THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

FILED

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Board on Professional Responsibility

In the Matter of:	:	
	:	
PAUL T. MENSAH,	:	
	:	Board Docket No. 19-ND-011
Respondent.	:	Bar Docket No. 2017-D286
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 480889)	:	

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

I. PROCEDURAL HISTORY

This matter came before this Ad Hoc Hearing Committee on August 20, 2020, for a limited hearing on a Petition for Negotiated Discipline (the "Petition"). The members of the Hearing Committee are John R. Gerstein (Chair), Patricia Mathews (public member), and John L. Szabo (attorney member). The Office of Disciplinary Counsel was represented by Assistant Disciplinary Counsel Hendrik deBoer, and Respondent, Paul T. Mensah, was represented by Richard Berwanger.

The Hearing Committee has carefully considered the Petition signed by Disciplinary Counsel, Respondent, and Respondent's counsel, the supporting affidavit submitted by Respondent (the "Affidavit"), and the representations during the limited hearing made by Respondent, Respondent's counsel, and Disciplinary Counsel. The Hearing Committee also has fully considered the Chair's *in camera* review of Disciplinary Counsel's files and records and his *ex parte* communications

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

with Disciplinary Counsel. For the reasons set forth below, we approve the Petition, find the negotiated discipline of a three-year suspension with fitness is justified and not unduly lenient, and recommend that it be imposed by the Court.

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 him an investigation into allegations of misconduct. Tr. 17[1]; Affidavit ¶ 2.

3. The allegations that were brought to the attention of Disciplinary Counsel are that Respondent recklessly misappropriated entrusted funds in two matters, failed to maintain complete records of entrusted funds, and entered into a fee-splitting arrangement without the client's consent, in violation of Rules 1.5(e) and 1.15(a). Petition at 1-2.

4. Respondent has freely and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true. Tr. 18; Affidavit ¶ 4. Specifically, Respondent acknowledges that:

> (a) At all times listed herein, Respondent was sole signatory of a Bank of America IOLTA account titled "DC IOLTA Trust Accounts" (xxxx-xxxx-4908) and an operating account titled "Mensah Law Office PLLC" (xxxx-xxxx-4911).

[1] "Tr." Refers to the transcript of the limited hearing held on August 20, 2020.

COUNT I – AUTUMN KENNEDY

(b) On September 29, 2016, Autumn Kennedy sustained injuries in an automobile accident with Charles Hill.

(c) After the accident, John Stringfield, a lawyer and friend of Ms. Kennedy's, referred her to Respondent. Respondent agreed to pay Mr. Stringfield 40% of any fee collected in the matter in exchange for the referral.

(d) On January 17, 2017, Ms. Kennedy hired Respondent to pursue a personal injury claim against Mr. Hill. The written retainer agreement provided that Respondent was entitled to 25% of any recovery and Ms. Kennedy was required to reimburse any expenses advanced by Respondent. Respondent did not inform Ms. Kennedy in writing of his arrangement with Mr. Stringfield.

(e) On May 9, 2017, Ms. Kennedy entered into a settlement of her claims against Mr. Hill for $15,000.

(f) On May 12, 2017, Respondent deposited the $15,000 settlement check into his IOLTA account. After the deposit, the ending balance of the IOLTA account was $15,030.29.

(g) According to a disbursement sheet in Respondent's file, of the $15,000, Respondent was entitled to $3,863.59 in fees and expenses, Ms. Kennedy was entitled to $6,904.02, and the remaining $4,232.39 was to be paid to third parties.

(h) On May 15, 2017, before depositing any additional funds into the account, Respondent withdrew $3,860 from his IOLTA by two checks and a counter withdrawal. Of the remaining $11,170.29 in the account, $11,136.41 belonged to Ms. Kennedy or third parties who had an interest in the settlement funds.

(i) On May 16, 2017, Respondent transferred $520 of entrusted funds from his IOLTA account to his operating account. After the transfer, the ending balance of Respondent's IOLTA account was $10,650.29. The day after the transfer, Respondent withdrew $500 in cash from his operating account, leaving an operating account balance of $26.89.

(j) On May 19, 2017, Respondent paid $1,500, or 40% of his $3,750 fee, to Mr. Stringfield by check from his operating account. The check cleared on May 24, 2017.

(k) Also on May 19, 2017, Respondent paid $4,270.48 to Ms. Kennedy by check from his IOLTA account. The check cleared on May 24, 2017.

(l) On May 31, 2017, Respondent paid $735.93 to Anne Arundel Health Systems by check from his IOLTA account as payment of medical bills incurred by Ms. Kennedy. The check cleared on June 7, 2017.

(m) Also on May 31, 2017, Respondent paid $30.00 to Community Radiology Associates, Inc. by check from his IOLTA account as payment of medical bills incurred by Ms. Kennedy. The check cleared on June 9, 2017.

(n) After these transactions, Respondent should have maintained $6,100 in trust for Ms. Kennedy and third parties.

(o) On June 16, 2017, Respondent's operating account had an ending negative balance of $-125.22. On June 19, 2017, Respondent transferred $2,620 of entrusted funds from his IOLTA account to his operating account, leaving an IOLTA balance of $2,707.84.

(p) On June 27, 2017, Respondent deposited into his IOLTA account a check for $435.93 he received from Anne Arundel Health System as a reimbursement for overpayment from the May 31, 2017 disbursement.

(q) After the reimbursement, Respondent should have maintained $6,535.93 in trust for Ms. Kennedy and third parties who had an interest in the settlement funds.

(r) On July 5, 2017, the ending balance of Respondent's IOLTA account was $58.77 and the ending balance of Respondent's operating account was $131.54.

(s) On October 12, 2017, Respondent paid Ms. Kennedy $2,633.54 by check from his operating account. The check cleared on October 19, 2017.

(t) On November 7, 2017, Respondent paid Physiotherapy Corporation $2,408.00 by debit card from his operating account as payment of medical bills incurred by Ms. Kennedy.

(u) On October 30, 2017, Respondent paid Ms. Kennedy $435.93 by check from his operating account. At the same time, Respondent provided Ms. Kennedy with a disbursement sheet reflecting how the settlement proceeds had been disbursed. The check cleared on November 15, 2017.

(v) On November 1, 2017, Respondent paid Blue Cross Blue Shield $963.46 by check from his operating account as reimbursement of medical expenses paid on Ms. Kennedy's behalf. The check cleared on November 13, 2017.

(w) At some point in 2017, Respondent paid $95.00 to Bowie Internal Medicine as payment of medical bills incurred by Ms. Kennedy.

(x) Ultimately, Respondent appropriately disbursed all of the Kennedy settlement funds to Ms. Kennedy, third parties, and himself.

COUNT II – COMPEST SOLUTIONS

(y) On May 17, 2017, Compest Solutions, Inc. hired Respondent to collect a debt from Tequarian Corp. for breach of contract. The written retainer agreement provided that Respondent was entitled to 35% of any recovery in the event litigation was necessary.

(z) On July 6, 2017, Respondent filed a complaint in District of Columbia Superior Court on behalf of Compest against Tequarian for breach of contract.

(aa) On August 10, 2017, the parties filed a Stipulation of Settlement, settling the case for $15,200, to be paid in three installments.

(bb) By September 29, 2017, Tequarian had paid all $15,200 in settlement funds to Respondent's IOLTA account, of which Respondent had disbursed $6,565 to Compest. On that day, the ending balance of Respondent's IOLTA account was $5,723.71, of which Compest was entitled to $3,315.

(cc) On October 3, 2017, Respondent transferred $3,200 of entrusted funds from his IOLTA account to his operating account, leaving an ending balance of $123.71 in the IOLTA account. The ending balance of Respondent's operating account that day was $2,466.94.

(dd) On October 11, 2017, the ending balance of Respondent's operating account was $1,501.88.

(ee) On October 17, 2017, after depositing other funds into his operating account, Respondent wired $3,315 from his operating account to Compest.

(ff) Ultimately, Compest received all of the settlement funds to which it was entitled.

COUNT III – ACCOUNT RECORDS

(gg) On October 15, 2018, Disciplinary Counsel issued a subpoena to Respondent for financial and accounting records related to his IOLTA account for the period of July 6, 2016 to October 15, 2018, including a check register or journal for the account, subsidiary client ledgers for each client, and records showing the reconciliation of the account with Respondent's records.

(hh) On November 15, 2018, Respondent admitted that he did not maintain the records called for in the subpoena.

Petition at 2-7.

5. Respondent is agreeing to the disposition because he believes that he cannot successfully defend against discipline based on the stipulated misconduct. Tr. 16-17; Affidavit ¶ 5.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition. Affidavit ¶ 7. Those promises and inducements are that Disciplinary Counsel agrees not to pursue any other charges or sanctions based on the facts described in the Petition. Petition at 7. Respondent confirmed

during the limited hearing that there have been no other promises or inducements other than those set forth in the Petition. Tr. 20.

7. Respondent has conferred with his counsel. Tr. 11; Affidavit ¶ 1.

8. Respondent has freely and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction set forth therein. Tr. 20; Affidavit ¶ 6.

9. Respondent is not being subjected to coercion or duress. *Id.*

10. Respondent is competent and was not under the influence of any substance or medication that would affect his ability to make informed decisions at the limited hearing. Tr. 12-13.

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

(a) he has the right to assistance of counsel;

(b) he will waive his right to cross-examine adverse witnesses and to compel witnesses to appear on his behalf;

(c) he will waive his right to have Disciplinary Counsel prove each and every charge by clear and convincing evidence;

(d) he will waive his right to file exceptions to reports and recommendations filed with the Board and with the Court;

(e) the negotiated disposition, if approved, may affect his present and future ability to practice law;

(f) the negotiated disposition, if approved, may affect his bar memberships in other jurisdictions; and

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

Tr. 15-16, 23-25; Affidavit ¶¶ 9-12.

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be a three-year suspension with a requirement that Respondent prove his fitness to practice law as a condition of reinstatement. Petition at 7; Tr. 19-20.

13. Respondent understands that he must file with the Court an affidavit pursuant to D.C. Bar R. XI, § 14(g) in order for his suspension to be deemed effective for purposes of reinstatement. Tr. 25-26; Affidavit ¶ 13.

14. Respondent understands that he will be required to prove his fitness to practice law in accord with D.C. Bar R. XI, § 16 and Board Rule 9 prior to being allowed to resume the practice of law, and that the reinstatement process may delay Respondent's readmission to the Bar. Tr. 26-28.

15. The Petition does not set forth any factors that might be considered in aggravation of sanction and none have been proffered or appear to exist. Petition at 9; Tr. 22.

16. The Petition sets forth the following circumstances in mitigation, which the Hearing Committee has taken into consideration:

> (a) Respondent cooperated with Disciplinary Counsel, including hiring a bookkeeper at his own expense to provide an accounting of his IOLTA.
>
> (b) Upon discovering the misappropriations, Respondent acknowledged his misconduct, brought them to Disciplinary Counsel's attention, and deposited personal funds into his IOLTA account to return the misappropriated funds.

(c) Respondent was working as a contract attorney for the past six years while maintaining a part time law practice, frequently working late nights on weekdays and weekends to support his family.

(d) Respondent takes complete responsibility for lack of judgement in trying to maintain his own bookkeeping, under his circumstances, and further expresses his total remorse for his actions.

(e) In both matters charged in this case, the clients and third parties ultimately received all of the settlement funds to which they were entitled.

(f) Respondent does not have any prior discipline.

Petition at 9; Tr. 21-22.

17. There were no complainants in this matter who would have been entitled to be notified of the limited hearing and given an opportunity to appear and/or submit written comments. Tr. 9.

III. DISCUSSION

The Hearing Committee shall approve an agreed negotiated discipline if it finds:

(a) that the attorney has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction therein;

(b) that the facts set forth in the Petition or as shown during the limited hearing, support the attorney's admission of misconduct and the agreed upon sanction; and

(c) that the agreed sanction is justified.

D.C. Bar R. XI, § 12.1(c); 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 he is under duress or has been coerced into entering into this disposition. *See* Paragraphs 8-9, *supra*. Respondent understands the implications and consequences of entering into this negotiated discipline. *See* Paragraph 11, *supra.*

Respondent has acknowledged that any and all promises that have been made to him 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 him. *See* Paragraph 6, *supra*.

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 admissions of misconduct and the agreed upon sanction. Moreover, Respondent is agreeing to this negotiated discipline because he believes that he could not successfully defend against the misconduct described in the Petition. *See* Paragraph 5, *supra*.

With regard to the second factor, the Petition states that Respondent violated Rule 1.5(e), which provides that a division of a fee between lawyers who are not in

the same firm may be made only if, *inter alia*, "[t]he client is advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged." The parties agree that in Count I, Respondent agreed to pay Mr. Stringfield 40% of any fee collected in exchange for his referral of Ms. Kennedy's case, but did not notify Ms. Kennedy in writing. *See* Paragraph 4(c)-(d), *supra*. Thus, when Respondent paid Mr. Stringfield $1,500 from the settlement funds, he violated the clear terms of Rule 1.5(e). *See* Paragraph 4(j), *supra*.

The Petition further states that Respondent violated Rule 1.15(a) by engaging in reckless misappropriation of entrusted funds in two matters. Misappropriation is "any unauthorized use of [a] 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 [the lawyer] derives any personal gain or benefit therefrom." *In re Nave*, 197 A.3d 511, 514 (D.C. 2018) (per curiam) (quoting *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (alterations in original)). Reckless misappropriation is characterized by

> an unacceptable disregard for the safety and welfare of entrusted funds, and its hallmarks 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.

In re Ahaghotu, 75 A.3d 251, 256 (D.C. 2013) (internal quotation marks and citation omitted); *see also Anderson*, 778 A.2d at 339 ("[R]ecklessness is a state of mind in which a person does not care about the consequences of his or her action." (internal citations and quotation marks omitted)).

In Count I, the parties' stipulations support a finding that Respondent engaged in unauthorized use of settlement funds he was required to hold in trust because after he deposited Ms. Kennedy's settlement funds in his trust account, he made withdrawals that caused the balance in the account to drop below what he was required to hold in trust on behalf of Ms. Kennedy and third parties, including a transfer to an account with a negative balance. *See* Paragraphs 4(f)-(o), *supra*; *In re Pierson*, 690 A.2d 941, 947 (D.C. 1997) (providing that where entrusted funds are deposited in an account that is already overdrawn, unauthorized use occurs at "the moment [the attorney] deposit[s] [the] client's . . . money in the . . . account"). Similarly, in Count II, the parties agree that after Respondent transferred a portion of the settlement funds that he was required to hold in trust on behalf of Compest Solutions from his trust account into his operating account, he then withdrew more than half of that amount from his operating account over the next eight days. As a result, the balances in both the trust account and the operating account fell below the amount Respondent was supposed to hold in trust – another clear example of unauthorized use. *See* Paragraphs 4(bb)-(dd), *supra*; *In re Gray*, 224 A.3d 1222 (D.C. 2020) (per curiam) ("Misappropriation occurs when the balance of an attorney's trust account falls below the amount of the client's funds held in trust."

(citing *In re Abbey*, 169 A.3d 865, 872 (D.C. 2017))). The misappropriations were characterized by indiscriminate movement of money between the accounts in two separate cases, which, coupled with a complete failure to keep records of entrusted funds, rises to the level of an "unacceptable disregard for the safety and welfare of entrusted funds" sufficient to prove recklessness. *See Ahaghotu*, 75 A.3d at 256. While the clients and third-parties ultimately received the money to which they were entitled and none filed a disciplinary complaint, *see* Paragraphs 4(x), (ee), 17, *supra*, that is not a defense to misappropriation.

Finally, the Petition states that Respondent also violated Rule 1.15(a), which requires that "[c]omplete records of [entrusted] funds and other property . . . be kept by the lawyer and shall be preserved for a period of five years after termination of the representation." *See In re Edwards*, 990 A.2d 501, 522 (D.C. 2010) (appended Board Report) ("Financial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" (quoting *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003))). The parties agree that Disciplinary Counsel requested two years of financial and accounting records for his trust account, but Respondent admitted he did not keep those records, in violation of the clear terms of Rule 1.15(a). *See* Paragraphs 4(gg)-(hh), *supra*. The parties also point out that Respondent hired a bookkeeper to reconcile his records after becoming aware of the problem, which, while not a defense to the Rule 1.15(a) charge, we consider to be a mitigating factor. *See* Petition at 9; Tr. 21-22.

C. <u>The Agreed-Upon Sanction Is Justified.</u>

The third and 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); *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 Chair'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.

Respondent has admitted to engaging in reckless misappropriation, which, absent "extraordinary circumstances," carries a presumptive sanction of disbarment. *See In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc). Under *Addams*, "mitigating factors of the usual sort . . . will suffice to overcome the presumption of disbarment only if they are especially strong and, where there are aggravating factors, they substantially outweigh the aggravating factors as well." *Id.* at 191 (internal citation omitted). Here, the parties concede that no such "extraordinary circumstances" exist and that, if Disciplinary Counsel were to prove reckless misappropriation in a contested case, Respondent would likely be disbarred. *See* Petition at 9 (citing *In re Bach*, 966 A.2d 350, 366 (D.C. 2009) (listing cases in which ordinary mitigating factors were insufficient to overcome the presumptive sanction of disbarment)).

But that does not end our inquiry. While sanctions in contested cases may not "foster a tendency toward inconsistent dispositions for comparable conduct," *see* D.C. Bar Rule XI, § 9(h)(1), Board Rule 17.5(a)(iii) exempts negotiated discipline cases from that comparability standard and instead requires only that the agreed-upon sanction be "justified, and not unduly lenient." Thus, while any sanction short of disbarment for reckless misappropriation is inherently lenient, the question here is whether it is *unduly* so. *See Johnson*, 984 A.2d at 181. Notably, a three-year suspension with fitness is the next-most-stringent sanction available after disbarment, which is effectively a five-year suspension with fitness. *See* D.C. Bar R. XI, §§ 3(a), 16(a).

The Court has not squarely addressed the issue of whether a negotiated sanction short of disbarment for reckless misappropriation is impermissible under *Addams*, which was decided nearly two decades before the negotiated discipline process was created through the 2008 amendments to Rule XI. *See In re Harris-Lindsey*, 19 A.3d 784, 785 (D.C. 2011) (per curiam) (rejecting negotiated discipline in a misappropriation case due to factual insufficiency in the record, but "express[ing] no view on the broader position advanced by the Board that negotiated discipline should be presumptively unavailable in cases of misappropriation not 'clearly' shown to be negligent only, or unaccompanied by 'extraordinary circumstances'"). This negotiated resolution appears to be an appropriate exercise of the negotiated discipline process.

The Committee recommends that in circumstances such as these, a negotiated suspension of three years with a fitness requirement (and thus no guarantee of reinstatement in three years or ever) is not unduly lenient, and is an appropriate negotiated resolution of a matter such as this where the operative behavior is admitted and (i) there are no aggravating factors; (ii) the Respondent has no prior history of violations of ethics rules, (iii) the Respondent has been entirely forthcoming and cooperative (behavior which should be encouraged), and (iv) no client or third party has been harmed or is complaining.[2] The negotiated resolution process further promotes the administration of disciplinary complaints by avoiding undue consumption of time and resources to conduct a full-blown evidentiary hearing on claims that are susceptible of a "not unduly lenient" negotiated resolution.

We recognize that *Addams* warned that "[t]he appearance of a tolerant attitude toward known embezzlers would give the public grave cause for concern and undermine public confidence in the integrity of the profession and of the legal system whose functioning depends on lawyers." *Addams*, 579 A.2d at 193. However, given the advent of the negotiated discipline process, *Addams* should not be read to preclude a strong sanction short of disbarment in circumstances such as this, particularly where the sanction is close to the functional equivalent of disbarment (a three-year suspension instead of a five-year suspension) and may in practice work identically depending on whether a showing of fitness is made, if any, after a period

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[2] We recognize that these factors would not be considered "extraordinary circumstances" if this were litigated as a contested matter. *See Pierson*, 690 A.2d at 950.

of three years has passed. Rather than show tolerance for embezzlers, the agreed-upon sanction (the most serious available short of disbarment) serves the goals of the attorney discipline system: "to protect the public and the courts, to maintain the integrity of the profession, and to deter other attorneys from engaging in similar misconduct." *Pierson*, 690 A.2d at 948.

This matter will give the Court the opportunity to clarify its views in light of the advent of the negotiated resolution process, and as long as negotiated sanctions are permitted in certain cases of reckless misappropriation, we recommend that this Petition be approved.

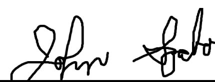
IV. CONCLUSION AND RECOMMENDATION

For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved and that the Court impose a three-year suspension with a fitness requirement.

AD HOC HEARING COMMITTEE

John R. Gerstein
Chair

Patricia Mathews
Public Member



John L. Szabo
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