DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
ROBERT E. CAPPELL,	:	Bar Docket No. 251-99
	:	
Respondent.	:	

REPORT AND RECOMMENDATION OF
THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter comes to the Board on Professional Responsibility (the "Board") from Hearing Committee Number Three (the "Committee"), which concluded that Respondent violated District of Columbia Rules of Professional Conduct ("Rules") 1.15(a) and 1.15(b) by misappropriating funds entrusted to him. The Committee has recommended that Respondent be disbarred, but that, on applying the *Kersey* doctrine, the disbarment should be stayed, with Respondent placed on probation for three years subject to a number of conditions. Bar Counsel agreed with this result before the Hearing Committee, and neither Respondent nor Bar Counsel has taken exception to the Hearing Committee Report and Recommendation.

We compliment the Hearing Committee on its report. The report is comprehensive and detailed and reflects a careful analysis of the issues in this case. We also compliment the Office of Bar Counsel, and in particular Assistant Bar Counsel H. Clay Smith, for his recognizing Respondent's need for mental health assistance and referring him to Dr. Richard Ratner. For the reasons set out in the Hearing Committee Report, which is appended hereto and summarized here, the Board, after thorough review of the record, agrees with the Hearing Committee and recommends that Respondent be disbarred, with the disbarment stayed as set forth herein.

I. Procedural History

Respondent is a member of the Bar of the District of Columbia, having been admitted on June 16, 1980.

On July 12, 2002, Bar Counsel filed with the Board a Specification of Charges and a Petition Instituting Formal Disciplinary Proceedings in this matter alleging that Respondent violated the following Rules: Rule 1.15(a), in that Respondent intentionally and/or recklessly failed to hold safe funds of third persons in his possession in connection with a representation, and Rule 1.15(b), in that Respondent, on receiving funds in which third persons had an interest, failed to promptly deliver to the third persons the funds which they were entitled to receive. In his Answer, Respondent provided notice of intent to raise disability in mitigation of charges pursuant to Board Rule 7.6.[1]

This matter was heard by the Committee on March 4, 2003. Bar Counsel's Exhibits ("BX") A-D and 1-27 were received into evidence. Hearing Transcript ("Tr.") at 8. Bar Counsel and Respondent entered into Joint Stipulations of Fact, which were received into evidence as Joint Exhibit ("JX") 1. *Id.* at 9. Respondent submitted Exhibits ("RX") 1-15, which were received into evidence. *Id*. at 14. After receiving the parties' documentary exhibits and the Joint Stipulations of Facts, the Committee announced its preliminary, non-binding, determination that

[1] By order dated December 18, 2002, pursuant to Board Rule 7.6(c), the Board ordered that Respondent, as a condition of continuing to practice during the pendency of the disciplinary proceeding, refrain from any involvement in the management of his firm, its trust account or other financial accounts. After Respondent's resignation from his law firm (*see* discussion, *infra*, pp. 9-10), the Board, on Respondent's motion, amended its December 18, 2002 order to allow Respondent to practice law from his home under the supervision of a financial monitor, appointed to oversee the management of Respondent's client, trust and law firm operating accounts and to serve as a co-signatory on those accounts. *See* Board Order, Sept. 22, 2003. The appointed monitor thereafter declined to serve as co-signatory on Respondent's accounts, prompting the parties to move to delete that requirement, which motion the Board denied by Order dated November 21, 2003. The November 21, 2003 order also vacated the monitor's appointment and directed the parties to identify a new monitor willing to assume all of the responsibilities set forth in the September 22, 2003 order, including co-signatory status. After the parties, working with the Lawyer Practice Assistance Program, were unable to identify a new monitor willing to serve as a co-signatory, the Board issued an order amending its September 22, 2003 order to remove the co-signatory requirement and to reappoint the original financial monitor. *See* Board Order, Mar. 25, 2004.

Bar Counsel had presented evidence sufficient to find a violation on the charges. *Id.* at 19. Thereafter, the Hearing Committee directed the parties to submit evidence in aggravation or mitigation of the misconduct. *Id*. at 15.

In mitigation, Respondent testified on his own behalf and called as witnesses Dr. Richard A. Ratner; Maynard Henry, Esq.; Sharon Theodore Lewis, Esq., and Pastor John Hickman. *Id*. at 16-18. Bar Counsel called as a witness Dr. Thomas C. Goldman and also submitted BX 28, Dr. Goldman's report, which was received into evidence. *Id*. at 10. Respondent then also submitted RX 16, a letter from Dr. Ratner responding to Dr. Goldman's report, which the Hearing Committee received into evidence. *Id.* at 14.

The Hearing Committee issued its report October 31, 2003. Neither Bar Counsel nor Respondent filed any exceptions.

II. Findings of Fact

The Hearing Committee Report includes detailed Findings of Fact that are supported fully by the record. The Board adopts these Findings of Fact and appends the Hearing Committee Report hereto. Since neither Respondent nor Bar Counsel filed exceptions to the Hearing Committee Report, and since the facts were largely stipulated to, we set forth here only a summary, which we believe will be sufficient to demonstrate the basis for our concurrence with the Hearing Committee's recommendation.

Respondent's Misconduct

Respondent was charged with misappropriation in connection with two clients for whom he prosecuted personal injury claims. In each instance, the claim was settled and Respondent (1) failed promptly to pay (the) medical provider(s) and (2) allowed his trust account to fall below the amount owed to (the) medical provider(s).

In the first case, the client was Ernest T. Williams. Respondent collected $7,000 on Mr. Williams's claim and properly disbursed fees to himself and the correct amount to Mr. Williams, but he did not pay the bill for $1,476 rendered by J. Richard Lilly, M.D. for services provided to Mr. Williams.[2] Respondent did pay Dr. Lilly's bill some nine (9) months after receiving the settlement proceeds, but in the meantime, Respondent's trust account balance was often below $1,476. Respondent acknowledged that he used money in the account for personal and business expenses when the account balance was under $1,476. Hearing Committee Findings of Fact ("HC Find.") at 3-16.

In the second case, the client was Shirleyne Herold. Respondent settled her case for $8,000 and owed $2,979.75 to three medical providers. Again, he disbursed the correct amounts to himself and his client, but he did not pay the medical providers for about two months. During almost the entire two-month period, his Trust Account balance was below $2,979.75. During this period, Respondent used money from the account for personal and business expenses. HC Find. at 17-32.

The misappropriations occurred from September 1998 to June 1999. At the hearing, Respondent acknowledged that his conduct was intentional:

> I knew what I was doing when I misappropriated the funds and I knew that it was wrong. But I was making bad decisions, poor judgments, decisions at that time in my life.

Tr. at 42; HC Find. at 33.

Disability and Mitigation Findings

Respondent has suffered for many years from Hepatitis C, which was not diagnosed until 1997. In 1993, he fell into a major depression, which was not diagnosed until 2002.

[2] In both representations, Respondent used a form Assignment and Authorization Agreement, by which the client *assigned* portions of the recovery to the medical providers.

Beginning in 1993, Respondent suffered a series of personal and financial setbacks, which continued through the period of his misconduct. His wife announced that she no longer loved him, and he moved out of their condominium and stayed with his sister for a few months. During this time his solo law practice was struggling, and he was behind in taxes. Living with his sister was inconvenient, but he could not afford an apartment and a car. He found an apartment and borrowed his sister's car. Hearing Committee Disability Findings ("H.C. Dis. Find.") at 1-3.

In 1995, Respondent's wife filed for divorce. Respondent was devastated. In addition, his practice was failing, and he fell behind on rent for his apartment and his office. The IRS had tax liens of $100,000. Respondent was evicted from his office, filed for personal bankruptcy and moved his office to his home. H.C. Dis. Find. at 5-6.

In 1997, Respondent began dating Michelle, a woman he met at his church. She asked him to obtain a life insurance policy with herself as beneficiary. In submitting to the required blood test, he learned that he had a problem, confirmed by a blood test at a homeless clinic to be Hepatitis C. If untreated, Hepatitis C can be fatal. This was Respondent's second potentially fatal illness; at age 21 he had been diagnosed with Hodgkin's Lymphoma, which had been cured by chemotherapy. Because of the Hepatitis C, Respondent was required to take Interferon, an expensive drug. He obtained health insurance but then was unable to afford the premiums, and was forced to seek treatment for his Hepatitis C from a homeless shelter. H.C. Dis. Find. at 7-8.

Around this time, a man, who Michelle identified as her cousin, moved into her apartment. Later, in 1998, Respondent learned this man was not a cousin and that Michelle planned to marry him. During all this period, Respondent was having difficulty sleeping, felt

heartbroken, sad and disillusioned. H.C. Dis. Find. at 9-10. The Hearing Committee described Respondent's situation as follows:

> Respondent began going to bed between 7:30 and 8:30 p.m. because he did not like being awake to face his situation, and he would wake up at midnight or 12:30 and lie awake until 5:00 or 6:00 in the morning; he existed on three to four hours of sleep a night from 1997 to 1999. Tr. at 36. He described his life during that period as, "daytime was a nightmare …. My state of mind was sad. My state of mind was heartbroken. My state of mind was disillusionment. My state of mind was – it was a disaster. I'm living in a storm. I'm living in a sandstorm. And every day, like I said, I get up one leg at a time." *Id.*

H.C. Dis. Find. at 9.

In late 1998 or 1999, Respondent received an eviction notice from his home. At some point thereafter, Respondent's face became numb, and he was diagnosed with Bell's Palsy, which paralyzes nerves on the face and can appear disfiguring. This aggravated Respondent's depression and Respondent for a time confined himself to the townhouse because of the disfigurement. In December 1999 his church rented him a townhouse it owned. During all this time, Respondent relied on his religious beliefs and prayer, and received help from one of the pastors at his church, Elder John Hickman. H.C. Dis. Find. at 11-15.

In 1999, things began to improve. The Bell's Palsy receded; Respondent met Maynard Henry, his future law partner, and he met another woman. H.C. Dis. Find. at 16.

In 2002, however, Respondent was contacted by Assistant Bar Counsel, H. Clay Smith, regarding this matter. He admitted the misappropriation and stated that he felt depressed. Mr. Smith referred Respondent to Dr. Richard Ratner, who provided therapy and prescribed medication. H.C. Dis. Find. at 18. Respondent's condition improved substantially. In addition, he joined Maynard Henry's law firm and, by the time of the hearing, had made substantial progress both personally and professionally. Dr. Ratner diagnosed Respondent as suffering from major depression from 1993 through 1999, but observed that Respondent had been unaware of

his condition. Dr. Ratner testified that Respondent's depression substantially affected Respondent's misconduct. Dr. Ratner concluded that, in his professional judgment, Respondent would not have engaged in the misappropriation had he not been depressed. H.C. Dis. Find. at 19-21.

Dr. Ratner, who has been following Respondent's progress since 2002, testified that at the time of the hearing, Respondent's current situation was quite different from the 1993-1999 time period: he was no longer running his law practice from his apartment; he had joined a law firm; he no longer has the kinds of worries which he once had as a solo practitioner. His living situation had stabilized; he was in treatment; he had developed insight into his situation; the Bell's Palsy had resolved; he had put his troubled relationships behind him, and he was enthused about getting himself help. H.C. Dis. Find. 22.

Dr. Ratner also spoke to the question of the risk of recurrence of the misconduct. He opined that Respondent is unlikely to repeat the conduct with which he has been charged because the desperation element has been removed; he is not antisocial; he is ethical and religious, and he now knows that there are places to turn should he find himself confronted by the situations in which he found himself between 1993-1999. According to Dr. Ratner, Respondent was in "partial remission" from his major depression. H.C. Dis. Find. at 23.

Bar Counsel hired Dr. Thomas C. Goldman, a board-certified forensic psychiatrist, to evaluate Respondent. Dr. Goldman diagnosed Respondent as suffering from major depression, now in remission. Dr. Goldman differentiated this "major depression" with which he diagnosed Respondent as "substantially more than just the blues and blahs, someone who has got enough impairment that they not only feel depressed but they may be unable to sleep, sometimes they

can't eat, they can't concentrate, they can't think clearly, they can't pay attention and they have memory lapses." H.C. Dis. Find. at 25-26.

Dr. Goldman also found that Respondent's masochistic personality led Respondent to allow others to mistreat him and to believe that it was necessary to suffer in order to be in tune with a higher power. He also opined that frequently, the symptoms for people with this diagnosis are triggered by a significant loss, such as the loss of a spouse. Dr. Goldman also cited Respondent's Hepatitis C as a significant medical condition that affected his depression and which would require treatment by Interferon, a drug which itself causes depression. H.C. Dis. Find. at 26-27.

Dr. Goldman agreed that treatment of Respondent's serious liver disease was important to his overall condition: "[H]is prognosis should be reasonably good if he receives treatment for both conditions [depression and liver disease] . . . Successful treatment for both conditions should substantially lessen the likelihood of his getting back into a position where the temptation to repeat his offenses would be significant." BX 28 at 10. Hodgkin's Lymphoma and Bell's Palsy were also cited by Dr. Goldman as additional significant medical conditions affecting Respondent. H.C. Dis. Find. at 27. Dr. Goldman concluded that Respondent had substantially recovered from his disability and that his depression was in partial remission.[3] Based on his evaluation and diagnosis of Respondent, Dr. Goldman agreed with Dr. Ratner's conclusion that Respondent's major depression caused his misconduct, and but for his depression, he would not have engaged in the misconduct with which he had been charged. H.C. Dis. Find. at 28.

[3] The Hearing Committee noted that both Drs. Goldman and Ratner had opined that Respondent's depression was in "partial remission." The Hearing Committee stressed that this does not conflict with its conclusion that he had "substantially recovered" from his disability and was therefore substantially rehabilitated. H.C. Dis. Find. at 28. The Hearing Committee understood the psychiatrists' testimony to reflect that, essentially, people do not fully recover from depression, and are nevertheless able to practice law effectively while their depression remains in check. Moreover, Dr. Goldman specifically opined that Respondent was not at high risk to engage in misconduct even if he were to have another major depression.

Dr. Goldman did not believe that Respondent was "in high risk" to engage in the kind of misconduct with which he has been charged, even if he were to fall into a major depression again. Dr. Goldman stated in his report that Respondent "appears to have an intact value system and to feel contrition and shame about his lapses, and to be ready to do what is necessary to keep his professional life free of further infractions." BX 28 at 10. He also opined that, if Respondent were precluded from practicing law, "it would be counterproductive." H.C. Dis. Find. at 29.

Both Dr. Ratner and Dr. Goldman believed that Respondent needed to continue therapy. Dr. Goldman stressed the need for continued antidepressant medication. Both also agreed that the support of the law firm was important to the prognosis for Respondent's continued progress. H.C. Dis. Find. at 22, 24, 27, 29.

Subsequent Developments

After the hearing was concluded and after post-hearing briefs had been filed, but prior to preparation of the Hearing Committee report, Respondent advised that he had resigned from the law firm effective August 14, 2003, because of its financial difficulties, including its inability to meet payroll. He reported that he had consulted with Dr. Ratner prior to resigning and stated that Dr. Ratner had concurred in his decision. Respondent indicated that he continued to receive treatment from Dr. Ratner. He asked that the conditions of any probation be amended so that he could be allowed to practice from his home, provided a financial monitor was appointed. Hearing Committee Report ("HC Rpt.") at 29-30.

Bar Counsel supported Respondent's request. Bar Counsel noted that the Director of the D.C. Bar's Lawyer Practice Assistance Program had identified an attorney who had agreed to serve as Respondent's financial monitor. HC Rpt. at 30-31.

The Hearing Committee concluded, notwithstanding that it had considered Respondent's affiliation with the law firm to be an important positive factor, that Respondent was nonetheless entitled to *Kersey* treatment and that the absence of the firm as a stabilizing element could be addressed by having a substantial period of probation, with a practice monitor, and additional conditions. The Hearing Committee noted in this regard that Dr. Ratner, in his testimony at the hearing, had expressed the opinion that it was unlikely, even if Respondent were to leave the firm, that he would relapse into a major depression that would lead to misconduct. Dr. Ratner testified:

> I can't say with a hundred percent certainty that that would not happen again, but I do think that his experiences with this so far have made a significant difference in that even if he were to say leave the firm and went back into solo practice, I think he now knows himself better to the point where he would construct one way or another some other kinds of safeguards that would prevent this from happening . . . .

Tr. at 112; HC Rpt. at 31.

III. Analysis

There is no question that Respondent engaged in misconduct which, but for *Kersey*, would compel the sanction of disbarment. Misappropriation is defined as "any unauthorized use of client's funds entrusted to [the lawyer], including not only stealing but also *unauthorized temporary use for the lawyer's own purpose*, whether or not he derives any personal gain or benefit therefrom." (Emphasis added.) *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) (quoted in *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001)); *see also In re Pierson*, 690 A.2d 941, 947 (D.C. 1997); *In re Pels*, 653 A.2d 388, 393-94 (D.C. 1995).

The record is clear that, in the settlement of claims for two clients, Respondent failed promptly to pay monies that had been assigned to medical providers and instead used those funds to pay personal and business expenses. This is garden-variety misappropriation. *In re Smith*,

817 A.2d 196, (D.C. 2003); *In re Davenport*, 794 A.2d 602 (D.C. 2002); *Anderson*, 778 A.2d 330; *In re Moore*, 727 A.2d 895 (D.C. 1995) (per curiam). Respondent acknowledged candidly that his misappropriation was intentional. He conceded that he "understood he was wrong" when he took money that had been designated to pay his clients' bills, adding that he now "know[s] not to ever do that again. . . . I'd rather be set out than ever borrow my clients' money. I would never do that again." "I knew what I was doing at the time I misappropriated the funds and I knew that it was wrong." "I . . . never did say that I didn't know what I was doing. I just, I was making bad decisions, bad judgment." HC Rpt. at 24.

Absent extraordinary circumstances not present here, the sanction for intentional or reckless misappropriation is disbarment. *In re Addams*, 579 A.2d 190 (D.C. 1990) (en banc); *In re Micheel*, 610 A.2d 231 (D.C. 1992); *In re Pels*, 653 A.2d 388, *cert. denied*, 519 U.S. 812 (1996). Under the doctrine announced in *In re Kersey*, 520 A.2d 321 (D.C. 1987), however, the normal sanction may be avoided in certain limited circumstances involving disability. In order to qualify for this special treatment, a respondent must establish (1) by clear and convincing evidence that he has a disability; (2) by a preponderance of the evidence that the misconduct was substantially affected by the disability (nexus); and (3) by clear and convincing evidence that he is rehabilitated. *In re Stanback*, 681 A.2d 1109, 1113 (D.C. 1996); *In re Appler*, 669 A.2d 731, 737 (D.C. 1995); *In re Temple*, 596 A.2d 585, 586 (D.C. 1991); *In re Miller*, 553 A.2d 201 (D.C. 1989); *cf.* Board Rule 11.12(a).

The Hearing Committee carefully reviewed the evidence presented by Respondent on each of the foregoing three elements. That evidence consisted not only of the testimony of Respondent and his pastor, but also the testimony of Dr. Ratner, a psychiatrist well-known to and often relied upon in our disciplinary system, and Dr. Goldman, a psychiatrist retained by Bar

Counsel to render an opinion independent of Dr. Ratner, who was Respondent's treating physician. We quote from the Hearing Committee report:

> Both [Drs. Ratner and Goldman] agreed that Respondent had a disability, major depression. Both agreed that the disability was a substantial cause of the misconduct. And both agreed that he was in treatment, and in partial remission, in a situation in which he was unlikely to commit the same kinds of offenses in the future and therefore substantially rehabilitated. Thus, the Committee concludes that Respondent has proven by clear and convincing evidence that he is substantially rehabilitated.

HC Rpt. at 27.

The Hearing Committee relied in part on Bar Counsel's concurrence that Respondent satisfied the *Kersey* criteria, particularly on the element of rehabilitation. The Committee distinguished the case of *Appler*, 669 A.2d at 738, where proof of rehabilitation was found inadequate, noting the expert testimony that Respondent had benefited enormously from medical treatment and that it did not rely on continued monitoring as the primary tool for preventing future misconduct.

We see no reason to second-guess the Hearing Committee's conclusions here. We also conclude that the Hearing Committee adequately addressed through additional conditions Respondent's withdrawal from the law firm when because of financial difficulties it could not meet payroll obligations.

IV. Conclusion

The Board finds that this case is appropriate for application of the *Kersey* doctrine. It commends the Hearing Committee for its thorough and comprehensive report, and it appreciates the contribution of Bar Counsel toward an outcome that protects the public and allows Respondent to salvage his personal life and career.

The Board therefore recommends that the Court disbar Respondent, but stay the sanction and place Respondent on probation for three years, subject to the following conditions that were recommended by the Hearing Committee:

1. Respondent shall not be found to have engaged in any further misconduct.
2. Respondent shall continue to obtain regular treatment from Dr. Ratner, or such other psychiatrist as Dr. Ratner may recommend.
3. Respondent's practice shall continue to be supervised by a financial practice monitor, which monitor shall be appointed by the Board in the event the current monitor is unable to continue serving. All communications between Respondent and the monitor are subject to disclosure pursuant to D.C. Rule of Professional Conduct 1.6(i).
4. Respondent shall obtain from, and submit to the Board and Bar Counsel, quarterly reports from Dr. Ratner or such other psychiatrist as Dr. Ratner may have recommended, concerning Respondent's compliance with Dr. Ratner's and his other health care providers' recommendations for treatment of both his depression and his Hepatitis C.
5. Respondent and the financial monitor shall continue to comply with the terms and conditions outlined in the Board's Order dated September 22, 2003, as amended by Order dated March 25, 2004.
6. In the event that the required reports disclose any failure of Respondent to adhere to medical advice regarding his mental health, or that Respondent violates any term of his probation or any Rules of Professional Conduct he

will be required to show cause as to why his probation should not be revoked, and the sanction of disbarment be imposed.

7. In the event Respondent associates himself with another firm on a full-time basis, and a financial monitor in his view is no longer warranted, Respondent may file a motion with the Board for an amendment of the terms of his probation.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Timothy J. Bloomfield
Chair

Dated: March 25, 2004

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

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

In the Matter of	:	
ROBERT E. CAPPELL,	:	Bar Docket No. 251-99
Respondent.	:	

REPORT AND RECOMMENDATION OF HEARING COMMITTEE NUMBER THREE

This matter is before Hearing Committee Number Three on a Complaint alleging that Respondent violated District of Columbia Rules of Professional Conduct 1.15(a) and 1.15(b) by misappropriating entrusted funds. Respondent has admitted to having engaged in the misconduct charged, and stipulated with Bar Counsel to the basic facts underlying the misconduct. He argued, however, that his sanction for such misconduct should be mitigated because he was suffering from a disability at the time, from which he has since been rehabilitated. After the hearing, Bar Counsel indicated its agreement that Respondent established a disability, that the disability caused the misconduct and that he has established his rehabilitation. Hearing Committee Number Three (the "Hearing Committee") has carefully considered the parties' submissions and the evidence before it and submits this Report and Recommendation regarding disposition of the Complaint against Respondent.

I. PROCEDURAL HISTORY

1. The first phase of the hearing in this matter was originally scheduled for November 6, 2002. At the November 1, 2002 pre-hearing conference, it was decided that, given the parties' agreement as to all of the material facts regarding the underlying violations charged, the parties would simply submit a joint stipulation of facts rather than participating in a formal hearing regarding the underlying misconduct. As Respondent had given his notice of intent to present a defense of mitigation pursuant to Board Rule 7.6, the Hearing Committee Chair established a schedule for the submission of expert reports regarding mitigation.

2. After several postponements during late 2002 and early 2003, due to the expert reports not being prepared and submitted in a timely way, a hearing was held on March 4, 2003, before Hearing Committee Number Three, composed of Deborah Baum, Esquire, Chair; Ms. Nan Sullivan, public member; and Shelley Hayes, Esquire. Bar Counsel was represented at the hearing by H. Clay Smith, III, Assistant Bar Counsel. Respondent was present at the hearing and was represented by his then-partner, Richard E. Patrick, Esquire.

3. Prior to the hearing, on October 25, 2002, Bar Counsel submitted Bar Exhibits ("BX") A through D and 1 through 27. The Hearing Committee received all of Bar Counsel's exhibits into evidence. Tr. at 8. During the hearing, Bar Counsel moved into evidence Joint Stipulations of Fact, which were entered into by Respondent and Bar Counsel prior to the disciplinary hearing. These stipulations

were received into evidence as Joint Exhibit ("JX") 1. Tr. at 9. The Joint Exhibits established the material facts regarding the conduct underlying the offense charged.

4. Prior to the hearing, Respondent also submitted Respondent's Exhibits ("RX") 1-15, all of which were received into evidence. Tr. at 14.

5. Following the receipt of the parties' documentary exhibits and the joint stipulation of facts, the Hearing Committee made a preliminary, non-binding determination that Bar Counsel had proven that Respondent's conduct violated the Rules as charged in the Specification of Charges. Tr. at 19. Thereafter, the Hearing Committee directed the parties to proceed into Phase II of the hearing and to submit evidence in aggravation or mitigation of the misconduct. *Id.*

6. During the mitigation phase, Respondent testified in his own behalf and called as witnesses Dr. Richard A. Ratner; Maynard Henry, Esquire; Sharon Theodore-Lewis, Esquire; and Pastor John Hickman. Respondent submitted RX 16, which the Hearing Committee received into evidence. Tr. at 14.

7. Bar Counsel called as a witness Dr. Thomas C. Goldman. Bar Counsel also submitted BX 28,[1] which the Hearing Committee received into evidence. Tr. at 10.

II. FINDINGS OF FACT

1. Respondent is a member of the Bar of the District of Columbia Court

[1] Dr. Goldman's report was originally submitted prior to the hearing and designated by Bar Counsel as Exhibit 27, and was referred to as such for some purposes. Bar Counsel later re-designated Dr. Goldman's report as Exhibit 28. *See* Letter of H. Clay Smith, III, Assistant Bar Counsel, dated March 5, 2003.

of Appeals, having been admitted by examination to the District of Columbia Bar on June 16, 1980, and subsequently assigned Bar number 321265. JX 1 at ¶ 1; BX A.

2. At all times relevant herein, Respondent maintained an IOLTA Trust Account at First Union Bank, N.A., formerly known as Signet Bank, N.A., designated Account Number 2066700973903 (the "Trust Account"). JX 1 at ¶ 2; BX 16.

A. <u>The Underlying Offenses</u>

The evidence regarding the underlying offenses was stipulated to by the parties, except as expressly noted where it was necessary for the Committee to supplement that evidence for completeness. As set forth in those stipulations, the Committee finds as follows:

<u>Count I (Williams Representation)</u>

3. On or about February 9, 1998, Respondent was retained to represent Ernest T. Williams in a personal injury matter. JX 1 at ¶ 3; BX 1.

4. On or about January 31 and May 7, 1998, Mr. Williams and Respondent, respectively, executed authorization and assignment agreements ("A&A Agreements") with J. Richard Lilly, M.D., A.B.F.P., Chartered ("Dr. Lilly"). The A&A Agreements provided, *inter alia*:

> I [Ernest T. Williams] . . . authorize and direct said attorney [Robert Cappell] to pay from the proceeds of any recovery in my case all reasonable fees for services provided by [Dr. Lilly] . . . .
>
> The undersigned attorney [Robert E. Cappell] for the patient referenced

> above hereby agrees to comply fully with the foregoing "Authorization and Assignment" . . . .

JX 1 at ¶ 4; BX 2; BX 3.

5. On or about July 8, 1998, Respondent wrote a letter to the Hartford Insurance Company regarding Mr. Williams' claim. In the letter, Respondent submitted Dr. Lilly's bill for services rendered to Mr. Williams, totaling $1,476. Dr. Lilly's bill identified Mr. Williams' account as "41234." JX 1 at ¶ 5; BX 4.

6. On or about August 21, 1998, Respondent settled Mr. Williams' claim for $7,000. JX 1 at ¶ 6; BX 5.

7. On or about August 21, 1998, Respondent addressed a letter to Mr. Williams, setting forth the intended distribution of the settlement funds as follows:

Gross Amount Received $7,000.00	
Less Attorney's Fees	2,333.00
J. Richard Lilly, M.D.	1,476.00
Net Amount to You	$3,191.00

JX 1 at ¶ 7; BX 6.

8. On or about August 24, 1998, Respondent deposited into the Trust Account a check in the amount of $7,000 from the Hartford Insurance Company made payable to "Robert E. Cappell, Attorney at Law and his client Ernest Tyrone Williams" for "Bodily Injury Settlement." JX 1 at ¶ 8; BX 17(b) at 3-4.

9. On or about September 4, 1998, Respondent drew check number 1201 on the Trust Account payable to Ernest Williams in the amount of $3,191, representing his share of the settlement. JX 1 at ¶ 9; BX 17(a) at 1; BX 17(c) at 14.

10. Following his disbursement of $3,191 to Mr. Williams, and recognizing his entitlement to $2,333 as attorney's fees, as of September 4, 1998, Respondent was required to maintain at least $1,476 in the Trust Account, until he paid that amount to Dr. Lilly. JX 1 at ¶ 10; BX 4; BX 6.

11. Although Respondent did not pay Dr. Lilly until June 11, 1999, from October 6 through December 6, 1998, the balance in the Trust Account was below the $1,476 due to Dr. Lilly in connection with Mr. Williams' matter. JX 1 at ¶ 12; BX 19(a) at 28; BX 20(a) at 37; BX 21 at 50-51.

12. From February 12 through March 9, 1999, the balance in the Trust Account was below the $1,476 due to Dr. Lilly in connection with Mr. Williams' matter. JX 1 at ¶ 13; BX 23(a) at 87; BX 24(a) at 93.

13. From March 16 through May 5, 1999, the balance in the Trust Account was below the $1,476 due to Dr. Lilly in connection with Mr. Williams' matter. JX 1 at ¶ 14; BX 24(a) at 93; BX 25(a) at 108; BX 26(a) at 115.

14. From May 14 through June 7, 1999, the amount in the Trust Account was below the $1,476 due to Dr. Lilly in connection with Mr. Williams' matter. JX 1 at ¶ 15; BX 26(a) at 115; BX 27(a) at 121-22.

15. Checks written by Respondent and drawn on the Trust Account from October 6, 1998, through June 7, 1999, were not issued to or on behalf of Mr. Williams or Dr. Lilly. Rather, Respondent knowingly drew them for his business and personal expenses, or for client matters not related to Mr. Williams' claim. JX 1

at ¶ 16; BX 17(c), 18(c), 19(c), 20(c), 21(c), 22(c), 23(c), 24(c), 25(c), 26(c) and 27(c). As indicated above (¶ 7), Respondent knew that $1,476 of the settlement funds received were earmarked to pay Dr. Lilly, and that he had so advised his client, Mr. Williams.

16. On June 11, 1999, Respondent paid Dr. Lilly, by drawing check number 1285 on the Trust Account, payable to "J. Richard Lilly, MD and Assoc." in the amount of $1,476 for "Ernest Williams 41234." JX 1 at ¶ 11; BX 27(c) at 129.

Count II (Herold Representation)

17. On or about August 5, 1998, Respondent was retained to represent Shirleyne Herold. JX 1 at ¶ 17; BX 7.

18. On or about August 8, 1998, Ms. Herold executed an A&A Agreement with Herbert H. Joseph, M.D. & Associates ("Dr. Joseph"). The A&A Agreement provided, *inter alia*:

> I, Shirleyne Herold, . . . authorize and direct you [my attorney] to deduct and pay from the proceeds of any recovery in my case, or any monies which may be received to my physician, Herbert H. Joseph . . . . I further authorize this sum to be paid directly to Herbert H. Joseph at the
>
> time compensatory monies are received . . . .

JX 1 at ¶ 18; BX 8.[2]

[2] Although not referenced in the Joint Stipulations, in addition to the quoted "authorization" language, the "A&A Agreement" also contained assignment language as well. BX 8. This could be relevant in light of the Board's Report in *In re Bailey*, Nos. 442-92 and 483-92 (BPR Feb. 27, 2003 (on appeal)), in which the Board concluded that an attorney's utilization

19. On or about December 8, 1998, Respondent wrote a letter to the Government Employees Insurance Company ("GEICO") regarding Ms. Herold's claim. In the letter, Respondent submitted Dr. Joseph's bill for services rendered to Ms. Herold totaling $2,601.25. At that time, Respondent was aware of the A&A Agreement between Ms. Herold and Dr. Joseph. JX 1 at ¶ 19; BX 9.

20. In or about December 1998, HCC sent an invoice to Respondent regarding Ms. Herold's account (medical records), requesting payment of $29.10. JX 1 at ¶ 20; BX 10.

21. In or about December 1998 and January 1999, Howard University Hospital sent an invoice to Respondent regarding Ms. Herold's account, requesting payment of $349.40. JX 1 at ¶ 21; BX 11.

22. On or about January 21, 1999, Respondent settled Ms. Herold's claim and deposited into the Trust Account a check in the amount of $8,000 from the Continental Insurance Company, made payable to "Shirleyne Herold and Robert E. Cappell, Attorney" in "Full and Final Settlement" of a collision loss and bodily injuries. JX 1 at ¶ 22; BX 12.

23. On or about January 20, 1999, Respondent addressed a letter to Ms.

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of the proceeds of his client's settlement and failure to pay his client's medical provider with those proceeds was not misappropriation where the lawyer had only executed an agreement that authorized him to pay the medical provider, but did not formally assign the client's rights in those funds to the medical provider. It is also potentially relevant that Respondent never signed the A&A agreement with Ms. Herold. BX 8. His letter to his client on January 20, 1999, in which he described the disposition of the settlement proceeds, including a payment to the medical providers (BX 13 and FOF 23, *infra*), could certainly be construed as a ratification of the A&A agreement. More fundamentally, given the acknowledged misappropriation under Count I, the existence of a second misappropriation would not be dispositive of this case.

Herold, setting forth the intended distribution of the settlement funds as follows:

Gross Amount Received	$8,000.00
Less Dr. Joseph	2,601.00
Howard University Hospital	349.00
Attorney's Fees	2,500.00
Medical Records Cost	29.10
Net Amount to You	$2,520.90

JX 1 at ¶ 23; BX 13.

24. On or about January 25, 1999, Respondent drew check no. 1249 on the Trust Account payable to Shirleyne Herold in the amount of $2,520.20, representing her share of the settlement. JX 1 at ¶ 24; BX 22(c) at 79.

25. On or about January 26, 1999, Respondent drew check no. 1258 on the Trust Account, payable to himself in the amount of $2,000, representing a portion of the legal fees he claimed in the Herold matter. By the terms of his retainer agreement dated August 5, 1998, and his January 20, 1999, letter to Ms. Herold, Respondent was entitled to $2,500. JX 1 at ¶ 25; BX 13; BX 17; BX 22(c) at 85.

26. Following his disbursement of $2,520.90 to Ms. Herold, and in consideration of his entitlement to $2,500 as attorney's fees, as of January 25, 1999, Respondent was required to maintain at least $2,979.75 in the Trust Account, the aggregate sum due to Ms. Herold's medical providers, pending disbursements to Dr. Joseph ($2,601.25), Howard University Hospital ($349.40) and HCC ($29.10). JX 1 at ¶ 26; BX 9; BX 10; BX 11; BX 13.

27. On or about March 11, 1999, Respondent drew check number 1266 on

the Trust Account payable to Howard University Hospital in the amount of $349.40. As of March 11, 1999, Respondent was required to maintain at least $2,630.35 in the Account, pending payment to Dr. Joseph ($2601.25) and HCC ($29.10). JX 1 at ¶ 27; BX 24(c) at 101; BX 13.

28. On or about March 16, 1999, Respondent provided to Dr. Joseph a First Union cashier's check in the amount of $2,200 and check number 1268 drawn on the Trust Account in the amount of $401.25 (totaling $2,601.25), in satisfaction of Dr. Joseph's bill for services rendered to Ms. Herold. JX 1 at ¶ 28; BX 14; BX 15; BX 24(c) at 103.

29. Respondent did not issue funds from the Trust Account to HCC in satisfaction of its bill to Ms. Herold. JX 1 at ¶ 29.

30. From January 28 through March 11, 1999, the balance in the Trust Account was below the $2,979.75 due to Howard University Hospital, Dr. Joseph and HCC. JX 1 at ¶ 30; BX 22(a) at 66; BX 23(a) at 86-87; BX 24(a) at 92-93.

31. From January 28 through March 16, 1999, the balance in the Trust Account was below the $2,630.35 due to Dr. Joseph and HCC. JX 1 at ¶ 31; BX 22(a) at 66; BX 23(a) at 86-87; BX 24(a) at 92-93.

32. On March 19 and 30, 1999, the Trust Account was overdrawn. JX 1 at ¶ 32; BX 24(a) at 93.

33. Other than check numbers 1266 and 1268, all other checks written by Respondent and drawn on the Trust Account from January 28 through March 16, 1999, were not issued to or on behalf of Ms. Herold; rather, Respondent knowingly

drew them for his business and personal expenses or for client matters not related to Ms. Herold's claim. JX 1 at ¶ 33; BX 22(c); BX 23(c); BX 24(c). As to Respondent's state of mind at the time he used the funds from his Trust Account, in Respondent's candid words at the hearing, "I knew what I was doing at the time I misappropriated the funds and I knew that it was wrong. But I was making bad decisions, poor judgments, decisions at that time in my life." Tr. at 42.

B. <u>Disability and Mitigation</u>

Phase II of the proceeding was conducted to hear evidence of Respondent's claimed disability and rehabilitation. As to those issues, the Hearing Committee finds as follows:

1. Respondent has suffered over the years from a variety of medical disabilities, including Hepatitis C, and depression. His descent into major depression began in 1993, when Deryl, his wife of six years, told him that she did not love him anymore, and he agreed to move out of the couple's $260,000 condominium in Crystal City, Virginia. Tr. at 22-25.

2. When he moved out of the home that he had shared with Deryl, Respondent, who continued to harbor thoughts of saving his marriage, despite his wife's intentions to the contrary, moved in with his sister for the next few months. Tr. at 22-23. At this time, Respondent was a solo practitioner; his office was at Rhode Island Avenue, and his practice was struggling. *Id.*

3. In 1993, Respondent was making just enough money to pay the mortgage on the condominium, pay his overhead and pay one employee; however, he

was behind on the taxes and he was trying to work out a payment plan. Tr. at 22-23. He was forced to move out of his sister's home because it was inconvenient, but his credit was so bad that he could neither afford an apartment or a car, so for a period of time, he was driving his sister's car. Tr. at 24. Respondent was finally able to lease an apartment when he took over a lease from another individual who could not afford the lease payments. *Id*. The Committee concluded that throughout this period, Respondent was in a state of denial regarding the severity of his marital and other problems.

4. In 1995, a member of Respondent's church told him that he had seen Respondent's wife and an older gentleman vacationing together in the South of France; thereafter, Respondent's wife filed a complaint for divorce. Tr. at 24. Respondent answered his wife's divorce complaint by stating the marriage was reconcilable; he never asked the court for any part of the marital property. *Id*.

5. The separation from his wife and her eventual re-marriage left Respondent devastated, sad, and caused him to lose his dignity and self-esteem; he characterized his situation as "barely managing" from day to day. Tr. at 26.

6. In 1995, when the divorce from his wife was finalized, Respondent's law practice was under severe stress as he could barely afford to pay himself, his secretary or his office rent and the IRS had attached his bank accounts for back taxes. Tr. at 27. Then things began to get even worse when Respondent fell behind on his apartment rent as well as his office rent for which he owed his landlord $8,000, and his tax liens to the IRS were now $100,000. Tr. at 27-28. His landlord sued Respondent for possession of his office on several occasions because he had no

money to pay his rent and the landlord was granted judgment for possession of the office, forcing Respondent to file for bankruptcy in 1996 or 1997. Tr. at 29. After being evicted, Respondent dismissed his secretary and moved his office to his house, using one of his two bedrooms as his office. Tr. at 30.

7. In 1997, following the break-up of his marriage, Respondent met Michelle, a young lady who was a member of his church, and they began dating. Tr. at 32-33. Michelle asked Respondent to apply for a life insurance policy, with herself as the designated beneficiary, which required that he submit to a blood test which showed that he had a problem; he later confirmed through a homeless clinic that he was infected with Hepatitis C. Tr. at 33. When Respondent learned of the Hepatitis C diagnosis, he was further devastated, having lost his office, his wife, his dignity, his self-esteem, and he felt, soon his life. *Id.* Respondent prayed extensively regarding the situation. *Id.* He ultimately obtained some health insurance, and a liver biopsy confirmed he had cirrhosis of the liver which would require him to take Interferon, which was extremely expensive, on a daily basis. Tr. at 34.

8. Shortly after he was diagnosed with Hepatitis C, Respondent's insurance was canceled because he could not afford the monthly premiums, and he was forced to seek treatment at one of the shelters for homeless individuals. Tr. at 34. Hepatitis C, if left untreated, could ultimately lead to death. Tr. at 122-124. This was Respondent's second brush with a deadly disease, having been diagnosed with cancer when he was 21. Tr. at 35. That cancer was ultimately cured through chemotherapy, a result which Respondent attributes to God's intervention. *Id*.

9. Around the time Respondent was diagnosed with Hepatitis C,

Michelle, his girlfriend at the time, moved Sean, a male whom Michelle identified to Respondent as her cousin, into her apartment. Tr. at 35. Respondent began going to bed between 7:30 and 8:30 p.m. because he did not like being awake to face his situation, and he would wake up at midnight or 12:30 and lie awake until 5:00 or 6:00 in the morning; he existed on three to four hours of sleep a night from 1997 to 1999. Tr. at 36. He described his life during that period as, "daytime was a nightmare….My state of mind was sad. My state of mind was heartbroken. My state of mind was disillusionment. My state of mind was — it was a disaster. I'm living in a storm. I'm living in a sandstorm. And every day, like I said, I get up one leg at a time." *Id.*

10. In August 1998, Respondent discovered that Sean was not really Michelle's cousin but that they were living together and were going to be married. Tr. at 43. Despite Michelle's relationship with Sean, Respondent employed Michele as

secretary, and paid her rent, even though he eventually terminated her when he learned of her intention to actually marry Sean. Tr. at 42, 87.

11. Things got worse in October 1998, when Respondent received an eviction notice for failing to pay his rent, and with his bad credit, he could not afford a place to live. Tr. at 43-44. His Church came to his rescue in December 1999 when it rented Respondent a townhouse, owned by the Church, where he could live and locate his office. Tr. at 45.

12. On approximately February 3, 2000, the right side of Respondent's

face became numb and he was diagnosed with Bell's Palsy, a disease which paralyzes the nerves on the face and can appear disfiguring. Tr. at 47-48. As a result of his physical appearance, Respondent confined himself to the house. Tr. at 48.

13. During this entire period of time, Respondent was not aware that he was clinically depressed or that he needed psychiatric help, but relied on one of the pastors at his church, Elder John Hickman, to help him with his mounting personal, health and financial problems. Tr. at 37. Respondent continued to pray to God to help him through this situation. Tr. at 37-38. He also continued to service his clients without untoward event. *Id.* at 38.

14. On at least two occasions in 1997-1998, Respondent contemplated suicide, but did not come close to actually carrying through with those thoughts. Tr. at 38-39. There were other occasions when Respondent contemplated jumping off his 12th floor balcony, but again, he did not really come close to doing so. Tr. at 40.

15. During this entire period, Respondent was not aware that he was suffering from major depression. Tr. at 40.

16. In 1999 things began to improve for Respondent: the Bell's Palsy improved; he met Maynard Henry, which led to his joining the law firm of Patrick Henry in January 2000, and he met another young lady. Tr. at 50-51.

17. Throughout the difficult period in his life from 1997-2002, Respondent relied on the good advice and graces of Elder Hickman, an assistant

pastor at The Greater Morning Star Pentecostal, where Respondent attends church. Tr. at 154. Elder Hickman counseled Respondent and offered comforting advice, including advice regarding his marriage and Michelle, Respondent's girlfriend at the time. Tr. at 155-157.

18. In 2002, Respondent heard from Bar Counsel regarding this matter. Tr. at 50-51; BX B (Specification of Charges). Respondent came in and spoke to Assistant Bar Counsel, Clay Smith, regarding his situation and then, and in a letter to Bar Counsel, candidly admitted to the charged misconduct. Tr. at 51-52; RX 1. Mr. Smith referred Respondent to a board-certified forensic psychiatrist, Dr. Richard Ratner, who, in April 2002, began treating Respondent. Tr. at 52.

19. Dr. Ratner testified that when he began treating Respondent, Respondent related to him a chronology of the events in his life from 1993 to 1999. Tr. at 76-78. Some of the major events in Respondent's life involved his separation from his wife; his wife's affair with another man during their marriage; the diagnosis of Hepatitis C; his girlfriend's involvement with another man; his business reversals; and being evicted from his office and his home. Tr. at 78-80.

20. Dr. Ratner diagnosed Respondent as suffering from major depression from 1993-1999, but testified that although he had the classic signs, including insomnia, sadness, low self-esteem, worthlessness, and tearfulness, Respondent was unaware at the time of his condition. Tr. at 81-84, 98-99, 101. Dr. Ratner prescribed antidepressants, including Prozac, to help Respondent sleep, and for his depression generally. Tr. at 84-85, 88.

21. Dr. Ratner concluded that Respondent's depression substantially affected Respondent's misconduct, the misappropriation of monies from his client's trust accounts. Tr. at 89, 102. Dr. Ratner opined that Respondent's "frame of mind during the time that he was juggling these checks and accounts was such that he felt desperate, overwhelmed, distracted and with low energy and having so many things on his hands…things simply got out of hand and he felt the obligation to pay everybody that he owed…and that obligation at the moment maybe trumped the wrongness of this particularly if he could kind of make it up and that nobody would come out at the short end of the stick." Tr. at 102-03. Dr. Ratner concluded that in his professional opinion, Respondent would not have made the poor choices he did had he not been depressed. Tr. at 104.

22. Dr. Ratner has been following Respondent since 2002, and testified that at the time of the hearing, Respondent's current situation was quite different from the 1993-1999 time period: he was no longer running his law practice from his apartment; he had joined a law firm; he no longer has the kinds of worries which he once had as a solo practitioner. Tr. at 92. His living situation has stabilized; he is in treatment; he has developed insight into his situation; the Bell's Palsy has been resolved; he has put his troubled relationships behind him and he is enthused about getting help for himself. Tr. at 93-94.

23. Dr. Ratner also opined that Respondent is unlikely to repeat the conduct with which he has been charged because the desperation element has been removed; he is not antisocial; he is ethical and religious, and he now knows that there

are places to turn should he find himself being confronted by the situations in which he found himself between 1993-1999. Tr. at 93. Respondent is in "partial remission" from his major depression. Tr. at 105, 107.

24. As to a course of future treatment, Dr. Ratner testified that Respondent should continue to see Dr. Ratner on a regular basis. Tr. at 95, 109. Respondent testified that he intended to do so. Tr. at 57.

25. Because Respondent had developed a productive physician-patient relationship with Dr. Ratner at Bar Counsel's suggestion, Bar Counsel later, in connection with this proceeding, hired Dr. Thomas C. Goldman, a board-certified forensic psychiatrist well qualified to do so, to independently evaluate Respondent and opine on his disability and rehabilitation. BX 29.

26. Dr. Goldman interviewed Respondent on three separate occasions for the purpose of evaluating him. Tr. at 164, 171. As part of that evaluation, Dr. Goldman reviewed the charges, and took a history from Respondent. Tr. at 171-172. Dr. Goldman opined that Respondent was suffering from major depression, "single episode," which was in remission, and he concluded that Respondent's depression, which had a masochistic element, started in his adolescence if not childhood. Tr. at 174-177. Dr. Goldman differentiated this "major depression" with which he diagnosed Respondent as "substantially more than just the blues and blahs, someone who has got enough impairment that they not only feel depressed but they may be unable to sleep, sometimes they can't eat, they can't concentrate, they can't think clearly, they can't pay attention and they have memory lapses." Tr. at 175. Dr. Goldman also found that Respondent's masochistic personality led Respondent to

allow others to mistreat him and to believe that it was necessary to suffer in order to be in tune with a higher power. Tr. at 178. He also opined that frequently, the symptoms for people with this diagnosis are triggered by the loss of a significant other or something similar happens. *Id.*

27. Dr. Goldman also cited Respondent's Hepatitis C as a significant medical condition which affected his depression and which would require treatment by Interferon, a drug which itself causes depression. Tr. at 179-180. For this reason, Dr. Goldman agreed that treatment of Respondent's serious liver disease was important to his overall condition: "[H]is prognosis should be reasonably good if he receives treatment for both conditions [depression and liver disease]. … Successful treatment for both conditions should substantially lessen the likelihood of his getting back into a position where the temptation to repeat his offenses would be significant." BX 28 at 10. Hodgkin's Lymphoma, which Respondent contracted during his college years, and Bell's Palsy were cited by Dr. Goldman as additional significant medical conditions affecting Respondent. Tr. at 181-182.

28. Dr. Goldman concluded that Respondent has substantially recovered from his disability and that his depression is in partial remission.[3] Tr. at 185. Respondent's depression began in about 1997 and began remission in about 2000.

[3] To be clear, both Drs. Goldman and Ratner opined that Respondent's depression was in "partial remission." This should not be confused with their conclusions, and this Hearing Committee's conclusion, that he had "substantially recovered" from his disability and was therefore substantially rehabilitated. The Hearing Committee understood the psychiatrists' testimony to reflect that, essentially, people do not fully recover from depression, and are nevertheless able to practice law effectively while their depression remains in check. Moreover, Dr. Goldman, the independent psychiatrist, specifically opined that Respondent was not at high risk to engage in misconduct even if he were to have another major depression. Tr. at 200-201.

Tr. at 186. Based on his evaluation and diagnosis of Respondent, Dr. Goldman agreed with Dr. Ratner's conclusion that Respondent's major depression caused his misconduct, and but for his depression, he would not have engaged in the misconduct with which he has been charged. Tr. at 189-192.

29. As to rehabilitation, Dr. Goldman stated his belief that Respondent has learned from his experiences, and at that time, had the support of a law firm. Tr. at 193. Dr. Goldman stated his belief that for a number of reasons he articulated, Respondent was "probably much better off with a law firm than he is alone." Tr. at 193-194. Dr. Goldman testified that Respondent's condition was not the type that would go away easily, so that he would remain "vulnerable" to exercising bad judgment in the future, but that if he gets therapy, if he "keeps himself in contact with other people who are going to be basically good people, I think it's going to minimize that…." Tr. at 194-195. Dr. Goldman opined that Respondent should continue taking his antidepressant medication, he should continue with his psychotherapy at least once every two weeks or as often as he can afford to, and he should seek treatment for his liver. Tr. at 196-198, 199-200; BX 28 at 10. Although Respondent is still at risk, Dr. Goldman did not believe that Respondent was "in high risk" to engage in the kind of misconduct with which he has been charged, even if he were to go into a major depression. Tr. at 200-201. Dr. Goldman stated in his report that Respondent "appears to have an intact value system and to feel contrition and shame about his lapses, and to be ready to do what is necessary to keep his professional life free of further infractions." BX 28 at 10. He also opined that, if Respondent were precluded from practicing law, "it would be counterproductive."

Tr. at 198-199.

III. CONCLUSIONS OF LAW

A. Misappropriation

1. The parties do not disagree as to the material Rules governing the charged offenses. Rule 1.15(a) requires an attorney to preserve the separate identity of client funds. The Rule 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.

Rule 1.15(b) provides in pertinent part that:

> [u]pon receiving funds or other property to which a client or third person has an interest, a lawyer shall promptly . . . deliver to the client or third person any funds or other property that client or third person is entitled to receive . . . .

Misappropriation is defined as

> any unauthorized use of client funds entrusted to [the lawyer], including not only stealing but also *unauthorized temporary use for the lawyer's own purpose*, whether or not he derives any personal gain or benefit therefrom. (Emphasis added.)

In re Harrison, 461 A.2d 1034, 1036 (D.C. 1983) (quoted in *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001)); *see also In re Pierson*, 690 A.2d 941, 947 (D.C. 1997); *In re Pels*, 653 A.2d 388, 393-94 (D.C. 1995). Although Bar Counsel must prove

unauthorized use of funds by clear and convincing evidence, "in the case of misappropriation, …that proof requirement is not a demanding one, because misappropriation occurs whenever the balance in [the attorney's operating] account falls below the amount due to the client. Misappropriation in such cases is essentially a *per se* violation; improper intent is not required." *Anderson*, 778 A.2d at 335 (quoting *In re Micheel*, 610 A.2d at 233); *see also Harrison*, 461 A.2d at 1036; *Pierson*, 690 A.2d at 947; *In re Choroszej*, 624 A.2d 434, 436 (D.C. 1992).

2. *In re Withers*, 769 A.2d 784 (D.C. 2001) (per curiam), and other cases stand for the proposition that a lawyer owes a duty not only to his client, but to third-parties as well, to safeguard their funds. *See, e.g., In re Eaton*, Bar Docket No. 210-95 (BPR June 3, 1997) (holding respondent violated Rule 1.15(b) for failure to pay a physician promptly excess settlement proceeds due him); and *Leon v. Martinez*, 614 N.Y.S.2d 972 (1994) (holding that lawyer has ethical duty running to third-parties to whom settlement proceeds were assigned, even when third party's request for payment contradicts client's instructions). The cases are also clear that once the balance in an attorney's trust account falls below the amount held in trust for the attorney's client, misappropriation has occurred. *Harrison*, 461 A.2d at 1036; *In re Hessler*, 549 A.2d at 700 (D.C. 1988).

3. Misappropriation may be proven by examining the account records of the financial institution in which the attorney has deposited client or third-party funds. Once the balance in the account falls below the amount required to be held in trust on behalf of a client or third party, misappropriation occurs. *Harrison*, 461

A.2d at 1036; *Micheel*, 610 A.2d at 233; *Pels*, 653 A.2d at 394; *Pierson*, 690 A.2d at 947.

4. In this proceeding, Bar Counsel has proven (and Respondent agrees) that Respondent engaged in intentional misappropriation of entrusted funds in that he made knowing unauthorized use of funds belonging to two of his clients' third-party health care providers, in violation of Rules 1.15(a) and (b).[4] *In re Smith*, 817 A.2d 196 (D.C. 2003); *In re Davenport*, 794 A.2d 602 (D.C. 2002); *Anderson*, 778 A.2d 330; *In re Moore*, 727 A.2d 895 (D.C. 1995). Even apart from his Stipulations regarding the underlying misconduct, Respondent conceded in his testimony that he "understood he was wrong" when he took money that had been designated to pay his clients' bills, adding that he now "know[s] not to ever do that again. …I'd rather be set out than ever borrow my clients' money. I would never do that again." Tr. at 59. *See also* Tr. at 42 ("I knew what I was doing at the time I misappropriated the funds and I knew that it was wrong.") and Tr. at 54 ("I … never did say that I didn't know what I was doing. I just, I was making bad decisions, bad judgment.")

5. In connection with his representation of Mr. Ernest Williams, Respondent executed an A&A Agreement with Mr. Williams' health care provider, Dr. Richard Lilly. The A&A Agreement provided that Respondent would pay Dr. Lilly's fees from the proceeds of any recovery on Mr. Williams' case. Mr. Williams'

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[4] Upon executing an A&A Agreement, all of the patient's right, title, and interest in any proceeds from a tort claim for personal injuries, up to the amount of the health care provider's bill for services rendered, is equitably transferred to the health care provider, and the attorney representing the patient is obligated to comply fully with the assignment. *Hernandez v. Suburban Hospital Assn.*, 572 A.2d 144, 148 (Md. 1990).

case was settled on August 21, 1998, for $7,000, and Dr. Lilly's fees totaled $1,476.

6. Respondent paid Dr. Lilly $1,476 for his services to Mr. Williams on June 11, 1999, approximately 10 months after the case was settled. In the interim, the account balance into which Respondent had deposited the entrusted funds fell far below that due to Dr. Lilly on several occasions.

7. In connection with his representation of Ms. Shirleyne Herold, Respondent was aware of an A&A Agreement executed between Ms. Herold and her health care provider, Dr. Herbert H. Joseph. Pursuant to the terms of the A&A, Ms. Herold authorized and directed Respondent to pay Dr. Joseph for his services from the proceeds of any recovery in her case. Respondent was also aware that his client was obliged to pay other health care providers, HCC and Howard University Hospital, for services rendered to Ms. Herold in connection with her claim.

8. Ms. Herold's claim was settled on January 21, 1999, for $8,000. Respondent paid Howard University Hospital's bill on March 11, 1999, and he paid Dr. Joseph's bill on March 16, 1999, approximately two months following the settlement of Ms. Herold's claim. Respondent has not paid the claim of HCC ($29.10). In the interim, the account into which Respondent had deposited the entrusted funds fell below the amounts due to Dr. Joseph, Howard University Hospital and HCC on several occasions.

9. The bank records received into evidence demonstrate that checks written by Respondent during the periods of time when the account was out of trust were not written for, or on behalf of, Mr. Williams, Ms. Herold or their health care

providers. Instead, Respondent used the entrusted funds, either for client matters unrelated to the Williams and Herold matters, or for his personal and business expenses.

10. Respondent has acknowledged that he knowingly used the entrusted funds for business or personal expenses unrelated to his clients' matters in both the Williams and Herold matters. Accordingly, Respondent has engaged in the intentional misappropriation of entrusted funds.

B. <u>Disability and Mitigation</u>

1. In this case, Respondent has acknowledged that he engaged in a knowing misappropriation of entrusted funds. However, he has raised a *Kersey*-style plea for mitigation based upon a medical disability, specifically, depression. Phase II of this proceeding was conducted to examine Respondent's evidence in mitigation of his misconduct.

3. It is the burden of the attorney seeking to mitigate a disciplinary sanction on the ground of disability to prove (1) by clear and convincing evidence that he has a disability; (2) by a preponderance of the evidence that the misconduct was substantially affected by the disability (nexus); and (3) by clear and convincing evidence that he is rehabilitated. *In re Appler,* 669 A.2d 731, 737 (D.C. 1995); *In re Temple,* 596 A.2d 585 (D.C. 1991); *In re Miller,* 553 A.2d 201 (D.C. 1989); *cf.* Board Rule 11.11(a).

4. After the conclusion of the live testimony, but prior to submission of the parties' post-trial briefs, the Committee concluded informally that, upon

consideration of all of the evidence proffered during Phase II of the hearing, Respondent had proven the factors warranting mitigation of sanction under *Kersey*. The Committee's view was significantly influenced by the fact that both Respondent's treating psychiatrist and Bar Counsel's expert, essentially agreed as to the critical inquiries. Both agreed that Respondent had a disability, major depression. Both agreed that the disability was a substantial cause of the misconduct. And both agreed that he was in treatment, and in partial remission, in a situation in which he was unlikely to commit the same kinds of offenses in the future and therefore substantially rehabilitated.[5] Thus, the Committee concludes that Respondent has proven by clear and convincing evidence that he is substantially rehabilitated. The Committee found particularly helpful the testimony of Respondent's partner, Maynard Henry, regarding the support that Respondent's partners provided him, and Mr. Henry's view of Respondent as "family." Tr. at 144.

5. The Committee's decision was later significantly bolstered by the fact that Bar Counsel ultimately agreed that Respondent had demonstrated all of the *Kersey* factors. (*See* "Reply of Bar Counsel to Brief of Respondent in Mitigation" at 2-3.) Bar Counsel specifically concluded that the evidence was clear and convincing as to rehabilitation, the factor that was the closest call for the Hearing Committee.

[5] See discussion above, at footnote 3, regarding the distinction that the Committee drew between Respondent's depression being in "partial remission" and his "substantial rehabilitation" from his disability based on the psychiatrist's testimony. The Committee observes, as a general matter, that many practitioners may suffer from depression and other diseases that do not preclude them from effectively practicing law. The Committee does not understand *Anderson* or other precedent to require that the Respondent prove that he has been completely cured of his disease, but only that he have been substantially rehabilitated from the disabling effects of that disease.

Id. at 3 ("Bar Counsel submits that, considering Respondent's supplemental submissions and representations, there is clear and convincing evidence in the record that Respondent is sufficiently rehabilitated to qualify for *Kersey*-style mitigation of the sanction in this matter.") This case differs significantly from *Appler,* 669 A.2d 731, in which the Court of Appeals rejected the Committee's conclusion that the respondent in that case had been rehabilitated from the depression that had caused his misconduct. In *Appler,* the Court noted that the experts agreed that it was really the recommended "continued monitoring by the Board that would likely prevent a relapse." *Id.* at 740. By contrast, in this case, both experts seemed to agree that Respondent himself had benefited enormously from this proceeding and his therapy, and did not rely on any imposition of monitoring in order to reach their conclusions regarding the unlikelihood of Respondent repeating the misconduct that is the subject of these proceedings. *See, e.g.*, Tr. at 112 (Dr. Ratner); 200-01 (Dr. Goldman).

IV. RECOMMENDED SANCTION

1. The District of Columbia Court of Appeals (the "Court") has held that in virtually all cases of misappropriation, disbarment is 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) (*en banc*). A lesser sanction than disbarment is appropriate "only in extraordinary circumstances." *Id*. at 191. The Court has stated: "[A] lawyer's obligation to refrain, at the least, from misuse of a client's property must stand among the most insistent of professional norms." *Addams*, 579 A.2d at 194 (citations omitted). The Court "has repeatedly emphasized both the seriousness of the misuse of client funds as well as the need to

maintain if not enhance public confidence in the Bar." *Id*. at 196. Consequently, disbarment is not limited to those cases "involving multiple cases over an extended period of time." 579 A.2d at 198. Nor is it limited to those cases where only client funds are taken, but applies equally to misappropriation of third-party funds. Rule 1.15(a); *Moore*, 704 A.2d at 1192; *see In re Clarke*, 684 A.2d 1276, 1278 (D.C. 1996). The *Addams* court stated that one of the "extraordinary circumstances," in which it would consider imposing a sanction other than disbarment were circumstances such as those found in *In re Kersey*.[6] *Id.*

2. Having agreed that Respondent satisfied the *Kersey* standards, Bar Counsel recommended that Respondent not be disbarred, but that he be placed on probation for a period of two years, subject to the following conditions: 1) that he not be found to have engaged in any further misconduct and 2) that his health care providers provide quarterly reports to the Board and the Office of Bar Counsel regarding Respondent's compliance with his health care providers' recommend-dations for treatment of his depression and Hepatitis C. *Id.* at 3. Bar Counsel further recommended that, to the extent that Respondent violates the terms of his probation, that he should be required to show cause why his probation should not be revoked and why the usual sanction of disbarment should not be immediately imposed. *Id.*

3. Following the preparation of the transcript and the parties' submission of briefs, but prior to preparation of this Report and Recommendation, Respondent advised the Board that he had withdrawn from his firm effective August 14, 2003,

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[6] *In re Kersey*, 520 A.2d 321 (D.C. 1987) (Alcoholism considered a mitigating factor in

due to his firm's financial difficulties, specifically, its inability to meet payroll for some period of time. *See* "Motion to Amend Order Concerning the Conditions of Practice During These Disciplinary Proceedings," dated August 11, 2003. In his motion, Respondent noted that he had discussed his withdrawal from the firm with Dr. Ratner, who, according to Respondent, saw no other choice for Respondent at the time. *Id.* at 4. Respondent also indicated that he had, since the hearing, continued to receive treatment from Dr. Ratner, and attached invoices for psychotherapy that verified this statement. *Id.* at ¶ 26 and Ex. 2. Respondent therefore asked that the Board amend the conditions of the order permitting him to continue practicing during the pendency of his disciplinary proceeding in such a fashion as would permit him to practice from his home, provided a monitor were appointed to oversee his financial accounts. *Id.* at ¶ 19. Respondent also requested that he be allowed to "seek part-time employment with firms that can afford to pay Respondent." *Id.* Respondent claimed that not having to pay office rent would allow him to cover more of his living expenses. *Id.*

4. Bar Counsel supported this request, provided that the financial affairs of his practice were monitored during the pendency of the proceedings, and that Respondent provide to the monitor on a monthly basis a copy of all financial records relating to his law practice, and that Respondent participate in any meetings requested by the monitor. *See* "Response of Bar Counsel to Motion of Respondent to Amend Order Concerning the Conditions of Practice During These Disciplinary Proceedings," dated September 5, 2003. Bar Counsel noted that the Director of the

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fashioning the sanction.)

D.C. Bar's Lawyer Practice Assistance Program had advised that an attorney had agreed to serve as Respondent's financial monitor. *Id.* The Board granted Respondent's motion on September 22, 2003, and amended the order concerning the conditions of practice accordingly, subject to specific conditions concerning the terms of the financial monitor's rights and obligations.

5. The Committee was concerned about Respondent separating from his firm, but understands the practical reasons for the separation. It had viewed his association with the firm as a significant factor in his rehabilitation and understood the testifying psychiatrists to consider that association as a significant factor as well. Ultimately, however, the Committee did not find that factor to be dispositive, and remained of the opinion that Respondent could nevertheless satisfy the *Kersey* factors, warranting mitigation of sanction. Dr. Ratner testified, in fact, in response to Bar Counsel's questions, that, even were Respondent to separate from his firm and practice on his own, in Dr. Ratner's opinion, it would even then be unlikely that Respondent would "fall into a major depression which might lead him into making the same type of poor choices which led to the present proceedings." Tr. at 112. As Dr. Ratner explained, "I can't say with a hundred percent certainty that that would not happen again, but I do think that his experiences with this so far have made a significant difference in that even if he were to say leave the firm and went back into solo practice, I think he now knows himself better to the point where he would construct one way or another some other kinds of safeguards that would prevent this from happening…." *Id. See also Appler*, 669 A.2d at 740 (acknowledging that "in any such case [of depression], there exists a risk of relapse.") The Committee,

however, believes that under the circumstances, a substantial period of probation must be imposed, as recommended by Bar Counsel, and that continuation of the practice monitor should be a required aspect of that probationary period. Such a probationary period is appropriate in cases of disability, as is imposition of conditions requiring supervision and reporting by a practice monitor. *See In re Vohra*, 762 A.2d 544 (D.C. 2000) (affirming two-year probation); *In re Temple*, 629 A.2d 1203 (D.C. 1993) (affirming three-year probation); *cf. Appler*, 669 A.2d 731, 740 (D.C. 1995) (rejecting proposed "lifetime probation" as unauthorized and unreasonable). Due to the events following Bar Counsel's submission of its recommendation, the Committee recommends a longer period of probation, and the imposition of some additional conditions. Specifically, the Committee recommends that Respondent be disbarred, but that the sanction be stayed and Respondent placed on probation for a period of three years, subject to the following conditions:

1. Respondent shall not be found to have engaged in any further misconduct.
2. Respondent shall continue to obtain regular treatment from Dr. Ratner, or such other psychiatrist as Dr. Ratner may recommend.
3. Respondent's practice shall continue to be supervised by a financial practice monitor, which monitor shall be appointed by the Board in the event the current monitor is unable to continue serving. All communications between Respondent and the monitor are subject to disclosure pursuant to D.C. Rule of Professional Conduct 1.6(i).

4. Respondent shall obtain from, and submit to the Board and Bar Counsel, quarterly reports from Dr. Ratner or such other psychiatrist as Dr. Ratner may have recommended, concerning Respondent's compliance with Dr. Ratner's and his other health care providers' recommendations for treatment of both his depression and his Hepatitis C.
5. Respondent and the financial monitor shall continue to comply with the terms and conditions outlined in the Board's Order dated September 22, 2003.
6. In the event that the required reports disclose any failure of Respondent to adhere to medical advice regarding his mental health, or that Respondent violates any term of his probation, he will be required to show cause as to why his probation should not be revoked, and the sanction of disbarment be imposed.
7. Should Respondent associate himself with another firm on a full-time basis, and a financial monitor in his view no longer be warranted,

8. Respondent may file a motion with the Board for an amendment of

the terms of his probation.

HEARING COMMITTEE NUMBER THREE

By: _____
Deborah B. Baum, Chair

_____
Nan Sullivan, Public Member

_____
Shelley D. Hayes

Dated: October 31, 2003