DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued: April 5, 2018

In the Matter of:	:	
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BRIAN K. McDANIEL,	:	
	:	Board Docket No. 17-BD-076
Respondent.	:	Disciplinary Docket No. 2012-D371
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 452807)	:	

ORDER OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

Disciplinary Counsel charged Respondent, Brian K. McDaniel, with violating D.C. Rules of Professional Conduct 1.15(a) and 1.15(e) arising from his commingling of advanced, unearned fees with his own funds.

An Ad Hoc Hearing Committee found that Respondent violated both of those Rules, but that his commingling was inadvertent, and recommended that Respondent be reprimanded by the Board.

Neither Disciplinary Counsel nor Respondent has taken exception to the Hearing Committee's Report and Recommendation. The Board, having reviewed the record, concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record, with its conclusions of law, and with the recommended sanction.

For the foregoing reasons, and those set forth in the attached Hearing Committee Report, which is incorporated by reference herein, the Board finds that

Respondent violated Rules 1.15(a) and 1.15(e), in that he commingled advanced unearned fees with his own funds.

WHEREFORE, it is ordered that Respondent be and hereby is reprimanded by the Board on Professional Responsibility.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Robert C. Bernius, Chair

All members of the Board concur in this Order, except Ms. Smith and Mr. Kaiser, who did not participate.

FILED
February 23, 2018
Board on Professional Responsibility

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

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REPORT AND RECOMMENDATION OF THE
AD HOC HEARING COMMITTEE

Respondent, Brian K. McDaniel, is charged with violating Rules 1.15(a) and 1.15(e) of the District of Columbia Rules of Professional Conduct (the "Rules"), arising from his handling of client funds. Respondent admits to the two charged violations brought by Disciplinary Counsel. Disciplinary Counsel contends that Respondent should receive a public censure and Respondent requests an informal admonition.

As set forth below, the Hearing Committee finds that Disciplinary Counsel has proven both alleged violations by clear and convincing evidence and recommends that Respondent receive a Board reprimand.

I. FINDINGS OF FACT

The following findings of fact are based on the pre-hearing submissions and documentary evidence admitted at the January 5, 2018 hearing.[1] The Hearing Committee finds that the foregoing facts are supported by clear and convincing evidence. *See* Board Rule 11.6.

1. Respondent was admitted to the Bar of the District of Columbia Court of Appeals on November 8, 1996, and assigned Bar number 452807. DX A.[2]

2. At all times relevant hereto, Respondent maintained a Business Checking Account at the Manufacturing and Traders ("M&T") Bank, designated Brian K. McDaniel, DBA McDaniel and Associates, account no. xxx 0515 ("McDaniel Business Account"). Stip. ¶ 1;[3] DX 3A.

3. On August 22, 2011, Respondent undertook to represent Mr. Wilson Garrett in connection with an appeal of a criminal matter before the United States Court of Appeals for the Fourth Circuit. Stip. ¶ 2. The representation was memorialized in a retainer agreement Respondent entered with Ms. Vanessa Hammond, who was signing on behalf of Mr. Garrett (the "Retainer Agreement"). DX 1.

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[1] In particular, we rely on Respondent's December 4, 2017 Answer to Amended Specification of Charges, DX C, which admits all facts and charges alleged by Disciplinary Counsel, as well as the Stipulations of Fact.

[2] "DX" refers to Disciplinary Counsel's exhibits. "Tr." refers to the transcript of the hearing held on January 5, 2018.

[3] "Stip." refers to the joint stipulations filed by the parties on December 20, 2017.

4. The Retainer Agreement provided for Mr. Garrett to pay Respondent a total of $30,000.00 in legal fees in addition to any costs and expenses incurred in connection with the representation. Stip. ¶ 2; DX 1. The retainer agreement specifies that the "non refundable" $30,000 fee "will cover legal services rendered in the above referenced matter." DX 1.

5. Between August 23, 2011 and March 12, 2012, Respondent was paid a total of $23,600.00 in connection with the Garrett representation:

- August 23, 2011: $15,000
- October 5, 2011: $1,600
- November 22, 2011: $2,000
- December 7, 2011: $2,000
- January 11, 2012: $2,000
- March 12, 2012: $1,000

Stip. ¶ 3; DX 3C-1, 3C-2, 3C-3, 3C-4, 3C-9, 3C-10, 3C-11, 3C-12; DX 4.

6. Based on Respondent's own invoice, at the time of the initial $15,000 deposit, on August 23, 2011, he had only earned $2,475. *See* DX 4 at 55. However, immediate work was contemplated and did take place, such that within less than seven weeks (by October 10, 2011), Respondent had earned more fees than he had been paid, and that circumstance continued for the remainder of the representation. *See id.* By the time he made each subsequent deposit, beginning on October 5, 2011, and continuing through the end of the representation, Respondent had earned more than he had been paid by Mr. Garrett. *See id.* at 2-5.[4]

[4] The record supports the parties' stipulation that Respondent did not engage in misappropriation. Stip ¶ 7; *see* DX 3B-1 – 3B-3 (showing that Respondent's bank balance did not fall below $15,000, the amount he was required to hold in trust, from August 23, 2011, the date of the

It appears that Respondent was never paid in full the $30,000 non-refundable amount the client agreed to; further, Respondent ultimately earned more than he was actually paid.

7. All of the funds Respondent received in connection with the Garrett representation were deposited into the McDaniel Business Account. Stip. ¶ 4.

8. At the time of said deposits, the McDaniel Business Account contained funds belonging to Respondent or to his law firm. Stip. ¶ 4; DX 3B at 18, 24, 28, 30, 32, 39; DX 3C; DX 4.

9. At no time before or during the representation did Respondent advise Mr. Garrett, or his agents, that he would place the advanced fees into his business account, rather than into a trust account. Stip. ¶ 5.

10. Mr. Garrett did not consent to the advanced legal fees being placed into a non-escrow account. Stip. ¶ 6.

11. Subsequent to the receipt of the complaint made by Mr. Garrett, Respondent attended a D.C. Bar sponsored CLE on the application of *In re Mance*, 980 A.2d 1196 (D.C. 2009)[5] to retainer agreements in the District of Columbia. Stip. ¶ 8.

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initial deposit, through September 19, 2011, the date by which he had earned more than he had received).

[5] In *Mance*, the Court held that "when an attorney receives payment of a flat fee at the outset of a representation, the payment is an 'advance of unearned fees' and 'shall be treated as the property of the client . . .' [and] held as client funds in a client's trust or escrow account until they are earned by the lawyer's performance of legal services." 980 A.2d at 1202-03.

II. CONCLUSIONS OF LAW

The parties agree, and the record supports, that Respondent violated Rules 1.15(a) and 1.15(e) because he commingled advanced, unearned fees with his own funds.

Rule 1.15(e) provides that "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement." Rule 1.15(a) provides, in relevant 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."

Commingling occurs when an attorney fails to hold entrusted funds in an account separate from his own funds. *In re Moore*, 704 A.2d 1187, 1192 (D.C. 1997) (per curiam) (appended Board Report). Thus, "commingling is established 'when a client's money is intermingled with that of his attorney and its separate identity is lost so that it may be used for the attorney's personal expenses or subjected to the claims of its creditors.'" *In re Malalah*, Board Docket No. 12-BD-038 (BPR Dec. 31, 2013), appended HC Rpt. at 12 (Sept. 27, 2013) (quoting *In re Hessler*, 549 A.2d 700, 707 (D.C. 1988) (appended Board Report)), *recommendation adopted*, 102 A.3d 293 (D.C. 2014) (per curiam); *see also Moore*, 704 A.2d at 1192 ("Commingling occurs when an attorney fails to hold entrusted funds in a special account, separate from his own funds."). To establish commingling, the entrusted and non-entrusted funds must be in the same account at

the same time. "The rule against commingling has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client funds might be taken by the attorney's creditors, and most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally or inadvertently." *In re Rivlin*, 856 A.2d 1086, 1095 (D.C. 2004) (per curiam) (appended Board Report).

The stipulated facts, supported by documentary evidence, demonstrate by clear and convincing evidence that Respondent violated Rules 1.15(a) and 1.15(e) when he placed unearned fees paid to him by Mr. Garrett into his business operating account where he also held his own funds and law firm funds. Findings of Fact ¶¶ 5-6, *supra*. Not only has Respondent admitted to violation of the Rules, DX C ¶ 8, but review of the documentary evidence submitted by Defense Counsel shows that Respondent did, in fact, deposit a $15,000 payment into Respondent's personal or business account before Respondent had earned or incurred $15,000 in fees or costs. *See* Findings of Fact ¶ 6, *supra*. It is undisputed that the Retainer Agreement states that the $15,000 was for "legal services rendered in the above referenced matter," DX 1, and that all, or part, of the $15,000 should have been deposited in a client trust account until the fees were earned by Respondent. Accordingly, the Hearing Committee finds that Respondent's actions were in violation of Rules 1.15(a) and 1.15(e).

III. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of public censure. Respondent has requested that the Hearing Committee recommend an informal admonition. For the reasons described below, we recommend the sanction of a Board reprimand.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the

prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary Rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *Elgin*, 918 A.2d at 376). The Court also considers "'the moral fitness of the attorney'" and the "'need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)) (internal quotation marks omitted).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

The Court has held that the following circumstances are relevant to determining the appropriate sanction in a commingling case:

> whether the commingling was (1) inadvertent or knowing, (2) an isolated instance or protracted, (3) with or without injury to the client, (4) negligent or unintentional misappropriation, (5) with or without adequate record keeping, or (6) by experienced or inexperienced counsel.

In re Osbourne, 713 A.2d 312, 313 n.2 (D.C. 1998) (per curiam).

Respondent asserts that he inadvertently violated the Rules. *See, e.g.*, Tr. 16:16-20.[6] Disciplinary Counsel does not contest this assertion, and thus the

[6] At the hearing, Respondent made a statement explaining the circumstances surrounding his admitted violation of the Rules, the lessons he has learned from his experience with Disciplinary

Hearing Committee finds that this was an isolated incident that did not injure the client. However, the Committee is cognizant of the Court of Appeals' pronouncement in *Mance* that Rule 1.15 protects the policy that "the client's interest in protecting [] funds override[s] that of the lawyer's in immediate access to them, and that the public is ultimately better served" when an attorney keeps unearned fees in a trust or escrow account. *Mance*, 980 A.2d at 1203.

Disciplinary Counsel does not contend that Respondent's records are inadequate, and the Hearing Committee finds that the Exhibits admitted do appear adequate. Further, Respondent has represented and the record supports a finding that although he is experienced, he had recently moved his practice from Maryland to the District of Columbia and failed to familiarize himself fully with the District of Columbia's ethical requirements.

In sum, the Hearing Committee finds that Respondent's misconduct was inadvertent and ultimately harmless in this circumstance, but nonetheless sanctionable given the protections to clients afforded by Rules 1.15(a) and 1.15(e) and how those Rules have been interpreted. There is no evidence here, however, of a pattern of wrongdoing, dishonesty, or any attempt by the Respondent to dissemble or avoid responsibility once he received the complaint; and, conversely, there is evidence of proactive steps by Respondent to address the issue once raised

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Counsel and Respondent's efforts to educate himself and others about the seriousness and importance of complying with the financial obligations required of practicing attorneys. Tr. 26:17-29:1. Respondent explained at the hearing that, at the time of the alleged violations, he "did not understand and what [he] did not realize was that *Mance* had come into effect in the District of Columbia . . . [and] just simply did not know it[.]" Tr. 16:16-20.

by Disciplinary Counsel and to modify his actions going forward to comply with the letter of Rules 1.15(a) and 1.15(e).

2. Prejudice to the Client

The Hearing Committee finds there has been no prejudice to the client in this matter.

3. Dishonesty

The Hearing Committee finds no evidence that Respondent was dishonest.

4. Violations of Other Disciplinary Rules

The Hearing Committee finds that there were no other violations of disciplinary rules.

5. Previous Disciplinary History

While Disciplinary Counsel did not introduce the fact into evidence at the hearing, we note that Respondent received an informal admonition in 2012 for violating North Carolina Rules of Professional Conduct 1.1, 1.4(a)(2), 1.4(a)(3), and 1.4(b).[7] While Respondent notes in his brief that this previous admonition resulted from his status as the supervisor of a staff attorney in his office who violated the Rules, and the misconduct is distinct from the behavior at issue before the Hearing Committee, we do not ignore the prior North Carolina informal admonition entirely. It is a mildly aggravating factor in our view.

[7] We take judicial notice of the informal admonition, even though it was not introduced into evidence at the hearing. *See In re McDaniel*, Bar Docket No. 2011-D419 (Letter of Informal Admonition May 14, 2012) (informal admonition for, *inter alia*, failing to communicate with a client and failing to preserve that client's appellate rights).

6. Acknowledgement of Wrongful Conduct

Respondent has acknowledged and conceded his wrongful conduct.

7. Other Circumstances in Aggravation and Mitigation

The Hearing Committee finds a number of mitigating factors here, including (a) Respondent's forthcoming and candid position in this case; (b) Respondent's proactive efforts after the disciplinary complaint and before the hearing to take appropriate training concerning the standards in the wake of *Mance*, and his efforts following that to counsel and mentor others on the same issue; (c) the fact that while he did not comply with the strict requirements of the Rules in light of *Mance*, he otherwise appears to have been trying to comport himself honorably and responsibly—and within weeks had done more work than he had been paid for; (d) the client was not harmed during the short period where he had not earned all the fees that were deposited into his business account.

C. Sanctions Imposed for Comparable Misconduct

The Court has noted that "'[s]anctions for the single act of commingling generally have ranged from [public] censure accompanied by a requirement for continuing legal education in professional responsibility to suspension.'" *Martin*, 67 A.3d at 1053 (quoting *Berryman*, 764 A.2d at 767) (internal citations omitted). However, both public censures and Board reprimands have been imposed for simple commingling without aggravating factors. *See, e.g.*, Order, *In re Klass*, Board Docket No. 13-BD-041 (BPR Dec. 22, 2014) (appended HC Rpt.) (Board reprimand for a single instance of commingling where no client was harmed and

the respondent expressed remorse, took corrective action, fully cooperated with Disciplinary Counsel, and had no prior discipline); Order, *In re Canty*, Bar Docket No. 310-02 (BPR Dec. 31, 2003) (Board reprimand for commingling and failure to keep records where the respondent fully cooperated with Disciplinary Counsel and stipulated to all relevant facts, took steps to rectify his misconduct, did not harm any clients, and had no prior discipline); *In re Graham*, 795 A.2d 51, 52 (D.C. 2002) (per curiam) (public censure for three instances of intentional commingling, failure to designate a trust account, and inadvertent failure to pay a third-party, where no client was harmed); *In re Goldberg*, 721 A.2d 627, 628 (D.C. 1998) (per curiam) (public censure for brief commingling where the respondent voluntarily enrolled himself in an ethics class on trust accounting).

Here, the Hearing Committee finds it a close question whether the adequate and appropriate sanction should be a Board reprimand or public censure. Respondent's inadvertence and other professionalism, remorse, efforts to educate himself and others as to the importance of maintaining finances according to the Rules, and general cooperation with Disciplinary Counsel provide clear support to impose a sanction short of a suspension. Although Respondent's prior informal admonition, albeit six years ago, in another state on another unrelated issue that may have only indirectly related to him, cannot be completely ignored, given all the circumstances, the Hearing Committee concludes that a Board reprimand is the appropriate sanction here.

IV. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated Rules 1.15(a) and 1.15(e) in that he commingled unearned advanced fees with his own funds, and should be reprimanded by the Board.

AD HOC HEARING COMMITTEE

/JRG/
John R. Gerstein, Chair

/RJB/
Dr. Robin J. Bell, Public Member

/SIH/
Seth I. Heller, Esquire, Attorney Member

The Chair thanks Mr. Heller for preparing this report.