THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

Issued
May 13, 2019

In the Matter of:	:	
	:	
PERLESTA A. HOLLINGSWORTH, JR.,	:	
	:	Board Docket No. 18-ND-005
Respondent.	:	Bar Docket No. 2018-D133
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 494309)	:	

REPORT AND RECOMMENDATION OF HEARING COMMITTEE NUMBER SIX APPROVING PETITION FOR NEGOTIATED DISCIPLINE

I. PROCEDURAL HISTORY

This matter came before Hearing Committee Number Six on March 27, 2019, for a limited hearing on a Petition for Negotiated Discipline (the "Petition").[1] The members of the Hearing Committee are Theodore C. Hirt, Esquire, Webster M. Beary, Esquire, and Dr. Robin J. Bell. The Office of Disciplinary Counsel was represented by Assistant Disciplinary Counsel Jelani C. Lowery, Esquire. Respondent, Perlesta A. Hollingsworth, Jr., was represented by Justin M. Flint, Esquire, and Abby Franke, Esquire.

The Hearing Committee has carefully considered the Petition for Negotiated Discipline signed by Disciplinary Counsel, Respondent, and Respondent's counsel; the supporting affidavit submitted by Respondent on February 22, 2019 (the

[1] All references to the Petition refer to the "Amended Petition for Negotiated Disposition" filed February 22, 2019.

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

"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 Hearing Committee Chair's *in camera* review of Disciplinary Counsel's files and records and the Chair's *ex parte* communications with Disciplinary Counsel. For the reasons set forth below, the Hearing Committee approves the Petition, finds the negotiated discipline of a six-month suspension with three months stayed in favor of a one-year probation with conditions is justified and recommends 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. 18[2]; Affidavit ¶ 2.

3. The allegation that was brought to the attention of Disciplinary Counsel is that Respondent violated Rule 1.15(a) (negligent misappropriation of entrusted funds) in connection with his handling of settlement funds belonging to three clients in two matters. Petition at 5.

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

[2] "Tr." Refers to the transcript of the limited hearing held on March 27, 2019.

(a) Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by exam on December 11, 2006, and assigned Bar number 494309. Respondent is also licensed in Virginia and Connecticut.

(b) At all times relevant to these charges Respondent maintained an Interest on Lawyers Trust Account (IOLTA) at Capital One Bank with an account number ending in #4985.

(c) On April 3, 2017, Victor Lopez and Melvin Valdez retained Respondent to represent them in a personal injury matter against Progressive Insurance Company arising out of an automobile accident.

(d) On or about April 24, 2017, Erica Childs retained Respondent to represent her in a personal injury matter against GEICO arising out of an automobile accident.

(e) Respondent settled the case against Progressive for Messrs. Lopez and Valdez, and on November 29, 2017, Progressive issued a $3,350 settlement check for Mr. Lopez and a $2,990 settlement check for Mr. Valdez. Respondent did not immediately deposit these funds into his IOLTA.

(f) Respondent also settled the Erica Childs case with GEICO and on December 1, 2017, GEICO issued a $5,400 settlement check to Ms. Childs. Respondent did not immediately deposit these funds into his IOLTA.

(g) On December 28, 2017, Respondent deposited the $5,400 settlement check from GEICO into his Capital One Bank IOLTA account ending in #4985.

(h) On Saturday, December 30, 2017, Respondent wrote a $2,000 check to Victor Lopez and a $1,650 check to Melvin Valdez as payment for their settlements. When Respondent wrote the checks to Messrs. Lopez and Valdez, he knew he had not yet deposited the funds from their settlements into his IOLTA.

(i) Respondent instructed Messrs. Lopez and Valdez not to deposit the checks until the next business day, January 2, 2018, so that he could

deposit the settlement checks before the disbursement checks processed.

(j) Also, on Saturday, December 30, 2017, Respondent wrote himself two checks for legal fees in the Lopez and Valdez matters, one for $1,340 (Lopez) and another for $1,350 (Valdez). When Respondent wrote the checks to himself for legal fees in the Lopez and Valdez matters, he knew he had not deposited the settlement money into his IOLTA.

(k) On December 31, 2017, Respondent wrote three checks related to the Erica Childs matter:

i) An $1,800 check to Dr. Jason Carle with a notation in the memo line that the check was for "Erica Childs medical full & final."

ii) An $1,800 check to himself with a notation in the memo line that the check was for "Erica Childs legal fees."

iii) An $1,800 check to Erica Childs with a notation in the memo line that the check was for "settlement."

(l) On January 2, 2018, Respondent forgot to deposit the settlement funds from the Lopez and Valdez matters into his IOLTA.

(m) On January 2, 2018, Messrs. Lopez and Valdez negotiated their checks, withdrawing a total of $3,650 from Respondent's IOLTA. That money did not come from their settlement funds.

(n) On January 3, 2018, Respondent went to a Capital One Bank and deposited into his personal account, the two checks he had written himself as payment of legal fees for Lopez and Valdez matters. Respondent still had not deposited the Lopez and Valdez settlement funds into his IOLTA and did not do so at that time. As a result, a total of $2,690 was withdrawn from his IOLTA, and that money did not come from the Lopez and Valdez settlement funds.

(o) At the close of business on January 3, 2018, Respondent's trust account balance was $1,515. At that time, Dr. Carle and Ms. Childs had not negotiated their $1,800 checks that Respondent had issued in the Erica Childs matter.

(p) On January 12, 2018, Dr. Carle negotiated his $1,800 check and Respondent's IOLTA was overdrawn, resulting in a negative account balance of -$285.00. Ms. Childs still had not negotiated her $1,800 check and her money should have remained in Respondent's IOLTA.

(q) On January 16, 2018, Respondent received a call from Capital One Bank informing him that his IOLTA was overdrawn.

(r) That same day, Respondent deposited the settlement funds he had received from Progressive in the Lopez ($3,350) and Valdez ($2,990) matters into his IOLTA.

(s) On February 15, 2018, Ms. Childs negotiated her $1,800 check, bringing the balance in Respondent's account to $0.

Petition at 2-5.

5. Respondent is agreeing to the disposition because Respondent believes that he cannot successfully defend against discipline based on the stipulated misconduct. Tr. 17-18; Affidavit ¶ 5.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition for Negotiated Discipline. Affidavit ¶ 7. That promise is that Disciplinary Counsel agrees not to pursue any charges arising out of the conduct described in the Petition, other than the charge set forth in the Petition, or any sanction other than that stated in the Petition. 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. 20-21.

7. Respondent has conferred with his counsel. Tr. 13; Affidavit ¶ 1.

8. Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition for Negotiated Discipline and agreed to the sanction set forth therein. Tr. 19-21; Affidavit ¶ 4.

9. Respondent is not being subjected to coercion or duress. Tr. 21; Affidavit ¶ 6.

10. Respondent is competent and was not under the influence of any substance or medication that would affect his participation at the limited hearing. Tr. 13-14.

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 if Respondent is unable to afford 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, 23-25; Affidavit ¶ 1, 9-10, 12.

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be a six-month suspension with three months stayed in favor of a one-year probation with conditions. Petition at 5-6; Tr. 20. Respondent understands that the conditions of his probation are that he (a) shall not engage in any misconduct in this or any other jurisdiction during the period of probation; and (b) shall complete nine hours of Continuing Legal Education courses pre-approved by Disciplinary Counsel. Petition at 5; Tr. 20.

13. The Petition provides the following circumstances in mitigation, which the Hearing Committee has taken into consideration: that Respondent 1) proactively enrolled in and completed the D.C. Bar's Training and Beyond Course; 2) has implemented new record-keeping protocols including a detailed client ledger; 3) has no prior disciplinary history; 4) has cooperated with Disciplinary Counsel; and 5) has expressed remorse. Petition at 6.

14. There were no complainants who were required to be notified of the limited hearing pursuant to Board Rule 17.4(g). Tr. 10.

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. Tr. 19-21. Respondent understands the implications and consequences of entering into this negotiated discipline. Tr. 15, 23-25.

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. Tr. 20-21; Affidavit ¶ 7.

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 concludes that the facts support the admission 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. Tr. 17-18; Affidavit ¶ 5.

With regard to the second factor, the Petition states that Respondent violated Rule of Professional Conduct 1.15(a) (negligent misappropriation of entrusted funds). The evidence supports Respondent's admission that he violated Rule 1.15(a) in that the stipulated facts describe that Respondent provided settlement checks to two clients whose funds had not been deposited in his bank account, and then withdrew his own fees in that matter, resulting in the withdrawal of funds belonging to another client.

C. The Agreed-Upon Sanction Is Justified.

The third 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 a review of relevant precedent, the Hearing Committee concludes that the agreed-upon sanction is justified and not unduly lenient.

The Hearing Committee has reviewed the applicable precedent on what constitutes a negligent, as opposed to a reckless, misappropriation. The Hearing Committee concludes that, based on the specific facts of this case, Respondent's misconduct constituted a negligent misappropriation of client funds.

The Court has described negligent misappropriation as the "non-intentional, non-deliberate, non-reckless misuse of entrusted funds or an attorney's non-

intentional, non-deliberate, non-reckless failure to retain the proper balance of entrusted funds," often involving "a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded." *In re Abbey*, 169 A.3d 865, 872 (D.C. 2017). In contrast, the Court has characterized "reckless misappropriation" as "an unacceptable disregard for the safety and welfare of entrusted funds," with its "hallmarks" including (1) the "indiscriminate commingling of entrusted and personal funds"; (2) a "complete failure to track settlement proceeds"; (3) the "total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition"; (4) the indiscriminate movement of monies between accounts," and (5) the "disregard of inquiries concerning the status of funds." *Id.*; *see also In re Ahaghotu*, 75 A.3d 251, 253 (D.C. 2013) (equating an "unacceptable level of disregard for the safety and welfare of entrusted funds" with "a conscious indifference to the consequences of [respondent's] behavior") (citations omitted).

Because disbarment is the presumptive sanction for reckless or intentional misappropriation (*In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc)), the Hearing Committee's agreement with the parties that Respondent engaged in only negligent misappropriation is central to its finding that the sanction is justified and not unduly lenient. The Committee has not identified any original disciplinary matters involving the conduct admitted here. However, the Committee is guided by

the Court's decision in *In re Mba-Jonas*, a reciprocal matter, where the Court declined to impose disbarment for similar misconduct.

In *Attorney Grievance Comm'n v. Mba-Jonas*, 919 A.2d 669, 677 (Md. 2007), the Maryland Court of Appeals held that an indefinite suspension from the practice of law with the right to reapply for admission after ninety days was the appropriate sanction for the attorney's misconduct, which consisted of various irregularities in his trust account as to several clients. The attorney also issued post-dated checks to two clients and one medical provider (for convenience purposes), all of whom cashed the checks prematurely, apparently resulting in a negative balance in the attorney's trust account on two occasions. 919 A.2d at 673-74. The Maryland Court noted that the circuit court judge who heard the case determined that the attorney's offenses "occurred due to sloppiness, not dishonesty." *Id.*

In a subsequent reciprocal discipline proceeding, Disciplinary Counsel sought Respondent's disbarment, contending that the Maryland court found evidence of reckless misappropriation, which would overcome the presumption of identical reciprocal discipline. *In re Mba-Jonas*, 993 A.2d 1071, 1073-74 (D.C. 2010). *See generally* D.C. Bar R. XI, § 11(c)(4) (providing for a non-identical sanction where "[t]he misconduct established warrants substantially different discipline in the District of Columbia"). The District of Columbia Court of Appeals conducted a sanction analysis to determine whether the substantially different discipline exception applied, ultimately determining that the record was insufficient to support a finding of reckless misappropriation, although without specifically discussing the

post-dated check incidents that were identified in the Maryland proceedings. The Court imposed a 90-day suspension on the attorney, with a fitness requirement, as functionally identical discipline. 993 A.2d at 1074. Thus, *Mba-Jonas* supports the parties' contention that intentionally post-dating checks does not, in itself, rise to the level of reckless or intentional misappropriation.

The Hearing Committee concludes that Respondent's case is similar to *Mba-Jonas*. Respondent, like Mba-Jonas, issued checks to clients with the expectation that the checks would not be cashed until a prescribed future time. *See* Findings of Fact 4(h)-(i). Like Mba-Jonas, Respondent did not exercise due care in making these transactions. Respondent, however, did not engage in the kind of misconduct that the Court has identified as a reckless misappropriation of client funds. *See Ahaghotu*, 75 A.3d at 256 (describing the "hallmarks" of reckless misappropriation). The five "hallmarks" are not present here. *See id.* Nor is there a "pattern" of misappropriation of client funds in this case.[3] Respondent accommodated the interests of clients Lopez and Valdez, providing them their settlement monies with the instruction and understanding that these clients would not deposit those monies until he could deposit the settlement checks. *See* Findings of Fact 4(h)-(i).

Although the Hearing Committee concludes that Respondent engaged in one act of negligent misappropriation of funds, the Committee nevertheless does not seek to excuse Respondent's conduct. The Hearing Committee's conclusion that an act

[3] Some decisions suggest that reckless misappropriation does not occur in the absence on the proof of such a pattern. *See In re Cloud*, 939 A.2d 653, 660 (D.C. 2007); *In re Edwards*, 808 A.2d 476, 484-85 (D.C. 2002).

of negligent misappropriation occurred in this case should *not* be construed as condoning Respondent's conduct—or "sending a signal" to the Bar that similar such misconduct should be treated lightly.[4] Attorneys holding entrusted funds should not deliver checks to clients while knowing that the funds are not available, or that the only currently available funds belong to other clients, thereby running the risk of forgetting to deposit the client's funds in time.[5]

The Court has routinely imposed six-month suspensions even for isolated instances of negligent misappropriation. *See In re Davenport*, 794 A.2d 602, 603 (D.C. 2002) ("When the Board finds that an attorney has commingled and negligently misappropriated funds, we have uniformly imposed a suspension for a period of no less than six months."); *see also, e.g.*, *In re Frank*, 881 A.2d 1099, 1100 (D.C. 2005) (per curiam) (six-month suspension for negligent misappropriation); *In re Katz*, 801 A.2d 982, 982 (D.C. 2002) (per curiam) (providing that a six-month suspension was appropriate before taking into account disability mitigation under *In re Kersey*, which resulted in a stayed suspension); *In re Evans*, 578 A.2d 1141, 1143 (D.C. 1990) (per curiam) (six-month suspension for negligent misappropriation). Thus, a partially stayed six-month suspension falls slightly below the sanction Respondent would likely receive in a contested case. However, because a strict comparability analysis does not apply in negotiated discipline cases, and because

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[4] *See In re Reed*, 679 A.2d 506, 508 (D.C. 1996) (per curiam) (emphasizing "the seriousness with which [the C]ourt regards an attorney's duty to properly care for funds belonging to the client").

[5] *See In re Anderson*, 778 A.2d 330, 338 n.4 (D.C. 2001) (declining to articulate an "intermediate level of culpability," such as '"gross negligence,"' that would be "short of recklessness" but that might warrant disbarment).

there are mitigating factors, but no aggravating factors, the Hearing Committee concludes that the sanction is not "unduly" lenient.

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 six-month suspension with three months stayed in favor of a one-year probation with the conditions that Respondent (a) shall not engage in any misconduct in this or any other jurisdiction during the period of probation; and (b) shall complete nine hours of Continuing Legal Education courses pre-approved by Disciplinary Counsel, and with a violation of the terms of probation resulting in Respondent serving the full six-month suspension.

HEARING COMMITTEE NUMBER SIX

Theodore C. Hirt

Theodore C. Hirt, Esquire
Chair

Robin J Bell

Dr. Robin J. Bell
Public Member

Webster M. Beary, Esquire
Attorney Member