THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
April 7, 2023

In the Matter of:	:	
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GEORGE A. TEITELBAUM,	:	
	:	D.C. App. No. 22-BG-0906
Respondent.	:	Board Docket No. 21-ND-002
	:	Disciplinary Docket No. 2019-D161
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 370926)	:	

SUPPLEMENTAL REPORT AND RECOMMENDATION
OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

On January 31, 2023, the Board recommended that the Court reject the negotiated disposition because "the stipulated facts support the conclusion that Respondent engaged in misappropriation in addition to the stipulated record-keeping charge." The Board focused on the stipulation that the balance in the estate account was overdrawn after the last legatee presented her check for payment, and concluded that Respondent had engaged in the unauthorized use of entrusted funds, relying on *In re Ekekwe-Kauffman*, 267 A.3d 1074, 1080 (D.C. 2022) ("An attorney commits misappropriation when the balance of the attorney's account holding client funds drops below the amount the attorney owes to the client and/or owes to third parties on the client's behalf."). The Board recommended that the negotiated disposition be rejected to permit further development of the record to determine

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

whether the agreed-upon disposition would be unduly lenient for conduct involving misappropriation.

On March 9, 2023, with the Court's permission, Disciplinary Counsel filed a response to the Board's recommendation, urging the Court to approve the petition for negotiated discipline. Disciplinary Counsel did not buttress the arguments made to the Hearing Committee and addressed by the Board—that there was no misappropriation because no legatee was harmed and because Respondent did not benefit—and instead acknowledged that "the Board cited case law to the effect that none of those factors disproves a charge of misappropriation." ODC Response at 7.

Disciplinary Counsel made two arguments concerning misappropriation that had not been addressed in the Hearing Committee report: (1) Respondent had not engaged in misappropriation because the Probate Division had approved his estate account disbursements; and, (2) Disciplinary Counsel did not have evidence that Respondent's handling of the estate account fell below a reasonable standard of care. Disciplinary Counsel also makes several additional non-case-specific arguments regarding the review of its charging decisions.

Because Disciplinary Counsel's March 9 response contains arguments that were not discussed in the Hearing Committee report, and thus not considered by the

Board when making its recommendation to the Court, the Board requested and received the Court's permission to supplement its January 31 report.[1]

The Probate Division's Approval of Respondent's Mistaken Accounting Did Not Authorize Respondent to Disburse Estate Funds to Some Legatees at the Expense of the Last Legatee

Respondent was a co-personal representative for the *Estate of Ora Lee Workman*.[2] At the conclusion of the estate matter, Respondent prepared a final accounting, pursuant to which he would pay his own fees and costs, pay two individual bequests, and divide the remainder of the estate among five beneficiaries (or their heirs in the case of two who were deceased). But because Respondent did

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[1] Because Disciplinary Counsel's arguments apply the law to the stipulated facts, we do not recommend a remand for the Hearing Committee to consider these arguments in the first instance. However, to facilitate the efficient resolution of negotiated discipline proceedings, Disciplinary Counsel should provide the Hearing Committee with a comprehensive written statement of the reasons supporting the petition, if requested during any *ex parte* meetings between Disciplinary Counsel and the Hearing Committee or its Chair. *See* Board Rule 17.4(h).

[2] Respondent and his co-personal representative, Jose Morgan, were both signatories on the estate bank account, but were not joint signatories, that is, both signatures were not required on a check. The parties stipulated that "[a]s co-personal representative, Respondent was responsible for the estate funds," that Respondent retained control of the estate checkbook, and that he made the disbursements. *See* HC Rpt. at 3, ¶¶ 5, 8-9. Thus, the facts do not appear to raise the issue of "whether an attorney who is a joint signatory on an estate account is 'entrusted' with the funds in that account," which was unresolved at the time of the events at issue in 2018. *See In re Harris-Lindsey*, 242 A.3d 613, 620-22 (D.C. 2020) (internal quotations and citations omitted); *see also id.* at 624-25 (holding that where the respondent is a co-signatory on an account, the account funds are "entrusted" if the respondent is "imbued with authority to prevent their unauthorized use," but applying that holding prospectively only).

not review the bank statements or other complete record of the estate's account, his accounting overstated the total amount in the estate account by $330. Because each legatee was due an equal share of the remainder of the estate account, Respondent's error as to the total in the account caused him to allocate more to each legatee than he should have allocated had he known the correct account balance. *See* ODC Response at 3-4.

Neither Respondent, his co-personal representative, nor the court were aware of the error, and the court approved the final accounting. Respondent disbursed the funds in accordance with the accounting. Because the account lacked enough funds to cover all of the checks, the balance in the account dropped below the amount due to the last legatee before she presented her check for payment.

Disciplinary Counsel does not contest that the balance in the estate account fell below the amount due to the last legatee, but it argues that the Board erred in finding an "unauthorized use" on this ground because the bank balance "analysis presupposes that the disbursement of funds has not been authorized by the client or a court." ODC Response at 10. Disciplinary Counsel argues that Respondent's overpayments to the legatees were "authorized" here because the Probate Division approved Respondent's mistaken final accounting: "Although Teitelbaum's calculation was wrong and the payments approved by the court exceeded the estate's account balance, that does not undo the court's order authorizing Teitelbaum to make those payments. Thus, when funds were 'used' by being withdrawn from the account, the use was authorized." *Id.* at 9; *see also id.* ("It would be illogical to

conclude that payments made . . . pursuant to [the] order . . . were 'unauthorized' simply because a mistake was made in calculating the balance of the estate account.").[3]

Disciplinary Counsel cites no authority to support the proposition that disbursements made pursuant to a court order issued in reliance on a respondent's mistake are still considered "authorized" disbursements of entrusted funds. This appears to be a question of first impression.

For the reasons below, we recommend that the Court reject Disciplinary Counsel's argument because where, as here, the court's approval of the disbursements arose from a respondent's mistake as to the amount available to be disbursed, the respondent should not be absolved of professional responsibility for his mistake simply because the court unwittingly endorsed it.

Mistaken Withdrawals of Entrusted Funds Are Not Authorized[4]

It is well-settled that a respondent's mistaken disbursement of entrusted funds constitutes an unauthorized use. For example, in *In re Chang*, the respondent believed that he had enough earned fees in his trust account to cover a check for

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[3] Although Disciplinary Counsel suggests on page 9 that Respondent erred in "calculating the balance of the estate account," there is no evidence in the record regarding the nature of any such miscalculation.

[4] Our analysis is limited to this case, where Respondent misstated the amount to be distributed because he had not reviewed the bank statements, and was thus unaware of the activities on that account. We do not intend our analysis to apply to what may be considered non-culpable "human" errors, for instance, transposing the numbers on a check.

property taxes. However, he had not checked the bank balance before writing the check. The property tax check caused the balance in his account to fall below the funds held in trust for clients, resulting in a negligent misappropriation. 694 A.2d 877, 878-880 (D.C. 1997) (per curiam) (and appended Board Report). In *In re Choroszej* and *In re Reed*, the respondent mistakenly believed that the client's medical provider had been paid, and negligently misappropriated entrusted funds when he mistakenly used money that he should have been holding in trust for the medical provider. *Choroszej*, 624 A.2d 434, 436 (D.C. 1992) (per curiam) (balance fell below $840 due to medical provider); *Reed*, 679 A.2d 506, 507-09 (D.C. 1996) (per curiam) (balance fell below $435 due to medical provider); *see also In re Dailey*, 230 A.3d 902, 907, 912 (D.C. 2020) (per curiam) (respondent's mistaken payment of office rent from his trust account was negligent misappropriation because it caused the balance to drop below the amount to be held in trust); *In re Cooper*, 591 A.2d 1292, 1295 (D.C. 1991) (respondent's mistaken withdrawal of $115 more than authorized by the engagement agreement was misappropriation), *op. after remand*, 613 A.2d 938, 939 (D.C. 1992) (per curiam) (finding respondent's misappropriation was negligent).

Mistaken withdrawals of estate funds have been found to constitute negligent misappropriation. In *In re Fair*, the respondent, a personal representative to an estate, took her fee through a series of withdrawals from the estate. She did not keep records of her fee withdrawals, and thought that she had taken only $6,100, when in fact she had withdrawn $6,600. 780 A.2d 1106, 1114 (D.C. 2001). As a result of

this mistake, her final fee withdrawal caused her to overpay herself approximately $600, and was a negligent misappropriation. *Id.* at 1113-15; *see also In re Travers*, 764 A.2d 242, 249-50 (D.C. 2000) (finding negligent misappropriation where the respondent sincerely believed that requirement of prior court authorization did not apply to his situation); *In re Ray*, 675 A.2d 1381, 1387-89 (D.C. 1996) (finding negligent misappropriation where the respondent simply did not know he could not take fees without an accounting).

Finally, focusing exclusively on the fact that the Probate Division approved the disbursement schedule ignores the fact that, in doing so, the Probate Division "authorized" Respondent to distribute more money than was in the account. In this respect, this case is similar to *In re Bailey*, where the client had given the respondent permission to borrow money that should have been held in trust for a medical provider. 883 A.2d 106, 121-22 (D.C. 2005). The client's authorization was insufficient to avoid a finding of negligent misappropriation because the money she lent to the respondent "was not [hers] to lend." *Id.* at 122. Disciplinary Counsel does not explain how the court could authorize the disbursement of funds that did not exist.[5]

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[5] The Court's recent decision in *In re Krame* also involved approval by the Probate Court. In *Krame*, the respondent paid himself when he submitted a fee petition, and then paid himself again when the Probate Division approved the fee petition. *Krame* concluded that the second self-payment constituted misappropriation. *In re Krame*, 284 A.3d 745, 765-66 (D.C. 2022). Just as Krame was not authorized to pay himself a second time simply because the Probate Division approved his fee petition, Respondent was not authorized to overpay some legatees at the expense of the final legatee, just because the Probate Division approved his erroneous accounting.

We disagree with Disciplinary Counsel's "court authorization" argument because we see no reason why Respondent's mistake, that resulted in nominal permission to disburse more than was in the account, necessarily should be treated differently than the cases discussed above. In particular, we think it is sufficiently equivalent to Chang's similar balance-related mistake, Fair's mistake of taking more than the court had permitted, or Bailey's reliance on the client's permission where she lacked authority to give it.

Finally, we are not persuaded by Disciplinary Counsel's efforts to distinguish the facts here from those in *In re Hollingsworth*, Board Docket No. 18-ND-005 (HC Rpt. May 13, 2019), *recommendation approved*, D.C. App. No. 19-BG-414, 2019 WL 2464475 (D.C. June 13, 2019) (per curiam). In *Hollingsworth*, the respondent disbursed settlement funds, but failed to deposit the settlement check, causing his account to be overdrawn before the final payee was paid. Disciplinary Counsel correctly notes that Hollingsworth's failure to deposit the settlement check resulted in the withdrawal of funds belonging to a client not involved in the settlement, and argues that that did not happen here. ODC Response at 11 (quoting *Hollingsworth*, Board Docket No. 18-ND-005, HC Rpt. at 9). We disagree. Because Respondent over-paid each of the five legatees, there was not enough money in the account to pay the last legatee who presented her check for payment. Thus, just as Hollingsworth's failure to deposit a settlement check allowed one client to be paid with another client's money, Respondent's error gave the first four legatees money that belonged to the fifth.

Also, Disciplinary Counsel inconsistently applies the relevant state of mind when comparing Respondent's and Hollingsworth's culpability. It argues that Hollingsworth knew he had not deposited the settlement checks when he disbursed funds to the clients, and knew *or should have known* that he had not deposited the checks when he paid himself. ODC Response at 11. Determining what a respondent "should have known" is a familiar part of the state of mind analysis in misappropriation cases. *See, e.g.*, *In re Micheel*, 610 A.2d 231, 235-36 (D.C. 1992) (indiscriminately writing checks at a time when the respondent knew or should have known that the account was overdrawn was a factor in determining that he was reckless); *Fair*, 780 A.2d at 1112 (taking estate funds without court approval was negligent where the respondent "should have known, but did not in fact know, of the need for authorization"). Yet, as to Respondent, Disciplinary Counsel argues only that its investigation did not show that Respondent *knew* that the accounting reflected the wrong account balance. What the respondent knew or should have known must be relevant to the culpability analysis here, as it was in *Hollingsworth*, *Micheel*, and *Fair*.

If Respondent Engaged in the Unauthorized Use of Entrusted Funds, Further Factual Development is Necessary to Determine Whether the Recommended Sanction is not Unduly Lenient

The Board recommended further factual development to determine whether Respondent's unauthorized use of estate funds resulted from simple negligence, or something worse. This recommendation was based on *In re Johnson*'s guidance, reiterated last year in *In re Burke*, that when reviewing a negotiated disposition,

"some consideration may be given to what charges might have been brought, but only to ensure that [Disciplinary] Counsel is not offering an unduly lenient sanction—the ultimate focus must be on the propriety of the sanction itself." *In re Johnson*, 984 A.2d 176, 181 (D.C. 2009) (per curiam); *see* Order, *In re Burke*, D.C. App. No. 22-BG-495, at 3 (D.C. Sept. 8, 2022); *see also* Board Rule 17.5(a)(iii) (directing the Hearing Committee to assess whether "the agreed upon sanction is justified, and not unduly lenient," based on, *inter alia*, "any charges or investigations that Disciplinary Counsel has agreed not to pursue" and "the strengths or weaknesses of Disciplinary Counsel's evidence"). In making this determination, we consider whether "[b]ased on all the facts and circumstances in this record, does it appear likely that Respondent is getting a result substantially more 'lenient' than he would expect if the negotiated discipline were disapproved and [Disciplinary] Counsel proceeded to adjudicate the case?" *In re Beane*, Bar Docket Nos. 340-07, *et al.*, at 34 (HC Rpt. July 16, 2010), *recommendation approved*, 6 A.3d 261, 262-63 (D.C. 2010) (per curiam).

Disciplinary Counsel does not address this well-settled negotiated discipline jurisprudence, and it argues that no further factual development is necessary here because the Board's contrary recommendation

> is founded on an incorrect view of this Court's misappropriation cases. The Board's view appears to be that if a set of facts aligns with the definition of misappropriation, it necessarily means that the attorney has at a minimum engaged in negligent misappropriation and should receive a sanction of no less than six months' suspension.

ODC Response at 12. Disciplinary Counsel misunderstands the Board's position.

The Board recognizes that the *en banc* Court held that "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than *simple negligence*." *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (emphasis added). The Court has defined negligent misappropriation as

> an attorney's non-intentional, non-deliberate, non-reckless misuse of entrusted funds or an attorney's non-intentional, non-deliberate, non-reckless failure to retain the proper balance of entrusted funds. Its hallmarks include a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and *an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded.*

In re Abbey, 169 A.3d 865, 872 (D.C. 2017) (emphasis added). Here, the parties stipulated that Respondent had a mistaken belief that the entrusted funds had been properly safeguarded (that is, that they had not been withdrawn from the account without his knowledge), and thus, the Board's initial report reflected the application of the definition in *Abbey* to the stipulated facts. That said, as discussed below, and considering Disciplinary Counsel's argument, it is possible that further factual development will show that the mistake is not culpable under *Abbey* or *Addams*.

Disciplinary Counsel suggests that even if Respondent engaged in the unauthorized use of entrusted funds, his conduct was not even negligent, and thus, not a violation of Rule 1.15(a). This argument relies on *In re Krame*, where the Court noted that it "might agree" with the contention that misappropriation "is not a strict liability offense; some level of negligent culpability is still required to establish a violation of Rule 1.15(a)." 284 A.3d 745, 766-67 (D.C. 2022). *Krame* declined

to definitively resolve that issue because it concluded that the respondent was negligent. *Id.* at 767 n.11. Because *Krame* did not resolve the issue, it also did not address the definition of negligent misappropriation from *Abbey* as setting forth the minimum culpability requirement.[6]

Disciplinary Counsel suggests that, unlike in *Krame*, it "does not have evidence to show that Teitelbaum's handling of the estate's funds fell below a reasonable standard of care." ODC Response at 14-15. However, Disciplinary Counsel makes this argument without any discussion of the applicable standard of care, which is addressed in Comment [1] to Rule 1.15: "A lawyer should hold property of others with the care required of a professional fiduciary." The stipulated facts do not foreclose the conclusion that Respondent failed to meet the standard of care.

The parties stipulated that Respondent "was responsible for the estate funds," that he did not review the bank statements and "prepared all Probate Division accountings based on information provided by [his co-personal representative,] Mr. Morgan, and submitted them for Mr. Morgan's review and approval, relying on Mr. Morgan to provide the information necessary to reconcile the estate account." HC Rpt. at 3, ¶¶ 3, 5. However, Respondent's stipulated reliance on Mr. Morgan to provide information seems inconsistent with other stipulations: that Mr. Morgan relied on Respondent's expertise when approving the accountings, and perhaps most

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[6] To be sure, like the Court in *Krame*, the Board agrees that nonculpable errors may not be misappropriation. *See supra* n. 4.

importantly, that Mr. Morgan "directed Respondent more than once to contact the bank and arrange to obtain monthly statements in order to properly track and manage the estate's assets." *Id.* at 3, ¶¶ 4, 7. In short, based on the stipulated facts, Respondent relied on Mr. Morgan, who in turn told Respondent to review the bank statements.

In arguing that it lacks evidence that Respondent's conduct fell below the standard of reasonable care, Disciplinary Counsel does not address *In re Cater*, where the Court concluded that "there can be no dispute that the regular and periodic review of the bank statements is a critical element of the duties of an attorney who is charged with protecting and accounting for entrusted funds." 887 A.2d 1, 13-14 (D.C. 2005) (internal quotations omitted); *see also In re Gregory*, 790 A.2d 573, 576-77, 579 (D.C. 2002) (per curiam) (appended Board Report) (failure to check bank statements which would have disclosed embezzlement was among the factors supporting the conclusion that the respondent was reckless in handling entrusted funds); *In re Gray*, 224 A.3d 1222, 1229-30 (D.C. 2020) (per curiam) (failure to check bank statements and reconcile his account balance were among the factors supporting the conclusion that the respondent was reckless in handling entrusted funds); *Abbey*, 169 A.3d at 873-74 (same).

Cater was not a misappropriation case, but it is relevant to this analysis because it examined whether the respondent had made reasonable efforts to prevent embezzlement by her secretary. During a nine-month period, Cater's secretary embezzled $47,000 from the estates of two incapacitated adults for whom Cater was

the court-appointed guardian and conservator. *Cater*, 887 A.2d at 5. Cater did not secure the account checkbooks, and she did not detect the embezzlement because she did not review the monthly bank statements (which showed the unauthorized transactions), and instead delegated that task to her secretary. *Id.* at 7-8.

The Court concluded that Cater violated Rule 5.3(b) (failure to use reasonable efforts to ensure that a non-lawyer's conduct is compatible with the Rules) and 1.1(a) (failure to competently represent a client) because it was not reasonable for her to delegate the handling of entrusted funds to her secretary, without securing the checkbook and/or periodically reviewing the bank statements. *Id.* at 12, 14-16. *Cater* observed that even if the respondent had not secured the checkbook, "[a] glance at any monthly account balance reported by [the bank] would have alerted respondent immediately that funds were missing from the Morton Estate account; the declining balance would have been a red flag, for respondent wrote only a handful of checks herself." *Id.* at 14. The Court concluded "that the respondent did not 'make reasonable efforts to ensure' that her secretary's conduct would be compatible with her professional obligations as a lawyer, as Rule 5.3(b) required." *Id.* at 14-15 (quoting Rule 5.3(b)).

Like Cater, Respondent was responsible for the estate funds. He secured the estate checkbook (which Cater did not); however, we do not read *Cater* as holding that the failure to check bank statements is unreasonable *only* when accompanied by the failure to secure the checkbook. Respondent relied on Mr. Morgan, his co-personal representative, and not his secretary, to provide the information for and to

approve the accountings. However, Mr. Morgan directed Respondent more than once to get the bank statements himself "in order to properly track and manage the estate's assets." HC Rpt. at 3, ¶ 7. The parties stipulated that Respondent "failed to account for the bank fees because he was not receiving monthly statements." *See id.* at 3, ¶ 8.

Perhaps further factual development will show that Respondent's reliance on Mr. Morgan is distinguishable from Cater's reliance on her secretary, and that his conduct was consistent with the care required of a professional fiduciary. However, without further factual development, we are unwilling to conclude as a matter of law that the stipulated facts do not reflect a departure from the standard of care.

The Board Has Not Recommended that Further Factual Development Must Take Place in a Contested Proceeding

Disciplinary Counsel presumes that the Board's recommendation of additional factual development would require a contested proceeding, and argues that a contested proceeding "is not an appropriate forum to determine what charges should have been brought in the first place" relying on the experience of *In re Harris-Lindsey*. ODC Response at 14.

To be clear, the Board recommended further factual development regarding Respondent's state of mind, not that there must be a contested proceeding:

> Because the parties did not believe that Respondent engaged in misappropriation, the record is silent as to whether Respondent's conduct was negligent, or worse. We leave that issue to be developed in subsequent proceedings, *either in a contested case or a negotiated disposition.*

Board Report at 8 (emphasis added). The Court has approved negotiated dispositions involving both reckless and negligent misappropriations. *See, e.g.*, *In re Mensah*, 262 A.3d 1100, 1104 (D.C. 2021) (per curiam) (reckless misappropriation); *Hollingsworth*, 2019 WL 2464475 (negligent misappropriation). We are aware of no presumption that issues of state of mind be resolved in a contested proceeding. *See In re Rigas*, 9 A.3d 494, 498-99 (D.C. 2010) (no hearing was necessary to determine whether the respondent's conduct involved moral turpitude when there was no evidence that he knew he made a false statement of fact). Indeed, our recommendation follows *In re Burke*, where the Court rejected the petition without prejudice to filing a revised petition following further investigation of possible misappropriation. Order, *Burke*, D.C. App. No. 22-BG-495, at 2-3.

Disciplinary Counsel resists further factual development in a contested proceeding by arguing that "[t]he history of *Harris-Lindsey* following the Court's rejection of the negotiated discipline illustrates that seeking to resolve charging decisions by way of a contested hearing is a mistake," and that "[t]he experience of *Harris-Lindsey* shows the limited utility of ordering a contested proceeding to determine whether misappropriation was negligent, reckless, or intentional." ODC Response at 13-14. It complains that the Court's rejection of the *Harris-Lindsey* negotiated disposition in 2011 was followed by "an additional ten years of proceedings that did not meaningfully illuminate the respondent's culpability and

ultimately resulted in only an informal admonition." The record tells a different story.

The Harris-Lindsey Negotiated Discipline

Harris-Lindsey represented a family member who served as guardian for her minor son, and she paid herself from the estate three times without court approval. After the second payment, she learned that prior court approval was required, but she nonetheless took the third payment without court approval. Disciplinary Counsel initially charged intentional misappropriation. After communication with Harris-Lindsey, Disciplinary Counsel "came to believe that Respondent was merely negligent, i.e., that she had an honest, albeit mistaken, belief that no prior court approval was necessary when she withdrew the funds," and it filed a negotiated discipline petition charging only negligent misappropriation. *In re Harris-Lindsey*, Bar Docket No. 384-02, at 4-5 (BPR July 1, 2010). The Hearing Committee recommended that the negotiated discipline be approved. *Id.* at 7.

The Court referred the matter to the Board, which recommended that the negotiated disposition be rejected because there was conflicting evidence about Harris-Lindsey's state of mind, and the resolution of that conflict turned on her credibility. *Id.* at 1, 10-11, 13-14. The Court agreed with the Board, concluding that "a serious question exists on the face of the record whether respondent acted negligently, or instead recklessly," and "that question, which may be critical to deciding the proper sanction for respondent's conduct," could not "be answered

without the presentation of evidence in a contested proceeding." *In re Harris-Lindsey*, 19 A.3d 784, 784-85 (D.C. 2011) (per curiam).[7]

The Harris-Lindsey Contested Case

In April 2015, Disciplinary Counsel charged Harris-Lindsey with intentional, reckless or negligent misappropriation. Disciplinary Counsel argued to the Hearing Committee that Harris-Lindsey had only been negligent, but the Hearing Committee's June, 2016, report concluded that she had been reckless, and recommended disbarment. *In re Harris-Lindsey*, Board Docket No. 15-BD-042, at 27 (HC Rpt. June 2, 2016). Notably, the Hearing Committee identified an issue that had not been briefed by the parties: whether the funds at issue were "entrusted" because Harris-Lindey did not have exclusive control of the estate checking account. *See id.* at 25-26.

In July 2017, a majority of the Board concluded that Harris-Lindsey had not engaged in misappropriation because she and her client jointly controlled the estate account. *In re Harris-Lindsey*, Board Docket No. 15-BD-042, at 27-28 (BPR July 28, 2017). The Board also concluded that there was no unauthorized use because the client had consented to the payments to Harris-Lindsey. *Id.* at 28-30.

The Court disagreed and concluded that the funds were "entrusted" to Harris-Lindsey because her signature was required before the funds could be disbursed.

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[7] In *In re Burke*, the Court similarly rejected a petition because it could not conclude that the recommended sanction was justified, given "evidence of possible misappropriation." Order, *Burke*, D.C. App. No. 22-BG-495, at 2-3.

Harris-Lindsey, 242 A.3d at 624. However, the Court applied this conclusion only prospectively because prior caselaw on this issue was "sparse and inconclusive." *Id.* at 622, 624. The Court ordered an Informal Admonition because the only remaining charge was the failure to keep records of the handling of entrusted funds. *Id.* at 625-26.

It is regrettable that *Harris-Lindsey* was not finally resolved until 2020. But the ultimately dispositive issue regarding the entrustment of jointly controlled funds was not considered in the negotiated discipline proceeding. It was also an open question within our disciplinary law. Thus, contrary to Disciplinary Counsel's argument, the time spent on *Harris-Lindsey* was not a "mistake," or "of limited utility." Instead, the record shows the importance of a thorough analysis of the facts and the law in order to "meaningfully illuminate the respondent's culpability."

Disciplinary Counsel's Remaining Arguments Are Without Merit

Disciplinary Counsel argues that it cannot charge Respondent with misappropriation for two reasons. First, Disciplinary Counsel refers to a practice followed by Contact Members during their review of proposed specifications of charges, which requires Disciplinary Counsel to specify the type of alleged misappropriation—negligent, reckless or intentional. ODC Response at 13. That is partially correct. At the charging stage, if Disciplinary Counsel plans to argue that a respondent engaged in reckless or intentional misappropriation, the specification of charges should specify as such. This provides a respondent with notice of the severity of the misappropriation charge. *Addams*, 579 A.2d at 191, 196 (holding

disbarment as the presumptive discipline for all but negligent misappropriation). But Disciplinary Counsel does not always know the culpability and routinely charges attorneys—with Contact Member approval—with misappropriation that was "negligent, reckless or intentional." *See, e.g.*, Specification of Charges, *In re Krame*, Board Docket No. 16-BD-014, at 11, 18-19 (Mar. 31, 2016) (alleging that the respondent "intentionally, recklessly, or negligently misappropriated trust funds"); Specification of Charges, *In re Johnson*, Board Docket No. 18-BD-058, at 27 (May 31, 2018) (charging intentional and/or reckless misappropriation). This is because at the charging stage, Disciplinary Counsel need only have probable cause—not clear and convincing evidence—that the misappropriation occurred. And at that lower evidentiary burden, Disciplinary Counsel may not know which type of misappropriation will be proven during a contested hearing. Indeed, it is this lower evidentiary burden that undermines Disciplinary Counsel's second argument, that unless it "already possesses what it believes to be clear and convincing evidence of reckless or intentional misappropriation, Disciplinary Counsel cannot allege those levels of culpability, under oath, in a specification of charges, and [thus] they cannot be resolved in a contested proceeding." ODC Response at 13-14 (citing D.C. Bar Rule XI and its oath requirement). But as noted, Disciplinary Counsel is relying on the wrong evidentiary burden—for charges probable cause, not clear and convincing evidence, is required. *In re Mitrano*, 952 A.2d 901, 918 (D.C. 2008) (appended Board report) ("Disciplinary petitions . . . are based on probable cause, not the clear and convincing level of proof necessary to prove a violation."). And the oath

requirement is satisfied by Disciplinary Counsel's statement under oath that "I do affirm that I verily believe the facts stated in the Specification of Charges to be true." *See In re Morrell*, 684 A.2d 361, 365-67 (D.C. 1996); *In re Barber*, 128 A.3d 637, 642 (D.C. 2015) (per curiam). This Court explained that the "oath satisfies the need at the charging stage to assure that [Disciplinary] Counsel, an officer of the court, has investigated the complaint and has sound reason to believe the charges are well founded." *Morrell*, 684 A.2d at 367.

Finally, Disciplinary Counsel's subjective evaluation of the culpability of the verified facts is not dispositive in determining what charges should be brought. Disciplinary Counsel does not have full discretion in charging decisions. A neutral Contact Member can approve, reject, or suggest modifications to Disciplinary Counsel's proposed charges and other dispositions of its investigations. Board Rule 2.12.[8] "The requirement that a contact member review and approve petitions and informal admonitions is meant to act as an additional protection for respondents so that they are not faced with wholly unsubstantiated charges." *In re Stanton*, 470

[8] Although not dispositive, Disciplinary Counsel's subjective judgment as to the application of the law to the facts is an important consideration in a Contact Member's review of charging decision. Board Rule 2.12 dictates that the Contact Members "shall give due deference to the expertise of Disciplinary Counsel in disciplinary matters and to the responsibility of Disciplinary Counsel to allocate the investigative and prosecutorial resources of Disciplinary Counsel's office."

A.2d 281 (D.C. 1983). The Contact Member review process also helps to ensure that Disciplinary Counsel does not overlook charges that are supported by the facts.[9]

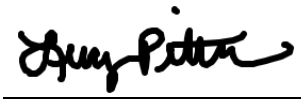
Conclusion

We encourage Disciplinary Counsel's continued use of the negotiated discipline process to efficiently resolve disciplinary cases. We understand that Disciplinary Counsel's counterparts in other jurisdictions may have more discretion to reach negotiated resolutions with respondents. However, our system requires review, including consideration of the charges that Disciplinary Counsel agreed not to pursue, to ensure that the sanction is not unduly lenient. Disciplinary Counsel has used the negotiated system to great effect, most notably recently in *In re Mensah* and *In re Agwumezie*, where it persuaded the Hearing Committee, the Board, and the Court that a three-year suspension with fitness was not unduly lenient in those cases involving reckless misappropriation. *Mensah*, 262 A.3d 1100; *Agwumezie*, 262 A.3d 823 (D.C. 2022) (per curiam). There was no question about the misconduct in those cases, and that permitted an analysis of the propriety of the sanction. Here, as in *Harris-Lindsey* and *Burke*, because this record contains questions regarding the

[9] This process does not mean that Disciplinary Counsel must prosecute every Rule violation that could be supported by the alleged facts. But, Disciplinary Counsel cannot unilaterally decide not to charge a Rule violation that is supported by probable cause, and must instead secure a Contact Member's agreement with that charging decision. This is not meaningfully different than requiring Contact Member approval before a complaint is dismissed following an investigation, and this independent review of Disciplinary Counsel's dispositions should blunt any criticism that disciplinary charges might reflect favoritism toward some members of the Bar.

underlying misconduct, we recommend that the petition be rejected, without prejudice to refiling, following further factual development.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Lucy Pittman
Chair

All members of the Board concur in this Report and Recommendation, except Mr. Hora, who did not participate.