Based on the record as a whole, including the stipulated circumstances in mitigation, the Hearing Committee's *in camera* review of Disciplinary Counsel's investigative file and *ex parte* discussion with Disciplinary Counsel, and our review of relevant precedent, we conclude that the agreed-upon sanction is justified and not unduly lenient in light of the relevant precedent (*supra*), for the following reasons:

We understand that we are to determine whether the proposed negotiated sanction is justified under the circumstances of this matter, not whether it is as consistent as possible with sanctions imposed in contested matters involving comparable misconduct. *See In re Beane*, Bar Docket Nos. 340-07, *et al.*, at 7-10 (BPR Dec. 22, 2009) ("*Beane I*"), *recommendation adopted*, No. 09-BG-862 (D.C. Jan. 21, 2010) (noting that the agreed upon sanction in negotiated discipline is not necessarily equivalent to the sanction that would be imposed after a contested proceeding). But we are mindful that sanctions in negotiated discipline cases should not be "completely unmoored" from the range of sanctions that might otherwise be imposed. *See In re Mensah*, 262 A.3d 1100, 1104 (D.C. 2021) (per curiam).

Nevertheless, we think it is useful for purposes of assessing the negotiated sanction to utilize as a framework for our analysis the seven factors that the Court of

Appeals has prescribed for sanction determinations in contested matters. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (providing that the factors to consider in determining the appropriate sanction in a contested matter include (1) the seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty, (3) Respondent's attitude toward the underlying conduct, (4) prior disciplinary violations, (5) aggravating and mitigating circumstances, (6) whether additional provisions of the Rules of Professional Conduct were violated and (7) prejudice to the client).

The first factor in that analysis – the seriousness of the misconduct – is adequately accounted for in the agreed-upon sanction of a public censure. The range of sanctions for prosecutions involving commingling and a failure to maintain complete financial records of entrusted funds in violation of Rule 1.15(a) is from Board reprimand to a short period of suspension. *See, e.g., In re Thomas- Edwards*, 967 A.2d 178 (D.C. 2009) (public censure for, *inter alia*, commingling and failing to keep complete financial records); *In re Mott*, 886 A.2d 535 (D.C. 2005) (public censure for failing, *inter alia*, to keep complete financial records); *In re Graham*, 795 A.2d 51 (D.C. 2002) (public censure for commingling over several months and failure to promptly disburse entrusted funds); *In re Ukwu*, 712 A.2d 502 (D.C. 1998) (30-day stayed suspension plus training for commingling and failure to maintain records); *In re Klass*, Board Docket No. 13-BD-041 (BPR Dec. 22. 2014) (reprimand for commingling fee advance with operating funds and failing to maintain complete trust account records).

The other six factors do not create issues in terms of supporting the negotiated sanction. Based on the record before us, Respondent does not appear to have been dishonest regarding the incident despite inconsistencies in her responses to Disciplinary Counsel, she seems to have been contrite throughout the matter, there is no indication of prior violations, she has been cooperative throughout, no Rules of Professional Conduct other than those presented in the Petition seem to be at issue[3], and no client has been prejudiced.

In addition, the Hearing Committee had the opportunity to observe Respondent and to hear from her during the course of the limited hearing. We conclude that she recognizes the wrongfulness of her actions and is remorseful.

Having carefully reviewed the agreed-upon facts in this matter, having heard from and questioned Respondent during the hearing, and taking into account the pertinent sanctions case law cited above and in the Petition (Petition at 7-8), we conclude the negotiated sanction is justified.

IV. CONCLUSION AND RECOMMENDATION

It is the conclusion of the Hearing Committee that the discipline negotiated in this matter is appropriate.

For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved and that the Court impose the following sanction:

(1) a public censure;

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[3] *See also* Confidential Appendix.

(2) one year's unsupervised probation, on the conditions that

a. Respondent not be the subject of a disciplinary complaint that results in a finding that she violated the disciplinary rules of any jurisdiction in which she is licensed to practice during the probationary period;

b. Respondent will (i) take the new admittees continuing legal education (CLE) course at any time before the Court acts on this Petition but not later than 30 days following entry of the Court's acceptance of this Petition, and (ii) provide Disciplinary Counsel proof of attendance at the CLE within 30 days;

c. Respondent will notify Disciplinary Counsel promptly of any ethics complaint against her and its disposition;

d. Respondent will consult with Dan Mills, Esquire, and the D.C. Bar's Practice Management Advisory Service to conduct a review of her practices surrounding how to handle – and document processing of – entrusted funds, waive confidentiality regarding all aspects of that review, and may do so at any time before the Court acts on this Petition but not later than 30 days following entry of the Court's acceptance of this Petition;

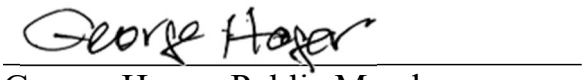
e. within 30 days of the Court's order of public censure, Respondent will notify Disciplinary Counsel in writing of all jurisdictions in which she is or has been licensed to practice; and

(3) If Respondent fails to satisfy any of these conditions, it may result in her probation being revoked and the Office of Disciplinary Counsel may docket an investigation into whether she has seriously interfered with the administration of justice in violation of Rule 8.4(d).

AD HOC HEARING COMMITTEE

By: 

Jeffrey Dill, Chair



George Hager, Public Member

Rebecca Goldfrank, Attorney Member