DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
	)	
SAMUEL BAILEY, JR.	)	Bar Docket Nos. 442-92 & 483-92
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

Respondent is charged with commingling and misappropriating funds, failing to maintain complete trust account records, failing to notify and pay promptly persons having an interest in entrusted funds, entering into an impermissible business transaction with a client, and preparing a legal instrument that effected a substantial gift to him from his client. Hearing Committee One (the "Hearing Committee" or "Committee") sustained all save the substantial gift charge. Neither Bar Counsel nor the Respondent has taken exception to the Committee's Report and Recommendation ("Cmte. Rpt."). We are obliged to "take action based on the record." Board Rule 13.4 (2001); see also D.C. Bar R. XI § 9(b) ("If no exceptions are filed, the Board shall decide the matter on the basis of the Hearing Committee record.").

This report and two separate statements are rendered in this matter, with the following results. The entire Board adopts the Hearing Committee's findings of fact with modifications and agrees with the Committee's findings of Rule 1.15(a) violations for commingling and failure to keep trust account records. A majority of the Board also agrees with the Committee's conclusion that Respondent violated Rule 1.15(b) by failing to notify a third person promptly upon receipt of funds.[1]

[1] Mr. Wolfson, joined by Dr. Payne, dissents from this conclusion.

A majority of the Board disagrees with the Committee's conclusion that Bar Counsel has established misappropriation by clear and convincing evidence; however, these Board members reach this conclusion for different reasons.[2] A majority of the Board also disagrees with the Committee's conclusion that Respondent violated Rule 1.15(b) by failing to pay a third party promptly upon receipt of funds.[3]

Finally, the entire Board agrees that the charge under Rule 1.8(a) (improper business transaction with client) has been established by clear and convincing evidence, and the entire Board agrees that the charge under Rule 1.8(b) (effecting substantial gift from client) cannot be sustained.

Based on their respective findings and conclusions, a majority of the Board recommends that Respondent be suspended from the practice of law for nine months with a requirement that he complete a course in ethics and a course in trust accounting as a condition of reinstatement.[4]

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[2] Mr. Baach, joined by Ms. Fort and Ms. Holleran-Rivera, expresses one viewpoint while Mr. Wolfson, joined by Dr. Payne, expresses a second. Mr. Bloomfield, joined by Mr. Knight, Ms. Frazier, and Mr. Klein, dissents from the positions stated by Mr. Baach and Mr. Wolfson.

[3] Mr. Bloomfield, joined by Mr. Knight, Ms. Frazier, and Mr. Klein, agrees with the Committee's conclusion that there is a violation of Rule 1.15(b).

[4] Mr. Wolfson, joined by Dr. Payne, recommends a six-month suspension.

I. FINDINGS OF FACT

We adopt the Hearing Committee's findings of fact with some modifications.

1. Respondent Samuel Bailey was admitted to the District of Columbia Bar on December 18, 1984, and was assigned Bar number 384974. Bar Exhibit ("BX") A. He is within the disciplinary jurisdiction of the District of Columbia Court of Appeals as he was a member of the bar during the relevant period. BX A.

2. Commencing in 1989, when he was at the firm of Lee & Harvey,[5] Respondent represented Almaz Haile in a personal-injury action arising out of an injury she sustained at a Giant Food store. At the time, she was employed as a hotel maintenance worker. Transcript of Proceedings, Vol. II ("II Tr."), at 262.

3. In the course of the representation, Respondent referred Ms. Haile to Dr. Franklin Garmon, who treated her for her injuries. Dr. Garmon provided Ms. Haile and Respondent with an "Authorization" form, which they executed on June 29, 1989. BX 1A:4. The Authorization provides in pertinent part as follows:

> I hereby authorize and direct you, my attorney, to pay directly to [Dr. Garmon] such sums as may be due and owed to him for medical services rendered to me . . . and any other bills that are due his office which shall include fees for his appearance in court on my behalf (including those accrued after he has been placed on alert for purposes of court appearance, whether or not he actually makes that appearance).
>
> If required as an expert witness, whether he testifies or not, for reports made or depositions given in this matter, I further authorize you, my attorney, to withhold such sums from any settlements, judgments or verdicts as may be necessary to adequately protect [Dr. Garmon] and compensate him for his time and efforts on my behalf and also to institute a lien on this case to [Dr. Garmon] against any and all proceeds for me . . . until [his] medical bills for treatment of me, . . . fees for court appearance(s) (or time awaiting that appearance), deposition(s) are paid [sic] or he is compensated for his efforts on behalf of me . . . .

[5] When Respondent left Lee & Harvey, he took Ms. Haile's case with him.

> I fully understand that I am directly responsible to [Dr. Garmon] for all medical bills submitted by him for services rendered and that this agreement is made solely for [his] additional protection. I fully understand that such payments are not contingent on any settlement, judgment or verdict from which I eventually recover damages, compensation or said fee.

BX lA:4.

4. The portion of the Authorization signed by Respondent provided as follows:

> The undersigned, being attorney of record for [Ms. Haile] does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement(s), judgement(s) or verdicts due [Ms. Haile] as may be necessary to adequately protect [Dr. Garmon].

BX 1A:4.

5. a. The Hearing Committee found that "[i]n th[e] authorization, Ms. Haile authorized and directed [Respondent] to pay Dr. Garmon's bills out of any settlement proceeds he received on her behalf, and [Respondent], for his part, agreed to withhold sums sufficient to pay Dr. Garmon from any settlement proceeds." Cmte. Rpt. at 3. The Committee also concluded that a reasonable person in the position of the parties would understand the Authorization as constituting an assignment of a portion of the settlement funds to Dr. Garmon. Id. at 13; see also id. at 12.

b. We disagree with these findings concerning the Authorization document. In the portion of the Authorization executed by Ms. Haile, she does generally authorize and direct Respondent to pay her medical bills, but this general authorization does not specify the settlement proceeds as the source of payment. In the next sentence of the Authorization, Ms. Haile authorizes Respondent to pay Dr. Garmon specifically out of settlement proceeds, and to institute a lien on those proceeds, but only in respect of Dr. Garmon's services as an expert witness. The portion of the Authorization signed by Respondent requires him to observe the

terms of Ms. Haile's Authorization and to withhold those sums required to be withheld thereunder for Dr. Garmon's protection.[6]

6. Although the Hearing Committee made no explicit finding on this point, we find that Dr. Garmon's bills were for diagnosis and treatment of Ms. Haile's injuries, and not for services as an expert witness. See BX 1C; 32B:35, 57, 95, 154, 241-43, 413-18; Transcript of Proceedings, Vol. I ("I Tr."), at 14, 15, 22.

7. On or about September 27, 1991, Ms. Haile's case settled for $25,000. BX 32A:3-5. Respondent promptly deposited the settlement check from the defendant's insurance company in Respondent's IOLTA account, City National Bank account No. 32003129, under the name of "Samuel Bailey Jr Atty at Law Client Trust Account" (the "Account"). BX 2:1, 8.

8. At about the same time, Respondent entered into an arrangement with Ms. Haile whereby he would "defer" payment of the sums owed to her medical providers, borrow those funds for his own use, pay interest on the borrowed funds, and try to negotiate reductions in the medical bills, paying any savings to Ms. Haile. I Tr. 166-73, 184-88, 193-94, 216, 223-24. Respondent did not inform Dr. Garmon or the other medical providers of this arrangement. I Tr. 229; II Tr. 266-67.

9. The borrowing arrangement between Respondent and Ms. Haile is reflected in two documents. First, Respondent prepared and provided to Ms. Haile a two-page disbursement sheet dated September 26, 1991. BX 32A:6-7.

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[6] Since neither the Hearing Committee nor we have relied on extrinsic evidence in construing the Authorization, our review is de novo. See International Bhd. of Painters v. Hartford Accident & Indem. Co., 388 A.2d 36, 43 (D.C. 1978). We do make certain findings in subsection II.B.2 below based on extrinsic evidence as an alternative basis for our conclusion that the Authorization creates a lien only to the extent that Dr. Garmon provides services as an expert witness.

a. The disbursement sheet shows $9,122.13 owing to Ms. Haile. This sum represents the $25,000.00 settlement figure, less Respondent's fees and expenses and the sums owing to Ms. Haile's medical providers including Dr. Garmon. BX 32A:6.

b. The disbursement sheet shows $5,425.86 owing to Ms. Haile's medical providers, including $2,400.00 due to Dr. Garmon. BX 32A:6.

c. The disbursement sheet states that Ms. Haile's "authorization has been given" for Respondent's office to "borrow" the settlement funds "to use as deemed appropriate," and includes on the second page Ms. Haile's signed statement that she "ha[s] read the above disbursement and agree[s] with all payments." BX 32A:7.

d. This was Respondent's standard form disbursement sheet, which was used in personal-injury matters and included this authorization for his office to borrow funds from settlement proceeds. I Tr. 213-14; II Tr. 295-96.

10. Second, Respondent testified that he prepared and executed a "Promissory Note" in connection with Ms. Haile's agreement to lend him the excess proceeds of the settlement, and that he prepared it on the same day the disbursement sheet was prepared by his secretary.[7] II Tr. 306-07. He also testified that he reviewed the terms of the Note with Ms. Haile, and that, although English was not her first language, they were "able to communicate," and he thought she understood its terms. II Tr. 283-84. The Note provided as follows:

Promissory Note

[7] The Promissory Note and Disbursement Sheet are prepared in different typefaces, and Ms. Haile's first name is spelled differently on the Promissory Note. The Committee noted that this "might suggest to a skeptic" that Respondent in fact unilaterally prepared the Promissory Note and back-dated it at some later time when it appeared prudent to have such a document in his files. Cmte. Rpt. at 6 n.2. Respondent testified, however, that he (as opposed to his secretary) prepared it on a different computer on the date it bears. II Tr. 293-94, 305-07. The Hearing Committee considered it unnecessary to resolve this factual issue, as do we.

$5,425.86 September 26, 1991

Washington, DC

For value recieved [sic], the undersigned "Borrower" promises to pay to Almas [sic] Haile, the sum of $5,425.86, the amount of medical expenses in her case, with interest at a rate of 5% per annum, or to pay outstanding medical expenses directly to medical providers listed on the settlement sheet after satisfactory negotiations.

If the undersigned is able to negotiate a discounted payment to any of the listed medical expenses [sic], such discount will be paid to Almas [sic] Haile. All monies owed to Ms. Haile under this agreement must be paid within a four year period from the date of this note.

_____

Samuel Bailey, Jr.

BX 32A:7.1. The Promissory Note bears only Respondent's signature. Id. Although there is insufficient foundational evidence in the record to make a finding in this regard, it appears that Respondent retained the executed Promissory Note in his file rather than delivering it into the possession of Ms. Haile. See Specification of Charges ¶ 13 ("Respondent's file reveals a document, entitled 'Promissory Note . . . .'"); BX 32A:7.1 (promissory note among documents copied from Respondent's case file).

11. Respondent's records reflect that during the time he was representing her, Ms. Haile earned $1080 per month. BX 32B:135; II Tr. 264. She is an immigrant from Eritrea who does not speak English as her first language. I Tr. 188. She appeared voluntarily to testify on Respondent's behalf at the hearing and indicated that she considered him to be a friend as well as her lawyer. II Tr. 312. The Committee observed that even in 1999, some eight years after the events in question, Ms. Haile had difficulty fully comprehending spoken English. Cmte. Rpt. at 16-17; see also II Tr. 312-22.

12. a. Ms. Haile believed that she had reviewed the Promissory Note with Respondent. She expected that the doctors were "going to be paid" and that Respondent "was going to take care of it," though she did not know when he would do so. II Tr. 314-15.

b. While Ms. Haile may not have fully appreciated the implications of her transaction with Respondent, she did agree to its basic terms, i.e., that he would borrow the settlement proceeds and "take care of" the medical bills. II Tr. 311-22. She appears also to have understood that he would attempt to negotiate discounts and pay her the difference. II Tr. 318-21.

c. The Committee found that "the money that [Respondent] borrowed was in effect the doctors' money rather than Ms. Haile's, though he agreed to pay interest to Ms. Haile." Cmte. Rpt. at 7. As discussed below, we disagree with this conclusion.

13. Respondent did not provide Ms. Haile with any information regarding the prevailing interest rate, nor did he advise her to seek independent legal counsel regarding the advisability of making the loan to him. II Tr. 285-86.

14. Bar Counsel's expert testified that Respondent could not have obtained a loan from a bank at an interest rate as favorable as that reflected in the Promissory Note. Bar Counsel did not establish that Ms. Haile could have earned more by investing or lending her money elsewhere. I Tr. 58-60, 65-66.

15. On or around September 26, 1991, the day before Respondent deposited Ms. Haile's settlement check, his Account balance was $931.38. BX 2:1. On or about September 27, 1991, after he deposited the settlement check, the Account balance was $25,931.38. Id. On October 4, 1991, the Account was debited for two checks totaling $9,122.13, the amount indicated on the disbursement sheet as owing to Ms. Haile after the deduction of Respondent's

fees and expenses and Ms. Haile's medical bills. BX 33:1. On or about November 1, 1991, the Account balance fell to $4,141.38. BX 29B:2. By December 16, 1991, the Account balance had fallen to $22.72. BX 29B:3. The Account balance fell to 11 cents on August 18, 1992. Respondent had made no disbursements to Ms. Haile's doctors at this point. BX 29B:8.

16. Dr. Garmon learned of the settlement from Ms. Haile when he fortuitously encountered her some months later. I Tr. 18-19. After learning that the case had settled, Dr. Garmon placed a number of calls to Respondent's office inquiring about his payment. Receiving no response, Dr. Garmon wrote Respondent a letter on August 19, 1992, demanding payment and threatening legal action if payment were not made. BX1A:2. On September 2, 1992, Dr. Garmon complained to Bar Counsel. I Tr. 24. Respondent did not pay Dr. Garmon until on or about October 23, 1992, more than one year after the case had settled, at which time he paid Dr. Garmon $2,420.30. I Tr. 29; BX 31B:3.

17. Other medical providers who had treated Ms. Haile for her injuries were owed sums reflected on the disbursement sheet that Respondent prepared. For example, The Pain and Therapy Group was owed $145.00. BX 32A:6. Respondent did not pay that bill until January 29, 1993. BX 31B:6. Similarly, Neurodiagnostic Associates was owed $1,400.00 for services to Ms. Haile. BX 32A:6. Respondent did not pay that bill until on or about January 29, 1993, at which time he paid them $1,228.00. BX 31B:5. Columbia Hospital for Women was also owed $1,405.86, as shown on the disbursement sheet provided to Ms. Haile. BX 32A:6. Respondent ultimately paid the hospital $787.86 on or about February 9, 1993, and he paid the additional $618.00 on or about February 11, 1993. BX 31B:4. The record is unclear regarding the payment of HealthTech, one of Ms. Haile's other medical providers. I Tr. 101; I Tr. 175, 248; BX 32A:6-7; 32B:42.

18. From September 1991 through November 1992, Respondent made several telephone transfers and cash withdrawals from the Account for which he had insufficient records. II Tr. 330-31, 341. The Account records for the period in question reflect a number of other transactions for which Respondent is unable to provide documentation. Id. Even armed with all of the documents and information that Respondent could locate regarding the Account, Respondent's own expert could not identify all of the transactions reflected in the Account. II Tr. 344-47, 350-59.

19. Between September 1991 and November 1992, Respondent deposited several checks in the Account for which the memorandum portion reflected that the payments were "legal fee[s]" or "attorney fee[s]." BX 2:7; BX 3:3, 8, 11, 13; BX 6:2; BX 7:2; BX 15:4; BX 18:2; BX 23D:4; BX 25:24; BX 26D:7-8, 10, 20, 94-95; BX 27:10, 15-16, 36; BX 33. We find record evidence to support the Committee's conclusion that Respondent borrowed $10,000 from his mother and deposited the funds in the Account along with fee advances. I Tr. 177-80; II Tr. 286-88. He also placed entrusted client funds into the Account. BX 2:4-6; BX 3:7; BX 5:3-4; BX 6:4; BX 9:6; BX 12:5; BX 13:4-10; BX 14:4; BX 25:16, 38, 45, 51, 63, 68, 75; BX 26D:4, 13, 29, 34, 52, 81, 83, 90, 105; BX 28B:19; BX 33; I Tr. 188-93; II Tr. 286-91, 342-45; Resp. Post-Hrg. Br. ¶ 14.

II. CONCLUSIONS OF LAW

A. Commingling

We agree with the Hearing Committee that Respondent commingled entrusted funds. Rule 1.15(a)[8] requires attorneys to segregate from their own funds all client and third-party funds

[8] The Rules of Professional Conduct ("Rules") superseded the Code of Professional Responsibility ("Code") on Jan. 1, 1991, and are applicable to "acts committed thereafter." In re Travers, 764 A.2d 242, 246 n.3 (D.C. 2000). The Authorization was executed in 1989, but the

entrusted to them in the course of a legal representation, and to hold the entrusted funds in a separate account meeting certain requirements.[9] Although we disagree with the Committee's conclusion that Ms. Haile assigned a portion of the settlement proceeds to Dr. Garmon, we are confident that commingling has been established regardless of whether these funds are considered as having belonged to Ms. Haile or to Dr. Garmon. As the Hearing Committee correctly observed:

> either Mr. Bailey is correct that he was entitled to use Ms. Haile's settlement proceeds as his own (in which case he should have deposited them into his own account separate from his trust account) or they were hers and/or the doctors' (in which case he should have preserved and segregated rather than spending them).

Cmte. Rpt. at 8-9. In short, Respondent used, as his own, funds that he kept in his trust account with clients' entrusted funds. It is plain from the record that Respondent held entrusted funds in the Account. BX 2:4-6; BX 3:7; BX 5:3-4; BX 6:4; BX 9:6; BX 12:5; BX 13:4-10; BX 14:4; BX 25:16, 38, 45, 51, 63, 68, 75; BX 26D:4, 13, 29, 34, 52, 81, 83, 90, 105; BX 28B:19; BX 33 (showing, inter alia, payments of settlement funds to clients and payments of clients' medical bills out of Account); I Tr. 188-93; II Tr. 286-91, 342-45; Resp. Post-Hrg. Br. ¶ 14. It is equally clear that he used the Account for his own funds, including attorney fees, and we find evidence

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"borrowing" (and hence any violation) did not occur until September 1991, shortly after the settlement. Bar Counsel charged under the Rules. Respondent argued to the Committee that the date of the Authorization governs and that the Code therefore applies in respect of the misappropriation charge. The Committee applied the Rules. Respondent has not raised any exception to the Board, but in supplemental briefing requested by the Board he did renew his argument that the Code applies. We agree with the Hearing Committee that the Rules are applicable in this case.

[9] Rule 1.15(a) provides in pertinent part 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 and which is a member of the Federal Deposit Insurance Corporation, or the Federal Savings and Loan Insurance Corporation, or successor agencies."

in the record to support the Committee's conclusion that the $10,000 received by Respondent from his mother and placed in the Account was a personal loan. BX 2:7; BX 3:3, 8, 11, 13; BX 6:2; BX 7:2; BX 15:4; BX 18:2; BX 23D:4; BX 25:24; BX 26D:7-8, 10, 20, 94-95; BX 27:10, 15-16, 36; BX 33; I Tr. 177-80; II Tr. 286-88. Bar Counsel has established commingling by clear and convincing evidence on this record.

B. Misappropriation

The Hearing Committee found misappropriation under Rule 1.15(a) and recommended that Respondent be disbarred under the rule of In re Addams, 579 A.2d 190, 194-98 (D.C. 1990) (en banc). Rule 1.15(a) provides in pertinent part 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." The central question as regards misappropriation is whether the Funds were the "property" of Dr. Garmon within the meaning of Rule 1.15(a). The answer depends on what type of interest constitutes "property" within the meaning of the Rule and whether the Authorization conveyed an interest of that type to Dr. Garmon. We conclude that the term "property" as used in the Rule requires either: (i) an assignment; or (ii) a lien or other legal or equitable interest sufficient, standing alone, to obligate the specific funds (or other property) in question. Because there is no language in the Authorization creating such an interest, and because the Respondent had his client's permission to use the funds, we conclude that there was no misappropriation.[10]

[10] Although Bar Counsel did not call this fact to our attention in its briefing or in the supplemental briefing we requested, this Board and the Court of Appeals have previously found misappropriations in cases involving this Doctor and the same Authorization form before us now. See In re Davenport, 794 A.2d 602 (D.C. 2002); In re Moore ("Moore I"), 704 A.2d 1187 (D.C. 1997) (per curiam); cf. In re Moore ("Moore II"), 727 A.2d 895 (D.C. 1999) (per curiam). In those cases, however, there was no defense of client permission, and hence the question of ownership of the funds as between client and doctor was neither essential to the finding of

A. What constitutes "property" for purposes of Rule 1.15(a)?

Our research discloses no case in which either the Court or the Board has been called upon to construe the term "property" for Rule 1.15(a) purposes where a Respondent had his client's permission to use the same funds that were the subject of a third party's authorization. The Court did, however, consider a similar issue in In re Haar, 698 A.2d 412 (D.C. 1997). The client in Haar disputed a fee in excess of $10,000, and offered to settle for $4,000. Id. at 414-15. The attorney did not accept the client's offer, but viewed it as an acknowledgement that the client owed at least $4,000 and therefore withdrew that amount from the trust account while continuing to dispute the balance. Id. The Court found that the attorney had taken an erroneous view of the law of accord and satisfaction, and thereby committed misappropriation, but regarded the mistake of law as a good faith, negligent one, and therefore declined to apply the presumptive sanction of disbarment. Id. at 417-18.

What is instructive for present purposes is that in assessing Haar's culpability the Court thought it important "to ascertain whether [he] in fact had a legitimate claim to the settlement proceeds *as such*, i.e., whether lawyer and client had an understanding that, whatever the attorney's fee turned out to be, it would come from the $20,000 settlement proceeds." Id. at 418 (emphasis in original). If so, the lawyer would have a "charging lien" against the specific settlement funds he withdrew, and the Court could more easily find simple negligence. Id. If not, the lawyer would have a "retaining lien," with only the rights of a general creditor. Id.

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misappropriation nor raised by the parties. Cf. In re Permian Basin Area Rate Cases, 390 U.S. 747, 775 (1968) (questions of law not determined through passing dictum in unrelated cases); Albertie v. Louis & Alexander Corp., 646 A.2d 1001 (D.C. 1994) (statement in dictum "'perhaps not as fully considered as it would have been if it were essential to the outcome'") (quoting United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988)).

Although Haar involves a differing fact pattern, its analysis is illuminating.[11] An outright assignment of funds makes the assigned funds the "property" of the assignee for purposes of Rule 1.15(a). See Black's Law Dictionary 119 (6th ed. 1990) (defining "assignment" as the "act of transferring to another all or part of one's property, interest, or rights"). A general debt obligation, by contrast, does not obligate specific funds. The creditor must take further steps, such as obtaining a judgment and writ of execution (or a writ of attachment), to gain rights to any specific funds or property. The analysis becomes more difficult in respect of liens and other interests that lie in the gray area between a mere debt obligation, on the one hand, and an outright assignment on the other. Haar suggests that the type of lien may be decisive (or at least significant), because some liens obligate specific property while others do not.

The distinction drawn in Haar between legal interests obligating a specific piece of property and those implicating only the personal responsibility of the debtor is essential to determining whether there was a misappropriation here. The distinction has a long pedigree. In Continental Cas. Co. v. Kelly, 106 F.2d 841 (D.C. Cir. 1939), the United States Court of Appeals for the District of Columbia held that a contingency fee agreement created an equitable lien on the proceeds of judgment because it was "clear from the agreement that from the time of its making there was a distinct appropriation of the fund by the client and an agreement that the attorneys should be paid out of it." Id. at 843. This specific commitment of funds for payment "creates rights different from those which arise when the attorney looks to the personal responsibility of the client for payment of the fee." Id. (citing cases). Hence, as the Haar Court observed, "it is important to keep clearly in mind the distinction between a right to payment and a right to particular property. . . . [A]bsent agreement or a statutory lien, the lawyer has no right

[11] "Debts payable by clients to attorneys should in general be subject to the same rules that normally apply to other debtor-creditor relationships." Wolf, 682 A.2d at 201.

to any particular property of the debtor-client, including the proceeds of litigation." Haar, 698 A.2d at 424; see also Wolf v. Sherman, 682 A.2d 194, 201 (D.C. 1996) (recognizing both express liens and equitable liens arising from designation of specific funds for payment); Elam v. Monarch Life Ins. Co., 598 A.2d 1167, 1169 (D.C. 1991) ("The test is whether the parties 'looked to the fund itself for payment . . . .'") (quoting De Winter v. Thomas, 34 App. D.C. 80, 84 (1909)).

We find clear support for our analysis in a recent D.C. Ethics Opinion. The Opinion examines Rule 1.15(a) and concludes that misappropriation of third-party funds requires that the third-party have a "just claim" to the particular funds held in escrow by the lawyer. See Ethics Opinion No. 293 (adopted July 20, 1999; revised Nov. 16, 1999). In providing general guidance to the Bar regarding the handling of third-party claims on escrowed funds, the Ethics Committee affirmed that "the mere assertion of a claim by a third party is not enough by itself to freeze property in the lawyer's possession until the dispute is resolved." The Ethics Committee noted that comment [4] to Rule 1.15 speaks in terms of a "just claim" by the third party under "applicable law," and advised that a "just claim that the lawyer must honor pursuant to Rule 1.15 is one that relates to the particular funds in the lawyer's possession, as opposed to merely being (or alleged to be) a general unsecured obligation of the client."[12]

[12] The Ethics Committee listed four frequently encountered instances of such "just claims": (i) an "attachment or garnishment arising out of a money judgment against the client (or ordered judicially prior to judgment)"; (ii) a statutory lien that applies to the proceeds of the suit handled by the lawyer"; (iii) a court order relating to specific funds in the lawyer's possession; and (iv) a contractual agreement made by the client and joined in or ratified by the lawyer to pay funds in the possession of the lawyer . . . to a third party." Id. The fourth example includes the "Authorization and Assignment" instruments "frequently utilized in contingent fee personal injury matters." Id.

The commentators are also in accord. See 1 Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering, § 1.15:302, at 460 (2d ed. 1990) (third party must have "matured legal or equitable claim in order to qualify for special protection"); cf. Restatement (Third) of the Law Governing Lawyers § 45 (2000) ("If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest on it, the lawyer is free to deliver the property to the person to whom it belongs.").

Finally, it is poor policy to construe the term "property" in Rule 1.15(a) to include a simple right to payment or the "retaining lien" discussed in Haar. Under such an interpretation, settlement funds would be the "property" of every general creditor of the client, and nearly every disbursement of settlement funds from lawyer to client would arguably result in a misappropriation of third-party funds. This result, obviously absurd, cannot be contemplated by Rule 1.15(a).[13]

B. Did the Authorization make the Funds Dr. Garmon's "property"?

We now turn to the Authorization to determine whether Ms. Haile transferred ownership of (i.e., assigned) the Funds to Dr. Garmon or otherwise conveyed an interest, comparable to the "charging lien" in Haar, sufficient to obligate the Funds specifically. In construing contracts, the Court of Appeals "adher[es] to the 'objective law' of contracts, whereby the written language embodying the terms of an agreement will govern the rights and liabilities of the parties . . . unless the written language is not susceptible of a clear and definite undertaking, or

[13] We need not consider here whether there might be some level of interest that does obligate specific property but is nevertheless too attenuated or contingent to trigger Rule 1.15(a). It is sufficient here to conclude that where a third party holds neither an assignment, nor a charging lien, nor any other comparable interest obligating specific funds, those funds are not the "property" of the third party within the contemplation of Rule 1.15(a).

unless there is fraud, duress or mutual mistake." Capital City Mtg. Corp. v. Habana Village Art & Folklore, Inc., 747 A.2d 564, 567 (D.C. 2000) (citing cases). In order to determine whether a contract provision has more than one reasonable interpretation, the Court looks to the "'face of the language itself, giving that language its plain meaning, without reference to any rules of construction.'" Id. (quoting Sacks v. Rothberg, 569 A.2d 150, 154 (D.C. 1990)). If the language will support more than one reasonable interpretation, it is ambiguous and the Court will determine, after admitting probative extrinsic evidence, what a reasonable person in the position of the parties would have thought the language meant. See Habana Village, 747 A.2d at 567. It is not necessary to reach that point, however, because the Authorization lacks any language conveying a "property" interest sufficient to trigger Rule 1.15(a) (except to the extent of Dr. Garmon's services as an expert witness, which were not provided).[14]

The Hearing Committee concluded that a reasonable person in the position of the parties would view the Authorization as an outright assignment of the Funds to Dr. Garmon. See Cmte. Rpt. at 13. We cannot accept this conclusion. First, the document is titled an "Authorization." It is not called either an "Assignment" or an "Assignment and Authorization." Documents denominated "Assignment" or "Assignment and Authorization" are routinely used by medical providers in the District of Columbia in similar circumstances when an assignment is intended.[15] Second, neither the word "assign" nor any of its forms appear in the document. Third, there is

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[14] The Authorization form was provided by Dr. Garmon. While not well written, it is not ambiguous.

[15] See, e.g., In re Gregory, 790 A.2d 573, 575 (D.C. 2002) ("Assignment and Authorization"); In re Ross, 658 A.2d 209, 209-10 (D.C. 1995) ("Authorization and Assignment"); Heffelfinger v. Gibson, 290 A.2d 390, 391-92 (D.C. 1972) ("Assignment"); In re Smith, BDN 473-97, at 3 (BPR Feb. 14, 2002) ("Assignment and Authorization"); BX 32B:76 ("Authorization and Assignment").

no language in the Authorization conveying or suggesting the conveyance of Ms. Haile's property rights in the Funds to Dr. Garmon – such conveyance being the hallmark of an assignment. On the contrary, the language of the Authorization conveys lesser interests.

Similarly, we decline to accept the view that the Authorization created a lien on the Funds. First, the only mention of the term "lien" in the document is preceded by and conditioned upon the phrase "If required as an expert witness." Second, the only language in the document identifying the Funds as the source of payment for any obligation is preceded by and conditioned upon the same phrase.[16]

In the first pertinent sentence, in the portion of the Authorization signed by Ms. Haile, she states that "I hereby authorize and direct you, my attorney, to pay directly to said doctor such sums as may be due and owed to him for medical services rendered . . . and any other bills that are due his office . . . ." BX 1A:4. This sentence does not contain lien language and does not specify any particular property as the source of payment.

The next sentence reads as follows:

> "*If required as an expert witness,* whether he testifies or not, for reports made or depositions given in this matter, I further authorize you, my attorney, to withhold such sums from any settlements, judgments, or verdicts as may be necessary to adequately protect said doctor and compensate him for his time and efforts on my behalf and also to institute a lien on this case to the said doctor against any and all proceeds for me . . . until the said doctor's medical bills for treatment . . . fees for court appearance(s) . . . deposition(s) [sic] are paid or he is compensated for his efforts . . . in connection herewith."

[16] We note that the "lien" theory was not charged by Bar Counsel or briefed by either party.

Id. (emphasis added). This sentence does contain lien language and clearly specifies the settlement proceeds as the source of payment, but it is expressly and unambiguously limited by the introductory phrase "If required as an expert witness."[17]

The next paragraph reads "I fully understand that I am directly responsible to said doctor for all medical bills submitted by him for services rendered and that this agreement is made solely for said doctor's additional protection. I fully understand that such payments are not contingent on any settlement, judgment or verdict from which I eventually recover damages, compensation or said fee." Id. Hence, the only provision referring to a lien or to a specific source of funds for the doctor's fees is expressly limited by the phrase "If required as an expert witness." The provisions not so limited contain only the language of general contractual debt obligation.[18]

The portion of the Authorization signed by Respondent provides that "[t]he undersigned, being attorney of record for the above patient/client does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement(s), judgment(s) or verdicts due said patient/client as may be necessary to adequately protect said doctor." Id. This provision is plainly calculated to subscribe Respondent to the obligations undertaken by his client in the first

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[17] Also, the verb "authorize" is not coupled with the phrase "and direct" as it is in the first sentence.

[18] The withholding obligation and lien arise only if Dr. Garmon's services are required as an expert witness, yet the lien survives "until the said doctor's medical bills for treatment . . . fees for court appearance(s) . . . deposition(s) [sic] are paid or he is compensated for his efforts." BX 1A:4. It may be possible to argue that latter phrase is evidence that the withholding obligation and lien apply to all of Dr. Garmon's bills, rather than just those arising from his services as an expert witness. Such an interpretation would not be a reasonable one, however, particularly in light of the "If required as an expert witness" language, which contradicts it. As we see it, the lien is premised on one event (rendering of specific services) but requires a different event (payment of all bills) to extinguish it.

part of the Authorization.[19] It does not encumber the Funds beyond Ms. Haile's undertakings in the first part of the document. Indeed, it would not be possible for Respondent to do so.

This reading of the Authorization is supported by comparison with documents from other cases. In Heffelfinger v. Gibson, 290 A.2d 390 (D.C. 1972), an attorney and his client entered into an "Assignment" of prospective settlement proceeds to the client's examining physician. The portion of the document signed by the client provided in pertinent part:

> I hereby authorize and direct you, my attorney, to pay directly to the said doctor such sums as may be due and owing him for medical services rendered me both by reason of this accident and by reason of any other bills that are due his office, and to withhold such sums from any settlement, judgment or verdict as may be necessary to adequately protect the said doctor. And I hereby further give a lien on my case to the said doctor against any and all proceeds of any settlement, judgment or verdict which may be paid to you, my attorney, or myself as the result of the injuries for which I have been treated or injuries in connection therewith.

Id. at 392. The attorney signed a statement that he, "being attorney of record for the above-named patient, does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement, judgment or verdict protect [sic] the said doctor above-named." Id. Based on this document, the Court found the attorney liable for the failure of successor counsel to set aside sums sufficient to protect the doctor's interests in the settlement. Id. at 393.

The contract in Heffelfinger differs from the Authorization here in three critical respects. First, it is titled "Assignment" rather than merely "Authorization." Id. at 392. Second, it directs the attorney to withhold from the settlement proceeds sums sufficient to protect the doctor's interest in payment, not only for a subcategory of his services, but in general. Contrast the equivalent withholding authorization in Dr. Garmon's Authorization, which is limited by the

[19] This construction is supported by Dr. Garmon's view that the attorney's portion of the Authorization "says almost the same thing" as the client's portion. See I Tr. 34. It is not necessary to rely on this testimony, however, because the meaning of this provision can be determined from the text.

phrase "If required as an expert witness." Cf. Elam, 598 A.2d at 1169 ("The test is whether the parties 'looked to the fund itself for payment . . . .'"). Third, the Heffelfinger document grants the doctor a lien on the settlement proceeds, not only for a subcategory of his services, but to the full extent of his right to payment.

The document at issue in In re Smith, BDN 473-97 (BPR Feb. 14, 2002), provides a similar contrast. It is entitled "Assignment and Authorization." It contains the client-patient's statement that "I hereby direct my attorney to withhold from any settlement or judgment secured by reason of my claim, an amount sufficient to pay [the medical provider] in full for their services rendered me." The attorney also signed a statement agreeing "to comply fully with the foregoing 'Assignment and Authorization.'" Hence, although the document does not use the term "lien," it does contain a "distinct appropriation of the fund[s]" and an agreement that the medical provider "should be paid out of [them]," Kelly, 106 F.2d at 843; cf. Gregory, 790 A.2d at 575 ("Authorization and Assignment" form paraphrased as stating that Respondent is "authorized and directed to deduct and pay from proceeds of any recovery in the case the money owed the doctor by Respondent's client"); Ross, 658 A.2d at 209-10 ("Authorization and Assignment" form authorizing respondent "to pay [medical provider] from the proceeds of any settlement or judgment received on behalf of his client"). The Authorization in the present case has neither of these features.

Because the Authorization before us establishes a lien only to the extent that Dr. Garmon provided services as an expert witness, it is necessary to consider whether the bills in question were for those services. Although the Hearing Committee did not make a specific finding on this point, our review of the record reveals that the services provided to Ms. Haile were for diagnosis and treatment of her injuries rather than for services of Dr. Garmon as an expert witness. See

BX 1C; 32B:35, 57, 95, 154, 241-43, 413-18; I Tr. 14, 15, 22. It follows that the Authorization did not establish a lien on the Funds.

We would reach the same conclusion if we found the Authorization ambiguous and considered extrinsic evidence. First, for the reasons discussed above, we believe that a reasonable person would conclude from the text of the Authorization that no assignment or lien had been created (in the absence of any services of Dr. Garmon as an expert witness). Second, the record shows that the Respondent did in fact come to the conclusion that no assignment or lien was created and relied upon it in entering into the borrowing arrangement with Ms. Haile. See I Tr. 196 ("I thought I was on legal ground doing what I did because . . . I thought an authorization was something different from an assignment or a lien and I hadn't thought the assignment or the lien had been perfected.").[20] (Nothing in the record suggests that the Respondent held a different view at the time he signed the Authorization.)

Dr. Garmon testified that he viewed the Authorization as creating an assignment (at least as of the time of the hearing). See I Tr. 32. However, his additional testimony suggests that, in reality, he had given little, if any, previous consideration to the legal effect of the Authorization. See id. ("I believe my former office manager obtained this document from another law firm or something that she had dealt with before."), 34 ("This is given to all the attorneys, every attorney that signs this, and every attorney gives me my money so apparently it is adequate."). Hence, even if it were necessary to consider extrinsic evidence (which we find unnecessary in light of the plain language of the Authorization), we think there is insufficient record evidence for a reasonable person in the circumstances to conclude that the parties intended to create a general lien to the extent of Dr. Garmon's bills for all services.

[20] The Hearing Committee did not make a negative credibility finding on this or any other point with respect to the Respondent.

In the event that ambiguity remained in the document after applying the rules of contract interpretation, we would construe the Authorization against Dr. Garmon, who provided the form to patients and their counsel as a matter of his routine business practice. See, e.g., Habana Village, 747 A.2d at 567 ("Only if, after applying the rules of contract interpretation, the terms still are not subject to 'one definite meaning,' will the ambiguities be 'construed strongly against the drafter.'") (internal citation omitted).

Misappropriation is an extremely serious ethical violation, with extremely serious consequences. Where, as here, a contract prepared by a third-party service provider is relied upon to support the charge, the language creating the assignment or lien must be clear – particularly where, as here, the charge requires clear and convincing evidence to be sustained. See In re Anderson, 778 A.2d 330, 335 (D.C. 2001).

We do not find that level of clarity in this case. The Authorization, as written, creates neither a lien against the settlement proceeds nor an outright assignment of them to Dr. Garmon. First, there is no language in the Authorization suggesting an assignment of the Funds to Dr. Garmon. Second, the provisions containing lien language relate only to fees for the Doctor's services as an expert witness, and the fees in question were not for those services. Hence, the Funds were Ms. Haile's to lend, and Dr. Garmon's remedies were those of a general creditor. It follows that the Funds were not the "property" of Dr. Garmon, and therefore that the Respondent did not commit misappropriation when he borrowed them from his client.

3. Culpability

Were we to agree with the Hearing Committee that Respondent committed misappropriation, we would conclude that it arose from a negligent mistake of law. The Authorization, which in our view maintains Ms. Haile's ownership of the Funds, in any event

does not convey them to Dr. Garmon or create a lien in his favor with sufficient clarity to establish that the resulting misappropriation was reckless or intentional. Cf. Haar, 698 A.2d at 421; In re Cooper, 613 A.2d 938 (D.C. 1992) (per curiam); In re Evans, 578 A.2d 1141 (D.C. 1990) (per curiam). As Respondent testified, "I thought I was on legal ground doing what I did because . . . I thought an authorization was something different from an assignment or a lien and I hadn't thought the assignment or the lien had been perfected." I Tr. at 196. We conclude that the Authorization entitled the Respondent to take this view, but in any event he cannot have been more than negligent in doing so.[21] See Anderson, 778 A.2d at 335 (burden on Bar Counsel to prove all elements).

C. Failure to Notify and Pay Promptly

The Hearing Committee found that the Respondent violated Rule 1.15(b) by failing to notify and pay Dr. Garmon promptly upon receipt of the Funds. Rule 1.15(b) contains two sentences. The first states that "[u]pon 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." The second states that "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."[22] It follows from the conclusion that the Funds were not the "property" of Dr. Garmon for purposes of Rule 1.15(a) that the second sentence of Rule 1.15(b) is not implicated, because the latter pertains only to funds that a third party "is entitled to receive." It is true, of course, that Dr. Garmon was entitled to be paid,

[21] Bar Counsel adduced no evidence to suggest this testimony was not credible.

[22] "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." D.C. R. Prof. Con. 1.15(b).

but "it is important to keep clearly in mind the distinction between a right to payment and a right to particular property." Haar, 698 A.2d at 424. Having found that Dr. Garmon had no interest sufficient to obligate the Funds specifically, we conclude that he was not "entitled to receive" the Funds and therefore decline to sustain this aspect of the Rule 1.15(b) charge. Cf. In re Harvey, BDN 214-95, at 6 (BPR June 3, 1997) ("The assignment signed by Respondent and his client created an interest for [the client's medical provider] in any settlement proceeds and in the Board's view, he was 'entitled to receive' settlement funds.") (emphasis added).

The next question is whether Respondent had an obligation to notify Dr. Garmon of his receipt of the Funds. The first sentence of Rule 1.15(b) applies to "property in which a . . . third person has an interest." Did Dr. Garmon have "an interest" in the Funds as contemplated by the Rule? There is a marked difference between the phrase "property in which a . . . third person has an interest" (Rule 1.15(b), first sentence) on the one hand, and the phrases "property that the . . . third person is entitled to receive" (Rule 1.15(b), second sentence) and "property of . . . third persons" (Rule 1.15(a)) on the other. Clearly, the first sentence of Rule 1.15(b) is intended to apply to a broader range of property than that comprehended by Rule 1.15(a) or the second sentence of 1.15(b). And understandably so. Rule 1.15(a) and the second sentence of Rule 1.15(b) impose binding ethical strictures affecting the disposition of property. The first sentence of Rule 1.15(b), by contrast, requires notification of receipt of property. Notification is far less likely to affect another party's interests adversely or irreversibly, and the provision is expressly subordinated to the other provisions of Rule 1.15 and attorney-client agreements.

Accordingly, we conclude that the Respondent violated the first sentence of Rule 1.15(b). To be sure, not every general creditor of a client will have an interest in escrowed property under the Rule so as to require notification upon an attorney's receipt of property. But there is

evidence in this record that provides a sufficient nexus with the settlement proceeds to distinguish Dr. Garmon's interest from those of other general creditors. First, Respondent was authorized and directed to pay Dr. Garmon as a condition of his rendering medical services. Second, Ms. Haile expected Respondent to "take care of" the medical bill by paying it, if perhaps in a reduced amount and after some delay, from the Funds. Finally, Dr. Garmon's services were bound up with the litigation effort that led to the settlement. Because Dr. Garmon had no entitlement to the Funds under the Authorization, any interest he had in the Funds was entirely contingent on the will of Ms. Haile that Respondent use the Funds to pay him. But because Ms. Haile did at all times intend that the Funds be paid to Dr. Garmon (albeit possibly with a discount and after a delay), his interest in the Funds vis-à-vis Respondent was sufficient to require notification under Rule 1.15(b).

Ms. Haile's case settled on or about September 27, 1991, BX 32A:3-5, yet Respondent had not advised Dr. Garmon of the settlement as of the time Dr. Garmon fortuitously learned of it on May 6, 1992, more than seven months later. I Tr. 18-19. Respondent also failed to respond to Dr. Garmon's telephone calls after that point, and to his letter of August 19, 1992. I Tr. 18-20. Dr. Garmon in fact heard nothing from Respondent until Respondent paid him on or about October 23, 1992, more than one year after the case had settled, and after Dr. Garmon had referred the matter to Bar Counsel. I Tr. 24, 29. Under these circumstances, Respondent violated Rule 1.15(b). Cf. Ross, 658 A.2d at 211 (eleven-month delay in paying third-party medical provider not prompt).

D. Failure to Maintain Complete Trust Account Records

The Hearing Committee sustained Bar Counsel's charge that Respondent failed to maintain complete trust account records in violation of Rule 1.15(a). That Rule states in

pertinent part that "Complete records of [entrusted] account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation." D.C. R. Prof. Con. 1.15(a); see also D.C. Ct. App. R. XI §19(f) (requiring attorney to maintain complete records of "all funds . . . belonging to another person . . . at any time in the attorney's possession, from the time of receipt to the time of final distribution"). The Committee observed that, "even at the hearing on this matter, when presumably Mr. Bailey had all the incentives to do the utmost to reconstruct the transactions through his IOLTA account, neither his accountant nor he was able to determine accurately the source and destination of funds deposited in and withdrawn from the account." Cmte. Rpt. at 14. The record supports this conclusion. II Tr. 344-47, 350-59. Frequently during his testimony Respondent's expert admitted that critical facts about transactions within the Account were supplied by Respondent, rather than being gleaned from the records themselves. Id. Even where Respondent "filled gaps," some of the transactions could not be reconstructed. Id. We therefore find that Respondent failed to maintain adequate trust account records in violation of Rule 1.15(a). Cf. In re Clower, BDN 453-98, at 13 (BPR Nov. 21, 2001) ("The purpose of maintaining 'complete records' is so that the documentary record itself tells the full story of how the attorneys handled client or third-party funds [and] . . . so that any audit . . . by Bar Counsel can be completed even if the attorney or the client, or both, are not available.").

E. Impermissible Business Transaction with Client

The Hearing Committee concluded that Respondent, by undertaking to borrow from Ms. Haile the sums owing to her medical providers, entered into an impermissible business transaction with his client in violation of Rule 1.8(a). That Rule provides that

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to the client unless:
>
> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

Bar Counsel has not established that the loan from Ms. Haile to Respondent was unfair or unreasonable to her in violation of paragraph (1) of Rule 1.8(a). The transaction provided Respondent with the use of the funds owed to the medical providers in exchange for 5% interest per annum and his promised efforts to negotiate reductions in and otherwise "take care of" the bills. Absent Respondent's efforts to negotiate discounts on her behalf, Ms. Haile had no expectation of retaining any of the funds owed to the medical providers; any discount achieved by Respondent would have been a windfall. The Committee found that Ms. Haile comprehended at least the broad contours of this arrangement, and we will not gainsay the economic rationality of the parties' decision to undertake it, or find that there was insufficient consideration for the transaction to be considered fair and reasonable.[23]

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[23] A potentially important fact bearing on the application of paragraph (1) of Rule 1.8(a) was not developed below, i.e., whether the Promissory Note was delivered to Ms. Haile. It is clear that Respondent reviewed the Note with Ms. Haile, but both the Specification of Charges and the location of the document in the record suggest it was not delivered into Ms. Haile's possession but rather kept in the Respondent's case file. See Specification of Charges ¶ 13 ("Respondent's file reveals a document, entitled "Promissory Note . . . ."); BX 32A:7.1 (Promissory Note among documents in exhibit listed as copy of Respondent's case file); I Tr. 224 (suggesting that BX 32 is copy of case file). The delivery of the Note to Ms. Haile bears on whether the terms of the loan were "fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client." D.C. R. Prof. Con. 1.8(a)(1). It is also potentially significant because non-delivery of the Note could prejudice Ms. Haile's interests as against the Respondent's. See Knight v. W.T. Walker Brick Co., 23 App. D.C. 519, 524 (1904) ("The mere

Although Bar Counsel established that Respondent failed to advise Ms. Haile to seek separate counsel, II Tr. 285-86, there is no evidence that he failed to advise her of a potential conflict of interest. The Court of Appeals has found a violation of Rule 1.8(a) where an attorney did not advise his clients of a potential conflict, did not advise them to seek separate counsel, and did not explain the terms of the transaction to them. See In re McLain, 671 A.2d 951, 953 (D.C. 1996). In view of Respondent's failure to advise Ms. Haile to consider separate counsel, it is tempting to infer that he also failed to advise her of the potential conflict of interest, since one would tend to flow naturally from the other. We will not, however, make this leap of logic. Bar Counsel must establish each element of her case by "clear and convincing evidence." We are therefore left to decide whether Respondent's failure to advise Ms. Haile to obtain separate counsel, standing alone, is sufficient to substantiate Bar Counsel's charge under Rule 1.8(a).

The text of Rule 1.8(a)(2) requires that the "client [be] given a reasonable opportunity to seek the advice of independent counsel." The question is whether, by failing to advise Ms. Haile to seek separate counsel, Respondent denied her a "reasonable opportunity" to do so. We find that Rule 1.8(a) was violated here. As the Committee found,

> Ms. Haile is an immigrant from Eritrea whose grasp of English at the hearing in 1999 was tenuous at best. Based on her poor comprehension demonstrated at the hearing, it implicitly must have been far worse in 1991 . . . . Under these circumstances, it was all the more incumbent on Mr. Bailey to ensure that his client understood fully the nature and terms of the transaction that he was proposing she enter into with him.

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writing of promissory notes creates no obligation; it is in the making current of the promise by delivery of the note that the obligation is found."); 10 C.J.S. *Delivery or Issue* § 34 (West 1995 & Supp. 2001) ("Negotiable instruments have no vitality until they are delivered. The maker of a note becomes liable when the maker issues and delivers the note."); 2 J.J. White & R.S. Summers, Uniform Commercial Code § 16-13 (4th ed. West 1995 & Supp. 2001) ("When the obligor has possession, the party suing on the instrument has to overcome a presumption that the instrument was discharged."). Because no foundation was laid regarding the provenance of the Note, however, we cannot make a finding in this regard.

Cmte. Rpt. at 16-17; see also II Tr. 312 (Ms. Haile stating that she considered Respondent to be her friend as well as her lawyer). We think it unlikely that Ms. Haile was aware of the potentially conflicted roles her counsel had assumed and of the need for disinterested legal advice. Realistically, she would not have sought separate counsel if Respondent did not make her aware of the advisability of doing so. We need not determine whether a lawyer's failure to advise a client to consider separate counsel in entering into a business transaction with the lawyer will result in a violation in every instance. On the present facts, we are persuaded that Respondent's failure to give such advice to Ms. Haile denied her a "reasonable opportunity to seek the advice of independent counsel" in violation of Rule 1.8(a).

F. Effecting a Substantial Client Gift

Bar Counsel charged Respondent with procuring a substantial gift from Ms. Haile in violation of Rule 1.8(b) on the theory that the loan of the settlement funds was on terms unfavorable to her and thus constituted a gift to Respondent. Rule 1.8(b) provides in pertinent part that "[a] lawyer shall not prepare an instrument giving the lawyer . . . any substantial gift from a client."[24] The Hearing Committee rejected the Rule 1.8(b) charge on the basis that the Funds were not Ms. Haile's to lend, and hence could not have been a gift from her to Respondent. Although we do not adopt the Committee's reasoning, we agree that the charge cannot be sustained. As discussed in subsection E above, the transaction provided Respondent with the use of funds owed to Ms. Haile's medical providers in exchange for 5% interest and his promised efforts to negotiate a reduction in and otherwise "take care of" the medical bills. For the same reasons that we could not find the transaction unfair or unreasonable to Ms. Haile, we

[24] "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." D.C. R. Prof. Con. 1.8(b).

are unable to say that the bargain was so asymmetrical or illusory as to constitute a substantial gift to Respondent.

III. SANCTION

In section II, we found that Respondent is subject to discipline for commingling, failing to maintain complete trust account records, failing to notify a third party promptly of receipt of funds, and entering into an impermissible business transaction with a client. We must now consider the appropriate sanction for those violations.

The Hearing Committee applied the presumption of disbarment in In re Addams, 579 A.2d 190, 194-98 (D.C. 1990) (en banc), and therefore did not undertake the normal discretionary analysis applied in cases not subject to the presumption. The parties have filed no exceptions. Having found there was no misappropriation, we must undertake our own inquiry in respect of the appropriate sanction. In doing so, we consider the seriousness of the violations, any mitigating and aggravating circumstances, the need to protect the public, the courts, and the legal profession, and the moral fitness of the attorney. See In re Hutchinson, 534 A.2d 919, 924 (D.C. 1987) (en banc).

We first consider the seriousness of the violations established and the need to protect the public, the courts, and the legal profession. The Court of Appeals has previously observed that "[o]ne of the most basic rules of fiduciary conduct is that the fiduciary must not commingle his own property with that held by him belonging to another." In re Hessler, 549 A.2d 700, 700 (D.C. 1988). Commingling "alone puts the client's funds at risk, regardless of the adequacy of the balance." Id. at 701-02. The Court therefore "emphasize[d] the ban against commingling to alert the bar that in future cases of even 'simple commingling,' a sanction greater than public

censure may well be imposed." Id. at 703. In the present case, the commingling is compounded by additional serious violations.

In recent years, sanctions for commingling have ranged from (i) Board reprimands: In re Curtis, BDN 366-95 (BPR Oct. 11, 1996); In re Jones, BDN 486-94 (BPR June 18, 1997); to (ii) public censures: In re Goldberg, 721 A.2d 627, 628 (D.C. 1998) (per curiam); In re Osborne, 713 A.2d 312, 313 (D.C. 1998) (per curiam); In re Teitelbaum, 686 A.2d 1037, 1038 (D.C. 1996) (per curiam); In re Parsons, 678 A.2d 1022, 1022-23 (D.C. 1996); In re Millstein, 667 A.2d 1355, 1355-56 (D.C. 1995) (per curiam); In re Ingram, 584 A.2d 602, 604 (D.C. 1991) (per curiam); In re Gilchrist, 488 A.2d 1354, 1358 (D.C. 1985); to (iii) suspensions of 30 days to one year: In re Arneja, 790 A.2d 552 (D.C. 2002) (one year for commingling with multiple additional violations); In re Ross, 658 A.2d 209 (D.C. 1995) (30 days for commingling and failure to notify and pay promptly); Hessler, 549 A.2d at 703 (6 months for commingling and negligent misappropriation); to (iv) suspensions of a year or longer: In re Hines, 482 A.2d 378 (D.C. 1984) (per curiam) (two years for commingling and unintentional misappropriation); In re Harrison, 461 A.2d 1034 (D.C. 1983) (one year and one day for commingling and inadvertent misappropriation); to (v) disbarment where the commingling also involved intentional misappropriation: In re Moore, 704 A.2d 1187 (D.C. 1997); In re Pierson, 690 A.2d 941 (D.C. 1997). The general rule is clear, however, that even a single act of commingling will result in at least a public censure, as commingling always involves a violation of a basic rule of fiduciary conduct. See In re Berryman, 764 A.2d 760, 767 (D.C. 2000); Goldberg, 721 A.2d at 628.

Assigning the appropriate sanction becomes more difficult when there are multiple violations. The present matter is comparable in some respects to Ross, 658 A.2d at 209. The respondent in Ross settled his client's case in May 1991, for $5,500, deposited the settlement

check into his operating account, disbursed his own fees and costs from the proceeds, paid his client the sum owing to him, and withheld $1,314 for payment to the client's medical provider. Id. at 210. Shortly after the settlement, he directed his secretary to draft a letter and prepare a check for the medical provider, but she failed to do so, and the provider was not informed of the settlement or paid. Id. In November 1991, the medical provider advised the respondent that the bill had not been paid. Id. Again, the attorney directed his secretary to send a check to the provider, and again she failed to do so. In January 1992, the provider spoke to the respondent, who promised to look into the matter and report back. Id. The attorney asked the secretary to verify that the check had been sent; she did not, and neither the respondent nor the secretary called the provider with an explanation. On February 14, 1992, the provider complained to Bar Counsel. The Board recommended and the Court imposed a suspension of 30 days for commingling and failure to deliver funds promptly to a third party. Id.; cf. In re McGann, 666 A.2d 489 (D.C. 1995) (30-day suspension for commingling and failure to maintain adequate trust account records); In re Graham, 795 A.2d 51 (D.C. 2002) (per curiam) (public censure for intentional commingling and unintentional failure to notify and deliver funds promptly).

Although similar in some respects, Ross also differs in some respects from the present case. In Ross, the Hearing Committee, Board, and Court credited as true Ross's account of the failure to notify and pay promptly, an account that centered at least in the early stages of the violations on inadvertence and derelictions of the respondent's staff. In the present case, by contrast, there is no indication of inadvertence or staff error as regards Respondent's failure to notify a third party promptly. On the contrary, Respondent (i) entered into an unsavory legal arrangement with his client that expressly contemplated his delaying payment to legitimate service providers, (ii) made no effort over the course of more than seven months to inform Dr.

Garmon of his receipt of the settlement funds, and (iii) failed to respond to inquiries and demands for payment for several more months, until Dr. Garmon referred the matter to Bar Counsel. Finally, inadequate record keeping and an impermissible business transaction with the client were not established in Ross as they are here.

The Court's recent decision in In re Arneja, 790 A.2d 552 (D.C. 2002), is also instructive. There, the respondent received personal injury protection (PIP) payments on behalf of his clients, who had consented to his use of the funds to pay for expected litigation expenses, and he used some of the funds instead for personal expenses. Id. at 552-54. The applicable disciplinary rule at the time provided that "advances of legal fees and costs become the property of the lawyer upon receipt." Id. at 552. Because the client's designation of the funds for expenses made the funds Arneja's property, the Court rejected the misappropriation charge, noting that the rule had afforded the respondent "an unexpected technical defense." Id. at 555. The respondent had also refused to turn over the case file and client funds to successor counsel, and, in order to avoid running afoul of a statute of limitations while doing so, filed a complaint on behalf of the client without authorization. Id. at 554. The respondent also failed to deliver funds promptly to a medical provider, who then garnished the client's wages. Id. Hence, in addition to commingling, the Court found violations for failure to notify and deliver funds to a third party promptly, failure to withdraw from a legal representation, failure to protect a client's interest in connection with a withdrawal, improper imposition of a lien on a case file, inadequate record keeping, and dishonesty. Id. at 556-58. The Court suspended the respondent from law practice for one year. Id. at 558.

Although Arneja involves some of the same violations established on the present record, it also involves some egregious conduct not present in this case, including dishonesty. By

violating the rules of conduct relating to withdrawal and surrender of case files, Arneja put himself in a position where he had to choose between irrevocably prejudicing his former client by operation of a statute of limitations, on the one hand, and filing an unauthorized lawsuit while dishonestly holding himself out as the client's counsel, on the other. Hence, while Arneja may be analogous as a case of multiple violations relating to the handling of client funds, it is clearly distinguishable in critical respects.

In reaching our recommendation as to sanction, we have considered several aggravating and mitigating factors. In applying the Addams presumption of disbarment, the Hearing Committee stated that it would try to characterize the mitigating circumstances in the case as "extraordinary" to overcome the Addams presumption, were it not for binding case law imposing an insuperably high burden for doing so. See Cmte. Rpt. at 19. The Committee emphasized that Respondent's actions had not harmed Ms. Haile, who appeared voluntarily before the Committee to testify on his behalf. See id.; see also Goldberg, 721 A.2d at 628 (considering risk to funds and harm to client as factor for sanction). In addition, "the amount of money was relatively small [and] Mr. Bailey has cooperated . . . ." Cmte. Rpt. at 19; see also Millstein, 667 A.2d at 1356 (considering cooperation with Bar Counsel as factor). Respondent also has no prior disciplinary record. See Teitelbaum, 686 A.2d at 1039 (considering lack of disciplinary record as factor). Although these mitigating factors are not unique or compelling, we do find them significant and have accordingly given them some consideration in formulating our recommended sanction.[25]

[25] Having taken the seriousness of the violations into account already in reaching our recommendation, we find nothing additional in the record detracting significantly from Respondent's fitness to practice law. Similarly, we do not find additional information in the record bearing significantly on Respondent's honesty and sense of public responsibility. See Teitelbaum, 686 A.2d at 1038 (considering these factors).

The principal aggravating factor apparent on this record is the ongoing and intentional nature of the violations, particularly the failure to notify promptly.[26] First, Respondent drafted a promissory note with a four-year maximum term for repayment, knowing that the funds in question were intended by his client to be used to repay her medical debts. He then used the funds for many months without so much as notifying the medical providers. Second, even though the Respondent apparently knew that client and personal funds had to be kept separate, as reflected by the fact that he maintained a trust account and admitted having some experience with handling client funds, see, e.g., I Tr. 166 ("I had learned some of the procedures for personal injury cases when I was at Lee & Harvey. I did a settlement sheet . . . ."); II Tr. 296, he nevertheless engaged in commingling and improper record keeping over a significant period of time. See Osborne, 713 A.2d at 313 n.2 (considering attorney's experience in handling client funds and whether commingling was knowing or inadvertent, and whether isolated or protracted). Finally, as reflected by his standard disbursement sheet, the Respondent engaged in borrowing arrangements of this kind with his clients on a regular basis as a means of financing his law practice. In view of the totality of the Respondent's conduct in respect of the settlement funds, we believe that a refresher course in ethics and the handling of trust funds is appropriate as a component of the recommended discipline in this case.

We are also very concerned about the overreaching character of the Respondent's dealings with his client in this matter. It is plain from the record that Ms. Haile's limited command of the English language and lack of sophistication in respect of the U.S. legal system left her in a position of particular vulnerability and reliance on her lawyer. She considered him a

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[26] Whether these factors are considered as exogenous aggravating factors or as aspects of the violations themselves is not crucial to our assessment of the appropriate sanction.

friend as well as her counsellor, and entrusted an important asset to him with very broad discretion. The Respondent availed himself of the full range of accommodation provided by his client, and did so for personal benefit. The business transaction he prevailed upon her to accept created a significant conflict of interest in these circumstances. Not only did the Respondent fail to make Ms. Haile aware of the possibility and advisability of seeking independent legal advice, he also failed to attend to his client's affairs in an adequate manner once they were entrusted to him. The Respondent's derelictions also prejudiced the interests of third-party creditors such as Dr. Garmon, who waited more than a year to be paid (and was only paid then after complaining to Bar Counsel).

We find the conduct evident on this record to fall somewhere between Ross and Arneja in terms of the seriousness of the violations and impact on the bar, Court, and public. In view of the foregoing considerations and authorities, we conclude that Respondent should be suspended from the practice of law for nine months and be required to complete a course in ethics and a course in trust accounting as a condition of reinstatement.

IV. CONCLUSION

For the foregoing reasons, the Board recommends that Respondent be suspended from the practice of law for nine months, without a requirement to show fitness, but with a requirement to complete a course in ethics and a course in trust accounting (at least three hours each) as a condition of reinstatement. His attention is called to the requirements of D.C. Bar R. XI § 14 and to the consequences of noncompliance as set forth in D.C. Bar R. XI § 16(c).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Martin R. Baach

Dated: February 27, 2003

All members of the Board adopt the findings of fact of the Hearing Committee with modifications and concur in the findings that Respondent violated Rule 1.15(a) (commingling and inadequate record keeping) and Rule 1.8(a) (improper business relationship with client), but did not violate Rule 1.8(b) (preparing legal instrument effecting substantial gift from client).

A majority of the Board (Mr. Baach, Ms. Fort, Mr. Wolfson, Ms. Holleran Rivera, and Dr. Payne) finds no violation of Rule 1.15(a) (misappropriation) for different reasons.

A majority of the Board (Mr. Baach, Ms. Fort, Mr. Bloomfield, Mr. Knight, Ms. Frazier, Mr. Klein, and Ms. Holleran Rivera) finds a violation of Rule 1.15(b) (failure to notify a third party promptly on receipt of funds).

A majority of the Board (Mr. Baach, Ms. Fort, Mr. Wolfson, Ms. Holleran Rivera, and Dr. Payne) finds no violation of Rule 1.15(b) (failure to pay a third party promptly upon receipt of funds).

A majority of the Board (Mr. Baach, Ms. Fort, Mr. Bloomfield, Mr. Knight, Ms. Frazier, Mr. Klein, and Ms. Holleran Rivera) recommends a nine-month suspension with a requirement to complete a course in ethics and a course in trust accounting as a condition of reinstatement.

Mr. Wolfson, with whom Dr. Payne joins, has submitted a separate statement concurring in the finding of no misappropriation but for different reasons and dissenting from the majority's Rule 1.15(b) (failure to notify third party) finding. Mr. Wolfson recommends a six-month suspension.

Mr. Bloomfield, with whom Mr. Knight, Ms. Frazier and Mr. Klein join, has submitted a separate statement dissenting from the findings of no violation of Rule 1.15(a) (misappropriation) and Rule 1.15(b) (failure to pay third party), but concurring as to the recommended sanction of a nine-month suspension with a requirement to complete a course in ethics and a course in trust accounting as a condition of reinstatement.

CONCURRING AND DISSENTING STATEMENT OF MEMBER TIMOTHY J. BLOOMFIELD

The Board report authored by Mr. Baach reflects a carefully considered and masterful analysis of the difficult issues presented by this case on the question of an attorney's duties as to

the safeguarding of settlement funds. [27] I concur with the Baach report in all respects, except for its conclusions that (a) Respondent's misconduct did not include misappropriation, and (b) that Respondent did not violate Rule 1.15(b) in failing promptly to pay Dr. Garmon. Notwithstanding that I would find misappropriation and failure to promptly pay, I concur in the recommended sanction of nine months suspension without a requirement to show fitness.

Mr. Baach's finding of no misappropriation rests on its view that the form entitled "Authorization for Release of Medical Records and Payment of Medical Expenses" (the "Authorization form") did not give Dr. Garmon a "lien" on the settlement funds or other interest specifically obligating the settlement funds. Bd. Rpt. at 17. Mr. Baach observes that the third sentence of the Authorization form, which does purport to create a lien, is limited by the phrase "If required as an expert witness … " and concludes that this sentence was not triggered because Dr. Garmon did not provide any expert witness services. *Id*. at 17-18. Seeing this sentence as thus inapplicable, Mr. Baach concludes that misappropriation did not result when he "borrowed" the funds meant for Dr. Garmon from his client and used them for his own purposes. *Id.* at 23.

I agree that the condition precedent to activation of the third sentence of the Authorization form did not occur, but I believe that the remaining undertakings by the client and Respondent in the Authorization form created contractual obligations the violation of which constituted misappropriation on the facts of this case. Omitting the third sentence, the Authorization form reads as follows:

> I, Almaz Haile, hereby authorize FRANKLIN C. GARMON, M.D. P.C. to release to my attorney a full report of his examinations, diagnoses, treatments, prognoses, etc. of me, my son, my daughter pertaining to the accident in which I, he or she was involved on March 28, 1989.

[27] Citations herein to "Bd. Rpt." are to the principal report authored by Mr. Baach, even when it does not reflect the opinion of a majority of the Board.

I hereby authorize and direct you, my attorney, to pay directly to said doctor such sums as may be due and owed to him for medical services rendered to me, my son, or daughter, and any other bills that are due his office which shall include fees for his appearance in court on my behalf (including those accrued after he has been placed on alert for purposes of court appearance, whether or not he actually makes that appearance).

* * *

I fully understand that I am directly responsible to said doctor for all medical bills submitted by him for services rendered and that this agreement is made solely for said doctor's additional protection. I fully understand that such payments are not contingent on any settlement, judgement or verdict from which I eventually recover damages, compensation or said fee.

6-29-89 _____/s/_____
Date Signature of Patient

The undersigned, being attorney of record for the above patient/client does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement(s), judgement(s) or verdicts due said patient/client as may be necessary to adequately protect said doctor.

6/29/89 _____/s/_____
Date Attorney's Signature

It must be remembered that Respondent referred Ms. Haile to Dr. Garmon, who was the source of the Authorization form which was signed both by Respondent and Ms. Haile. Bd. Rpt. at 3. Ms. Haile "authorized and directed" Respondent to pay Dr. Garmon for medical services rendered. Cmte. Report at 3. It is obvious from the circumstances that the source of funds for such payment would be proceeds from settlement or recovery in the litigation. Ms. Haile, in the next to last sentence of the patient's portion of the Authorization form, acknowledged her direct responsibility for Dr. Garmon's bills, and agreed that "this agreement is made solely for said

doctor's *additional* protection." BX 1A:4 (emphasis added.) I find particular significance in the language containing Respondent's undertaking:

> The undersigned, being attorney of record for the above patient/client does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement(s), judgement(s) or verdicts due said patient/client as may be necessary to adequately protect said doctor.

Id. It could not be clearer: Respondent agreed "to withhold such sums from any settlement(s), judgment(s) or verdicts due such patient/client as may be necessary to adequately protect said doctor."

Relying on Hernandez v. Suburban Hospital, 572 A.2d 144 (Md. 1990), the Hearing Committee found that a responsible person in the position of the parties would have understood the Authorization form to constitute an assignment of the proceeds. Cmte. Rpt. at 13. I believe the language of the Authorization form, when viewed in the context of the dealings between Respondent, Ms. Haile and Dr. Garmon, supports the Hearing Committee's conclusion.

I would argue, however, that it is not necessary to the conclusion that Respondent misappropriated the funds that the Authorization form be construed as an outright assignment. It is enough that the Authorization form created an undertaking by Respondent to withhold sufficient funds from settlement proceeds to protect Dr. Garmon's interest. As a matter of contract law, Dr. Garmon surely had a claim against Respondent for his actions here of not only not distributing such funds to Dr. Garmon but also "borrowing" those funds for his own use.

In my view, Dr. Garmon had a claim against these settlement funds. The Authorization gave him rights in *addition* to those of a general creditor, as specifically acknowledged by Ms. Haile in the next to last sentence of the Authorization form. See BX 1A:4. Under the Court's analysis in *In re Haar*, 698 A.2d 412, 424 (D.C. 1997), the Authorization was an agreement

which gave Dr. Garmon rights as to the settlement proceeds to the extent of his bills for medical services.

I believe Rule 1.15(b) required Respondent not only to notify Dr. Garmon that the settlement monies had been received, as acknowledged by Mr. Baach Bd. Rpt. at 25-27), but also required him to deliver those funds to Dr. Garmon. His failure to do either exposed him to culpability for misappropriation when he let his trust balance drop below the amount owed to Dr. Garmon.[28] Rule 1.15(b) provides:

> 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.

Mr. Baach agrees that the Authorization form gave Dr. Garmon an "interest" in the settlement proceeds sufficient to require notification under Rule 1.15(b). Bd. Rpt. at 25-27. I think it is also clear that the Authorization form, by virtue of (a) Ms. Haile's authorization "to pay directly to said doctor such sums as may be due and owed for medical services rendered to me", (b) her acknowledgment that the agreement is for the "doctor's additional protection", and (c) Respondent's agreement "to withhold such funds" from settlement proceeds, made the portion ($2,400) of the settlement proceeds reflecting the amount of Dr. Garmon's medical bills funds that a "third person was entitled to receive."[29]

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[28] As Mr. Baach notes, the Court has previously found misappropriation in such circumstances, in cases involving the same Authorization form and the same physician. Bd. Rpt. at 13 fn. 10 (citing In re Davenport, 794 A.2d 602 (D.C. 2002); In re Moore, 704 A.2d 1187 (D.C. 1997) (*per curiam*); In re Moore, 727 A.2d 895 (D.C. 1999) (*per curiam*)). One concern of course is whether Mr. Baach's decision if adopted by the Court would lead to attempts to reopen these and other cases where authorization forms did not contain the magic words "assignment" or "lien".

[29] Had Ms. Haile questioned the amount of Dr. Garmon's bill, Respondent would have been required under Rule 1.15(c) to hold the disputed amount in trust. He could not ethically either have distributed the funds to Ms. Haile or borrowed them from her. Similarly, had Dr. Garmon been notified of the settlement – as Mr. Baach agrees he

The Comments to Rule 1.15 support my conclusion. Comment 5 states:

> Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

In D.C. Ethics Opinion 293, recently issued, the Ethics Committee considered "the precise level to which a third-party claim must rise to trigger a duty of preservation by the lawyer in the face of a demand that she make disbursement to the client." D.C. Ethics Opinion 293 at 3. It concluded that a "just claim" is one relating to the particular funds in the lawyer's possession as opposed to "merely being (or alleged to be) a general unsecured obligation of the client." Included among the claims commonly considered to be "just claims" was the type of agreement presented here, which the Committee described as "a contractual agreement made by the client and joined in or ratified by the lawyer to pay certain funds in the possession of the lawyer … to a third party." *Id.* at 4.

I thus do not accept Mr. Baach's view that, since there was no assignment or lien, the $2,400 was not "property" of Dr. Garmon but rather was "property" of Ms. Haile which she was entitled to lend to Respondent. Both Ms. Haile and Respondent had agreed that Dr. Garmon would be paid out of the settlement proceeds, and that agreement gave Dr. Garmon a "just claim" such as to make him the beneficiary of Rule 1.15(b). Therefore, Ms. Haile did not have the authority to lend Respondent the money, and misappropriation occurred when he let his trust account balance drop below $2,400.

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should have been – and made a demand to be paid, Respondent would have been required either to pay the money under 1.15(b) or if Ms. Haile objected, hold the money under 1.15(c) until the dispute was resolved. In either of these scenarios, use of the funds for his own purposes would constitute misappropriation. It would seem anomalous for Respondent to avoid culpability for misappropriation by virtue of his failure to comply with the notification requirements of Rule 1.15(b).

Mr. Baach found that this loan transaction was "an unsavory legal arrangement … that expressly contemplated his delaying payment to legitimate service providers." Bd. Rpt. at 35. Under Mr. Baach's analysis, however, this arrangement would have involved no ethical breach had Respondent adequately advised Ms. Haile of her right to seek advice of independent counsel, as required by Rule 1.8(a)(2) and had he notified Dr. Garmon upon receipt of the settlement funds, as required by Rule 1.15(b). I think that result would be untenable. And while I concur that, due to the harshness of the sanction, findings of misappropriation should not be made lightly, it is equally inappropriate for the enforcement of rules designed to safeguard funds held in trust by attorneys to be undercut by unduly restrictive interpretations of what "property" is entitled to protection.

I concur in the recommended sanction, notwithstanding my belief that misappropriation occurred, because I believe that Bar Counsel did not satisfy her burden of establishing that the misappropriation was intentional or reckless. *See* In re Anderson, 778 A.2d 330, 335-40 (D.C. 2001). Respondent testified that he believed he could legitimately "borrow" the funds from his client and the Hearing Committee made no findings of intentional or reckless action. *See* I Tr. 196. Therefore, Respondent's misconduct resulted from mistake and was not intentional. In re Haar, 698 A.2d 417-18; In re Cooper, 613 A.2d 938 (D.C. 1992) (*per curiam*); In re Evans, 578 A.2d 1141, 1142 (D.C. 1990) (*per curiam*).

Since the normal sanction for negligent misappropriation is a six-month suspension, I concur with the recommendation of a nine-month suspension in light of the other serious misconduct found on this record. I also concur in the recommendation that Respondent be required, as a condition of reinstatement, to complete a course in ethics and a course in trust accounting.

Timothy J. Bloomfield

Dated: February 27, 2003

Mr. Knight, Ms. Frazier and Mr. Klein join in this concurring and dissenting statement.

CONCURRING AND DISSENTING STATEMENT
OF MEMBER PAUL R.Q. WOLFSON

Like Mr. Baach, I conclude that Respondent did not engage in misappropriation, in violation of Rule 1.15(a), although I would reach that conclusion by a somewhat different chain of reasoning. Unlike Mr. Baach and Mr. Bloomfield, I do not conclude that Respondent violated Rule 1.15(b) by failing to notify Dr. Garmon that Respondent received property in which Dr. Garmon supposedly had an "interest." In light of Respondent's commingling and, as Mr. Baach's report for the Board states (Bd. Rpt. at 38),[30] the seriously "overreaching character of the Respondent's dealings with his client," i.e., inducing a client of little sophistication and limited English skills to enter into a very risky financial transaction with him, I would recommend that Respondent be suspended from the practice of law for at least six months.[31]

[30] Citations herein to "Bd. Rpt." are to the principal report authored by Mr. Baach, even when it does not reflect the opinion of a majority of the Board.

[31] I do concur in the findings of fact as set forth in Mr. Baach's report for the Board, as well as the Board's conclusion that Respondent violated Rule 1.15(a) by engaging in commingling and failing to maintain complete trust account records.

The proper treatment of the settlement proceeds that Respondent received is difficult for many of the policy reasons identified by both Mr. Baach and Mr. Bloomfield. The unfortunate fact is that many persons of limited means in our community lack access to medical services, and many doctors are not willing to treat such persons unless the doctor has assurance of payment from another source, when the patient cannot pay out of her own funds. While it may be unappealing to us to see a doctor demanding that a patient sign a contract signing over a share of her potential recovery before providing medical services to that patient, the likely alternative – namely, that the patient would go without medical treatment altogether – is worse. Thus, our legal system is willing to give effect to a client's assignment of a portion of her settlement funds to a treating physician, provided that the assignment is properly drawn.

On the other hand, such assignments of funds, when joined by an attorney, have the potential to embroil lawyers in what are, or should be, simple collection disputes between the doctor and the patient. When the lawyer signs such an assignment, as Bar Counsel alleges was done in this case, the lawyer effectively becomes the fiduciary of the doctor as well as the patient (his client). The lawyer thus assumes fiduciary responsibilities to two parties who may very well have conflicting interests in a pot of funds. The consequences of a misstep by the lawyer in such a situation are grave indeed. Even if a lawyer makes an honest mistake of fact or law that his client, rather than the physician, is entitled to the funds, that mistake can result in the lawyer's suspension from the practice of law. For example, if a lawyer honestly but mistakenly determined that a doctor was not entitled to payment for some claim on the funds, and allocated those funds to the client's recovery, from which the lawyer took his share of the contingency fee, the

lawyer would likely have engaged in non-intentional misappropriation and would be subject to a sanction of six months suspension.

Given these consequences, I think we are rightly hesitant to conclude in this case that a sloppily- worded document, drawn up by the medical provider, constituted a valid assignment of funds by the patient to the doctor. I therefore agree with Mr. Baach that the record does not establish that Respondent ever held "property" of Dr. Garmon within the meaning of Rule 1.15(a). Bd. Rpt. at 16. Mr. Baach and Mr. Bloomfield both conclude that this agreement is unambiguous, but that conclusion points them in different directions. I would prefer to rule that the document is ambiguous as to whether Ms. Haile, by executing the document, created the kind of property interest covered by Rule 1.15(a). The fact that the document is at least ambiguous on that point, however, is sufficient to resolve this charge for me.[32] Ambiguous legal documents are generally construed against the drafter, especially where – as here – the drafter, the physician, is the individual with the predominant power in the relationship, and the other individual whose rights are affected by the document, here the patient, is a person with limited English skills. Nor do I see any extrinsic evidence that would assist us in resolving the ambiguity, especially since Respondent testified that he did not believe the document created an assignment.

Thus, in my view, the contested document as a matter of law did not create "property" under Rule 1.15(a). Having reached that conclusion, I further conclude that

[32] To the extent that a majority of the Board rules that the document is unambiguous, I am willing to abide by that decision. As I then must decide whether the document unambiguously did, or did not, create a valid assignment of funds, I readily conclude that it did not. At a minimum I cannot conclude that the document unambiguously created an assignment of funds sufficient to establish "property" under Rule 1.15(a).

the settlement funds were not property in which Dr. Garmon had an "interest" within the meaning of Rule 1.15(b). I agree with Mr. Baach that the standard for finding the existence of property in which a client or a third party "has an interest," under Rule 1.15(b), is more generous than the standard for finding that property is the "property of" such a client or third party, under Rule 1.15(a). Bd. Rpt. at 26-27. Rule 1.15(b) would cover a situation, for example, where the lawyer was aware that a third party claimed an entitlement to specific property or particular funds even if the lawyer believed that property or those funds rightfully belonged to the lawyer's client. In such a situation, the lawyer could not simply pay the money over to the client and disregard the third party's claim (especially where the lawyer was the fiduciary of the third party as well). Rather, the lawyer would have to give notice to the third party of the receipt of the funds, and might well have to deposit the disputed amount into escrow. Or, the lawyer's notification to the third party of the existence of the disputed funds would motivate the third party to take steps to protect his alleged interest in those funds.

In this case, however, there is no evidence that Respondent was aware that Dr.Garmon claimed an interest in some portion of the specific funds constituting the settlement, at least before Dr. Garmon became aware that the case had been settled. Respondent was therefore justified in treating the entirety of the settlement funds as the property of his client. And, as Mr. Baach ably demonstrates, those settlement funds *were* the property of his client: Dr. Garmon had, to be sure, a valid claim against his patient, but – given the ambiguity of the document that Dr. Garmon drafted and the principle that such ambiguities should be resolved against the drafter – as a matter of law that claim

was merely the claim of a general unsecured creditor, and not a claim to payment out of specific settlement funds. Bd. Rpt. at 13-24.

None of the above excuses Respondent's serious overreaching vis-a-vis his own client. A lawyer who induces an unsophisticated client with limited English proficiency to make an unsecured loan to the lawyer at a relatively low interest rate shows little regard for the fiduciary nature of the lawyer-client relationship. On the other hand, I agree with Mr. Baach that this case is not so grave as In re Arneja, 790 A.2d 552 (D.C. 2002), which involved dishonesty not present, or at least not found, in this case. Respondent also has no prior disciplinary record and cooperated with Bar Counsel. Bd. Rpt. at 37. And, unlike Mr. Baach, I do not conclude that Respondent intentionally failed to notify Dr. Garmon of his receipt of property in which Dr. Garmon had an interest. I therefore would recommend that Respondent be suspended for six months, without a requirement of fitness.

Paul R.Q. Wolfson

Dated: February 27, 2003

Dr. Payne joins in this concurring and dissenting statement.