THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
July 19, 2021

In the Matter of:	:	
	:	
CHARLES C. AGWUMEZIE[1],	:	D.C. App. No. 21-BG-88
	:	Board Docket No. 20-ND-005
Respondent.	:	Disc. Docket Nos. 2018-D174
	:	& 2019-D089
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 990751)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

In *In re Mensah*, Board Docket No. 19-ND-011 (BPR July 19, 2021), we today determine that a three-year suspension with a requirement of fitness is a justified sanction in a negotiated discipline case involving reckless misappropriation.

The Court of Appeals remanded this case to us to address the same question referred in *Mensah*: "the appropriateness of the recommended sanction in light of this court's precedent" in cases involving reckless misappropriation. Order, *In re Agwumezie*, D.C. App. No. 21-BG-88 (D.C. Feb. 24, 2021) (per curiam).[2]

[1] Respondent is also known as "Chinedu Charles Agwumezie." We use the name that is associated with his D.C. Bar number 990751.

[2] We do not understand the scope of the Court's Order to include a review of the Hearing Committee's determination that there was no intentional misappropriation here. *In re Agwumezie*, Board Docket. No. 20-ND-005, at 20 (HC Rpt. Feb. 5, 2021). We take that conclusion as a given, and note as did the Hearing Committee that intentional misappropriation was not included in the Specification of Charges initially filed against Respondent. *Id.* at 20 n.5.

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

We determine – as in *Mensah* – that there is sufficient mitigation here to justify a sanction of a three-year suspension with fitness. It is true that the Court of Appeals has held, in *Addams*, that disbarment is the usual sanction for reckless and intentional misappropriation even when there is mitigation of "the usual sort." 579 A.2d 190, 191 (D.C. 1990) (en banc). But here, there is exceptional and unprecedented mitigation – Respondent's decision to enter into negotiated discipline, his execution of an affidavit admitting that he recklessly misappropriated client funds, and his willingness to begin at once his disciplinary suspension, a suspension that will last for a minimum of three years and will continue until Respondent proves to the Court that he is fit to practice. Respondent's willingness to immediately accept a sanction – the most severe sanction save for disbarment – that may very well result in him never practicing law again is substantial mitigation.

In the disciplinary system in the District of Columbia, the benefit to a respondent in accepting responsibility is that her sanction is evaluated under negotiated discipline's "unduly lenient" standard, rather than a contested case's comparability analysis. For that reason, and because under the "unduly lenient" standard this sanction is justified, we determine that a three-year suspension with a fitness requirement is appropriate in this case, and in cases where Disciplinary Counsel is willing to enter into negotiated discipline for reckless misappropriation more generally.[3]

[3] We do not reach the question of whether a similar sanction would be acceptable in a negotiated discipline for intentional misappropriation or flagrant dishonesty, or for conviction of a crime involving moral turpitude. *See In re Pelkey*, 962 A.2d 268, 281 (D.C. 2008) (recognizing that disbarment has been imposed for conduct involving intentional misappropriation or flagrant

We recognize that the Court's referral order repeated *Addams*' admonition that

> The appearance of a tolerant attitude toward known embezzlers would give the public grave cause for concern and undermine public confidence in the integrity of the profession and of the legal system whose functioning depends upon lawyers.

Order, *In re Agwumezie*, D.C. App. No. 21-BG-88 (D.C. Feb. 24, 2021). As discussed below, the agreed-upon sanction shows no tolerance toward embezzlers. Far from undermining public confidence in the integrity of the profession, the agreed-upon sanction shows that even those who admit their wrongdoing face at least a three-year suspension from law practice, and will be excluded from practice until the Court determines they are fit to do so. The only lenity in the agreed-upon sanction is that Respondent will be eligible to make his case for reinstatement two years sooner than would have been the case if he were disbarred following a contested proceeding. He will bear the same burden of proof as any other lawyer who is suspended with fitness. *See* D.C. Bar R. XI, § 16(d)(1) (setting forth a petitioner's burden of proof). There is no suggestion that he has been promised an easier road should he seek reinstatement in the future. For these reasons, we do not consider this agreed-upon sanction to be "unduly lenient."

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dishonesty); D.C. Code § 11-2503(a) (requiring the disbarment of a lawyer convicted of a crime of moral turpitude). We recognize that the benefits discussed below that result from the expeditious removal from practice of a respondent who has engaged in reckless misappropriation would also be present in cases involving even more serious misconduct. But those facts are not before us, and thus we do not reach them.

I. Negotiated Discipline Furthers the Disciplinary System's Purpose.

Mindful of *Addams*' warning, we ground our analysis on the purpose of lawyer discipline,

> The discipline we impose should serve not only to maintain the integrity of the profession and to protect the public and the courts, but also to deter other attorneys from engaging in similar misconduct. In some instances the protection of the public, the courts, and the bar will require a sanction as severe as removal from practice. In other cases, discipline as light as a reprimand will suffice. In all cases, our purpose in imposing discipline is to serve the public and professional interests we have identified, rather than to visit punishment upon an attorney.

In re Reback, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *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). These purposes are served by an agreed upon sanction that removes a lawyer from representing clients sooner, rather than disbarment later. *See In re Mensah*, Board Docket No. 19-ND-011, at 6-8 (BPR July 19, 2021). This is particularly so when coupled with the fitness requirement in this sanction.

The period of suspension is not the disciplinary system's only means of protecting the public, the courts and the integrity of the legal profession. As the Court recognized in *Cater*, requiring a respondent to prove fitness to practice is "one of the most valuable tools in the disciplinary armamentarium." *Cater*, 887 A.2d at 23. *Cater* recognized that the fitness requirement may be imposed when the sanction mandated by the comparability analysis under D.C. Rule XI, § 9(h) "may not be enough by itself to protect the public, the courts and the integrity of the legal profession." *Id*. In *In re Steele*, the Court relied on the fitness requirement's

gatekeeping function when rejecting Disciplinary Counsel's argument that the respondent should be disbarred, and not suspended for three years with fitness, as the Board recommended:

> We do not think the difference between the three-year suspension with fitness recommended by the Board and [Disciplinary] Counsel's recommendation of disbarment is a matter of significant concern in this case because Respondent, pursuant to the sanction we now impose, will not be reinstated to practice law until he has demonstrated his fitness to do so.

868 A.2d 146, 154 (D.C. 2005).[4] We recognize that neither *Cater* nor *Steele* considered the issue we address here, whether a sanction other than disbarment can ever be imposed in a reckless misappropriation case, but both *Cater* and *Steele* recognized the fitness requirement's role in ensuring the protection of the public. We see no reason why it cannot play that role here.

Because Respondent must prove his fitness to practice, he will have the burden of proving by clear and convincing evidence, in light of his prior misconduct, that: (a) he "has the moral qualifications, competency, and learning in law required for readmission; and" (b) his "resumption of the practice of law . . . will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest." D.C. Bar R. XI, § 16(d)(l). In interpreting these criteria, the Court applies the five factors articulated in *In re Roundtree*: (1) the nature and circumstances of the misconduct for which the

[4] Mr. Steele did not seek reinstatement until July 19, 2016, eleven years after he was suspended. Unfortunately, Mr. Steele passed away shortly after his reinstatement case was fully-briefed in the Court of Appeals. *See* Order, *In re Steele*, D.C. App. No. 18-BG-004 (D.C. Oct. 18, 2018) (per curiam) (closing case).

attorney was disciplined; (2) whether the attorney recognizes the seriousness of the misconduct; (3) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones; (4) the attorney's present character; and (5) the attorney's present qualifications and competence to practice law. *In re Sabo*, 49 A.3d 1219, 1223-24 (D.C. 2012) (quoting *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985)). A petitioner seeking reinstatement must "prove that those traits that led to disbarment no longer exist and, indeed, that he is a changed individual having full appreciation of the wrongfulness of his conduct and a new determination to adhere to the high standards of integrity and legal competence which the Court requires." *Id.* at 1232 (internal quotations omitted).

Indeed, "the nature and circumstances of the misconduct for which the attorney was disciplined . . . is of primary importance" when considering a petition for reinstatement. *See In re Yum*, 187 A.3d 1289, 1292 (D.C. 2018) (per curiam) (internal quotations and citations omitted); *In re Robinson*, 705 A.2d 687, 688-89 (D.C. 1998) (in reinstatement cases, primary emphasis should be given to matters bearing most closely on the reasons why the attorney was suspended or disbarred in the first place); *In re Mba-Jonas*, 118 A.3d 785, 787-88 (D.C. 2015) (per curiam) (denying reinstatement where petitioner's handling of his own funds following reciprocal suspension for misappropriation showed that he could not be entrusted with client funds). As the Court explained in *In re Borders*, 665 A.2d 1381, 1382 (D.C. 1995)

> The nature and circumstances of the misconduct for which the attorney was disciplined . . . continue to weigh significantly, both because of

> their obvious relevance to the attorney's moral qualifications for readmission . . . and because of our duty to insure that readmission will not be detrimental to the integrity and standing of the Bar. . . . Among the questions the court must ask, in other words, is whether the public would regard reinstatement as an indication that the original offense was not viewed with sufficient gravity.

(internal citations and quotations omitted).

Thus, contrary to the dissent's suggestion, the discipline system will most certainly examine the precise nature of Respondent's misconduct, and the misconduct of others, like him, who enter into negotiated discipline in other cases, if he tries to prove that he is fit to resume the practice of law, three or more years from now. *See, e.g.*, *In re Mance*, 171 A.3d 1133, 1135, 1137-38 (D.C. 2017) (examining misconduct in each of five counts when considering petition for reinstatement following negotiated discipline of a six-month suspension, with fitness, imposed in 2012). To some extent, our disagreement with our dissenting colleagues is whether that examination should happen now or if Respondent seeks readmission. Our dissenting colleagues would prefer to thoroughly examine Respondent's conduct now, while he continues practicing. We would prefer to have Respondent's ability to practice end sooner, and have that examination in the future.

A sanction of a suspension of three years with a requirement that the respondent prove fitness before resuming the practice law again also deters similar misconduct by other lawyers. It is highly unlikely that any lawyer will find the difference between the sanction here and that urged by the dissent to be so different as to lose its deterrent effect. As the Court observed in *Cater* that "while a fitness requirement is not quite as severe an enhancement as disbarment, it comes close; as

we have explained, it can transform a thirty-day suspension into one that lasts for years." 887 A.2d at 25. And, of course, there is no guarantee that a lawyer suspended with a fitness requirement will ever be able to practice law again. *Id.* at 23 ("The fitness requirement can be a tail that wags the disciplinary dog. . . . [It] 'may have the practical effect of greatly prolonging—even tripling or quadrupling—a respondent's period of suspension.'" (citation omitted)).[5]

II. The Recommended Sanction is Not Unduly Lenient.

Our recommendation does not diminish, or reflect tolerance of, the nature and circumstances of the misconduct in a reckless misappropriation case. Instead, we recommend only that those engaged in reckless misappropriation, who are willing to admit that they did so, and who seek to resolve their disciplinary matter relatively quickly (thus forfeiting two or more years of active practice while their case moves through the discipline system),[6] be allowed a chance to prove their fitness to resume the practice of law after three years rather than after five years.

It is our conclusion that when the purposes of the disciplinary system are considered, the negotiated sanction in this case makes sense, given Respondent's

[5] *See, e.g.*, *In re Robinson*, 915 A.2d 358 (D.C. 2007) (per curiam) (granting fourth petition for reinstatement, seventeen years after disbarment); *In re Daniel*, 135 A.3d 796 (D.C. 2016) (per curiam) (reinstatement denied following three-year suspension with fitness in 2011, the respondent remains suspended); *In re Mba-Jonas*, 118 A.3d 785 (D.C. 2015) (per curiam) (reinstatement denied following three- and six-month reciprocal suspensions with fitness in 2010, the respondent remains suspended).

[6] *See, e.g.*, *In re Gray*, 224 A.3d 1222 (D.C. 2020) (per curiam) (hearing held in January 2017, Hearing Committee report issued in October 2017, Board report issued in July 2018, Respondent suspended pursuant to D.C. Bar R. XI, § 9(g) in November 2018); *In re Malyszek*, 182 A.3d 1232 (D.C. 2018) (per curiam) (hearing completed in March 2015, Hearing Committee report issued in December 2016, Board report issued in June 2017, Respondent suspended pursuant to D.C. Bar R. XI, § 9(g) in October 2017); *In re Abbey*, 169 A.3d 865 (D.C. 2017) (hearing held in December

acceptance of responsibility for his misconduct. The criminal justice system has long and routinely recognized substantial mitigation in acceptance of responsibility:

> the authority of sentencing judges to ameliorate the sanction when an offender admits his responsibility, including by entry of a plea of guilty, is well recognized. The ABA Standards governing pleas of guilty, for example, deem it "proper for the court to grant . . . sentence concessions to defendants who enter a plea of guilty" when "there is substantial evidence to establish that . . . the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct. . . ." ABA Standards for Criminal Justice, Vol. 111, 2d ed., Ch. 14 ("Pleas of Guilty"), Standard 14–1.8(a)(i). *See* United States Sentencing Guidelines Manual § 3E1.1 (1995 edition). *See also Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970) (defendant who pleads guilty "demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation").

Coles v. United States, 682 A.2d 167, 169 (D.C. 1996) (footnote omitted); *see also* District of Columbia Sentencing Commission, Voluntary Sentencing Guidelines Manual, § 5.1 ("A Rule 11(c)(1)(C) (formerly Rule 11(e)(1)(C)) plea agreement that is accepted by the court controls the applicable sentence. This means that if the parties and the court agree to a particular sentence or sentencing range, it need not fall 'within the box' or comply with otherwise applicable Guidelines rules.").

2015, Hearing Committee report issued in March 2016, Board report issued in July 2016, Respondent suspended pursuant to D.C. Bar R. XI, § 9(g) in October 2016). D.C. Bar R. XI, § 3(c)(1) provides that the Court may suspend a respondent prior to a hearing if the respondent "appears to pose a substantial threat of serious harm to the public." Most respondents facing charges of reckless misappropriation are not suspended during the pendency of the disciplinary matter unless and until the Board recommends disbarment. *See* D.C. Bar R. XI, 9(g)(1) (the Court may suspend a respondent following the Board's recommendation that the respondent be disbarred, suspended with fitness, or suspended for a year or more without fitness).

Our dissenting colleagues disagree, because they believe that three years with fitness would not be justified for this Respondent in this case because his conduct was worse than in other reckless misappropriation cases. We agree that Respondent's agreed-upon conduct is worse than the conduct in *Mensah*, at least in that there was more of it, if not in other ways as well. Respondent engaged in more instances of reckless misappropriation than the respondents in the contested cases *In re Gray*, 224 A.3d 1222 (D.C. 2020) and *In re Ahaghotu*, 75 A.3d 251 (D.C. 2013), both of which resulted in disbarment. But in this negotiated discipline proceeding, we are not bound by the comparability standard that applies in contested cases; rather, we must determine whether the sanction negotiated by Disciplinary Counsel and recommended by the Hearing Committee is *unduly lenient.*

In our view, our dissenting colleagues are simply applying the wrong standard; couched in adherence to *Addams*, they are using their own sense of what sanction would be warranted in a contested case, rather than asking whether, in light of other Court of Appeals cases, the sanction is unjustifiably lenient. In a contested case, we review the sanction *de novo* and analyze which other cases are "comparable." *See* D.C. Bar R. XI, § 9(h)(1) (the Court "shall adopt the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted"); *In re McClure*, 144 A.3d 570, 572 (D.C. 2016) (per curiam); *In re Baber*, 106 A.3d 1072, 1076 (D.C. 2015) (per curiam); *In re Vohra*, 68 A.3d 766, 771 (D.C. 2013). In cases of reckless misappropriation, the comparability analysis

is relatively simple, as disbarment is the presumptive sanction because "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction, unless it appears that the misconduct resulted from nothing more than simple negligence." *Addams*, 579 A.2d at 191.

The sanction analysis in negotiated cases is meaningfully different. In negotiated discipline, we consider only whether the sanction is "justified." *In re Johnson*, 984 A.2d 176 (D.C. 2009) (per curiam), recognizes that a "justified" sanction may be more lenient than the sanction that might have been imposed in a fully-litigated contested case, it just cannot be *unduly* lenient. As *Johnson* observed, "some consideration may be given to what charges might have been brought, but only to ensure that [Disciplinary] Counsel is not offering an *unduly lenient* sanction—the ultimate focus must be on the propriety of the sanction itself." *Id.* at 181 (emphasis added).[7] We agree with the Hearing Committee in one of the earliest negotiated discipline cases that, in making this determination, we must consider whether

> [b]ased on all the facts and circumstances in this record, does it appear likely that Respondent is getting a result substantially more "lenient"

[7] Relying on *Johnson*, the dissent suggests that the majority has carved out an exception to the requirement that each negotiated discipline case be considered on the facts. This in incorrect. This case was considered on the facts. The Hearing Committee concluded, and we agree, that if this were a contested case, Respondent would be disbarred. Thus, the Hearing Committee was fully apprised of and considered the sanction that would have been imposed if this were a contested case. This is all *Johnson* requires. No further review is necessary.

than he would expect if the negotiated discipline were disapproved and [Disciplinary] Counsel proceeded to adjudicate the case?

In re Beane, Bar Docket Nos. 340-07, et al., at 34 (HC Rpt. July 16, 2010), *recommendation approved*, 6 A.3d 261, 262 (D.C. 2010) (per curiam); *see also* Board Rule 17.5(a)(iii). We recognize that the agreed-upon minimum period of suspension[8] here is only sixty percent of the suspensory period if Respondent were disbarred, but as there is no other suspensory period in our system between three years and five years (disbarment), this difference is not "substantially more" or "unduly" lenient.[9]

III. Rejection of this Negotiated Discipline Would Undermine the Purpose of the Discipline System.

The dissent does not explain why the recommended sanction will not serve the interests of the discipline system, which suggests that it is driven by an additional end – punishment. But punishment is not a purpose of our system of discipline, regardless of the conduct of the respondent. *See In re Wilson*, 241 A.3d 309, 312

[8] Because Respondent must prove his fitness to practice, the precise length of his suspension is unknown.

[9] We note that in *In re Guberman*, the Court recognized that the respondent's dishonesty and misrepresentation, which resulted in his disbarment in Maryland, would have resulted in "substantially different discipline" ranging "from a suspension of thirty days to a suspension of three years." 978 A.2d 200, 205, 207 (D.C. 2009). Because *Guberman* was a reciprocal discipline case, applying D.C. Bar R. XI, § 11(c)(4), it did not address, and thus does not contradict, the conclusion we reach here.

The Court has also approached the question differently. In *In re Silva*, the Court imposed a three-year suspension with fitness recommended by the Board, rather than disbarment advocated by Disciplinary Counsel, noting that "[i]n point of fact, the difference between disbarment and a three-year suspension is not so great, for even a disbarred attorney may seek readmission to the Bar after five years." 29 A.3d 924, 928 n.15 (D.C. 2011). Like the other cases cited herein, *Silva* was not addressing the issue currently before the Board and the Court.

(D.C. 2020) (per curiam). Moreover, the dissent somewhat incongruously asserts that Respondent's conduct was so bad that he should not be permitted to remove himself from the practice of law now for a minimum of three years, but rather, should be permitted to continue to practice so that he can be disbarred in the future. We disagree.

Our acceptance of the proposed disposition reflects sound policy as it presents the combined benefits of more quickly removing Respondent from practice while conserving disciplinary resources. The disciplinary system as a whole is better when the disciplinary system's scarce resources (Disciplinary Counsel, Hearing Committees, the Board and the Court) are allocated prudently. If a lawyer who recklessly mishandles client money can be removed from practice relatively quickly, with an admission of misconduct and fewer resources from those involved in the prosecution and adjudication of disciplinary cases, the public is protected sooner, and the discipline system is able to focus on other cases – further protecting the public. We disagree with the dissent that permitting Respondent to petition for reinstatement two years sooner is too high a price to pay for the other benefits present here.

There is another reason to reject the dissent's view: it will have the practical effect of deterring respondents from accepting negotiated discipline in a case of reckless misappropriation. If the Court accepts our recommendation in *In re Mensah*, it could dramatically streamline some of the most time consuming and challenging cases in the disciplinary system: cases of reckless misappropriation. The respondent

almost inevitably argues that the misappropriation was negligent because absent unusual mitigating factors, this is the only way to avoid disbarment. Disciplinary Counsel spends time litigating that issue as a result. Then, hearing committee members, Board members, and judges on the Court spend time parsing the case and the often fine distinctions between negligent and reckless misappropriation, all while the respondent continues to practice law, even where, as is the case here and in *Mensah,* the respondent may be willing to admit to reckless misappropriation in exchange for avoiding the stigma of disbarment and a shorter minimum period before seeking reinstatement. Our recommended rule in *Mensah* can eliminate all of that pointless inefficiency. The dissent's proposed resolution takes those gains away.

If the propriety of a three-year suspension with fitness depends so dramatically on the facts of each case, no reasonable respondent would enter into negotiated discipline unless the facts of their case were virtually identical to those in *Mensah*. When a respondent enters into a negotiated discipline, she executes an affidavit "acknowledg[ing] the truth of the material facts upon which the misconduct described in the accompanying petition for negotiated disposition is predicated." D.C. Bar R. XI, § 12.1(b)(2)(iii). If the negotiated discipline is rejected, that respondent will likely have grave difficulty in meaningfully challenging the agreed-upon facts if there is a later contested hearing because "admissions made by the attorney in the petition or accompanying affidavit, or in the associated hearing," may be used for impeachment, but not as substantive evidence. D.C. Bar R. XI, § 12.1(e). As a practical matter, the distinction between impeachment evidence and substantive

evidence may be illusory. *See, e.g.*, *In re Fitzgerald,* Board Docket. No. 10-BD-057, at 14 (BPR Dec. 31, 2013) (noting that the respondent's effort to disavow admissions made during a negotiated proceeding "suggests that he is willing to play fast and loose with the truth when it serves his own interests"), *recommendation approved where no exceptions filed*, 109 A.3d 619 (D.C. 2014) (per curiam). Without some measure of certainty that negotiated discipline will be successful in a case of reckless misappropriation, a respondent may, in effect, be signing up for her own disbarment.

Particularly in cases involving reckless misappropriation, for respondents to be willing to enter into negotiated discipline they will need a clear expectation that the negotiated discipline will be accepted. Clear expectations come from clear rules. The dissent's approach – where each negotiated discipline is subject to a *de novo* review on its facts to determine degrees of recklessness and blameworthiness – effectively prevents negotiated discipline from being used in cases of reckless misappropriation. Were the dissent to articulate a rule for when negotiated discipline is an unduly lenient sanction for reckless misappropriation, perhaps its position would not create this result. But, by applying the *de novo* review familiar from contested cases, the dissent offers no guidance to Disciplinary Counsel and no guidance to respondents on when negotiated discipline for a reckless misappropriation is appropriate.[10] Particularly when this case has been remanded by

[10] Because of the presumption of disbarment in reckless and intentional misappropriation cases, there is no prior authority to guide the dissent's determination that three years with fitness is unduly lenient here and was not unduly lenient in *Mensah*.

the Court of Appeals for the Board's view, we have an obligation to address the broader practical implications of our views. The dissent fails to do this.

Moreover, we can trust Disciplinary Counsel with this decision because it's not meaningfully different than other decisions we trust Disciplinary Counsel with. Indeed, when it comes to whether a lawyer who needs to show fitness has done so, we already do trust Disciplinary Counsel with that initial determination. The Court permits Disciplinary Counsel, if it agrees that the lawyer has shown that fitness is appropriate, to bypass a hearing and simply tell the Court why it thinks the lawyer should be readmitted.

> Uncontested petitions for reinstatement. A petition for reinstatement by a disbarred attorney or a suspended attorney who is required to prove fitness to practice as a condition of reinstatement, which is uncontested by Disciplinary Counsel following a suitable investigation, may be considered by the Court on the available record and submissions of the parties. In every uncontested matter, Disciplinary Counsel shall submit to the Court a report stating why Disciplinary Counsel is satisfied that the attorney meets the criteria for reinstatement. The Court may grant the petition, deny it, or request a recommendation by the Board concerning reinstatement.

D.C. Bar R. XI, § 16(e).

Whether a petitioner is fit to practice following suspension or disbarment is a highly subjective determination. While Disciplinary Counsel's decision not to contest a petition is subject to review, the Court certainly relies on Disciplinary Counsel to make a judgment about a petitioner's fitness. *See, e.g.*, *In re Boyd*, 238 A.3d 953 (D.C. 2020) (per curiam) (relying on Disciplinary Counsel's report that Petitioner was fit to practice in granting petition for reinstatement, following

respondent's reciprocal suspension for sixty days with fitness in 2013); *In re Brown*, 228 A.3d 141 (D.C. 2020) (per curiam) (same, following disbarment for intentional misappropriation in 2015). It is appropriate to permit Disciplinary Counsel a similar form of judgment on the front end.

IV. The Dissent's Citations to Prior Cases Are Not on Point.

The dissent includes many case cites as it explains why the mitigation in this case was inadequate to support a sanction of three years with fitness. None of them are from cases involving negotiated discipline. None of them wrestle with, or address, the different standard that applies in assessing whether a negotiated sanction is "unduly" lenient.

The dissent also cites *In re Harris-Lindsey*, a case where the Court rejected negotiated discipline when Disciplinary Counsel and Respondent agreed that the conduct showed negligent misappropriation. 19 A.3d 784 (D.C. 2011) (per curiam). Instead, the Court determined that "a serious question exists on the face of the record whether respondent acted negligently, or instead recklessly" when taking funds from a probate estate. *Id.* at 784-85. Recognizing that the record was insufficient to resolve the culpability issue, which was critical to deciding the sanction, the Court determined that a contested hearing, "with its careful attention to issues of credibility," was necessary. *Id.* at 785. In short, *Harris-Lindsey* rejected the negotiated discipline because there was a question whether the respondent would receive a negotiated one-year suspension for conduct that would otherwise warrant disbarment under *Addams*. Here there is no question whether the

stipulated misconduct would warrant disbarment in a contested case, it would. The Court has asked for our views "as to the appropriateness of the recommended sanction" of a three-year suspension with fitness in light of *Addams* and its progeny. Order, *In re Agwumezie*, D.C. App. No. 21-BG-88 (D.C. Feb. 24, 2021). *Harris-Lindsey*, in short, tells us nothing about the question remanded to us.

For all the reasons a negotiated sanction of three years with fitness is appropriate in *Mensah* – particularly that such a sanction protects clients sooner, and it allows more efficient expenditure of disciplinary system resources – the disciplinary system as a whole is better off if negotiated discipline is a viable option for Disciplinary Counsel to pursue in this and other reckless misappropriation cases.

Accordingly, we conclude that these reasons are sufficient to meet the standard in D.C. Bar R. XI, § 12.1 for negotiated discipline cases that the sanction be "justified," and we recommend that the Court approve this petition for negotiated discipline.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Matthew G. Kaiser, Chair

All members of the Board concur in this Report and Recommendation except Vice Chair Pittman, Mr. Hora, and Ms. Blumenthal, who dissent for the reasons set forth in their Separate Statement in Dissent.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

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SEPARATE STATEMENT IN DISSENT

We wrote in a concurring statement in *In re Mensah*, Board Docket No. 19-ND-011 (BPR July 19, 2021), that reckless misappropriation cases may be appropriate for negotiated discipline under certain circumstances, but not in every case. Here, we again write separately to explain why D.C. Bar Rule XI, Section 12.1 and relevant precedent require us to make individual assessments in each case as to whether a negotiated sanction is justified and not unduly lenient.

In this Amended Petition for negotiated discipline, the stipulated facts involve reckless misappropriations as did *Mensah*, but the serious nature of the overall misconduct and the limited mitigating circumstances well distinguish it – sufficiently so that we find that the agreed-upon sanction of a three-year suspension with fitness is unduly lenient.

[1] "Charles C. Agwumezie" is the name associated with D.C. Bar number 990751. Respondent is also known as "Chinedu Charles Agwumezie."

As explained in greater detail below, Respondent, Charles C. Agwumezie, engaged in reckless misappropriation in his handling of entrusted funds for at least three clients in violation of Rule 1.15(a), paid himself more in fees than he represented he would in his settlement statements for at least five other clients, and did not always pay clients' medical providers the amounts reflected in the settlement statements because of "referral fees" he collected that were neither disclosed nor passed on to his clients as credits. Respondent did not keep records related to his trust account and extensively commingled client and personal funds in violation of Rule 1.15(a). He additionally did not provide written fee agreements to clients from whom he received advanced fees in violation of Rule 1.5(b) (written statement of fees), had improper conflicts of interest in two different contexts in violation of Rule 1.7(b)(4) (conflict of interest – professional judgment adversely affected by own interests), and in connection with the disciplinary investigation, violated Rules 8.1(b) (knowingly failing to respond reasonably to Disciplinary Counsel's lawful demands for information) and 8.4(d) (serious interference with the administration of justice).

The question of whether a negotiated sanction is justified requires a fact-specific approach,

> taking into consideration the record as a whole, including the nature of the misconduct, any charges or investigations that Disciplinary Counsel has agreed not to pursue, the strengths or weaknesses of Disciplinary Counsel's evidence, any circumstances in aggravation and mitigation (including respondent's cooperation with Disciplinary Counsel and acceptance of responsibility), and relevant precedent.

Board Rule 17.5(a)(iii); D.C. Bar R. XI, § 12.1(b) (documentation of negotiated discipline) & (c) (the Hearing Committee review). Rule XI, Section 12.1 requires that a petition for negotiated discipline include "[a] stipulation of facts and charges, . . . and [a]n agreed upon sanction, with a statement of relevant precedent and any circumstances in aggravation or mitigation of sanction that the parties agree should be considered." D.C. Bar R. XI, § 12.1(b)(ii)-(iv). The Rule explains that a hearing committee may recommend an approval of a petition for negotiated disposition only after it finds that (in addition to respondent's knowing and voluntary agreements and the sanction being justified): "*[t]he facts set forth in the petition or as shown at the hearing support the admission of misconduct and the agreed upon sanction*." D.C. Bar R. XI, § 12.1(c)(2) (emphases added). The majority, however, proposes deferring a consideration of the facts and circumstances set forth in this Amended Petition to the reinstatement hearing because, in their view, a sanction of a three-year suspension with fitness is presumptively justified and not unduly lenient for every negotiated reckless misappropriation case. In our view, such a detour from the specific requirements of Rule XI, Section 12.1(c) would require a Rule amendment or a decision from the *en banc* Court carving out an exception from the practice of considering each negotiated case on its own merits.[2] When Rule XI, Section 12.1

[2] In *In re Harris-Lindsey*, 19 A.3d 784 (D.C. 2011) (per curiam), the Court deferred consideration of the legal question of whether negotiated discipline should be "presumptively unavailable" in reckless misappropriation cases: "Our decision rests on the insufficiency of the record before the Hearing Committee to permit a satisfactory determination of respondent's culpability, and our judgment that only a fact-finding proceeding, with its careful attention to issues of credibility, can resolve that issue in this case." *Id.*. at 785. In its Report to the Court, the Board had suggested that "[c]onsistent with [*In re Addams*, 579 A.2d 190 (D.C. 1990)] absent extraordinary circumstances, the parties should not be free to negotiate a sanction other than disbarment in clear cases of reckless

was adopted in 2008, *Addams* had already been decided, yet no exception was carved out explaining a different approach for determining what constitutes a justified and not unduly lenient sanction in reckless misappropriation cases.[3]

It is possible to conduct the same type of analysis here that is conducted in *every* other negotiated discipline case. Contrary to the majority's characterization of our argument, this does not require distinguishing between different "degrees of recklessness" (Majority Report at 15), but, instead, requires examining whether the negotiated resolution is unduly lenient in light of the "facts set forth in the petition." D.C. Bar R. XI, § 12.1(c)(2). It is not surprising that we disagree with the Hearing Committee's conclusion on the justifiability of the sanction in this matter because in its review of the Amended Petition, it did not adequately account for the seriousness of the misconduct or the multiple aggravating factors described in the stipulated facts. *See, e.g.*, *In re Tun*, Bar Docket No. 273-06, at 14 (BPR Nov. 24, 2009) (on remand from the Court, the Board disagreeing with the hearing committee by finding that the proposed sanction did not comport with Rule XI, Section 12.1 in light of the

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or intentional misappropriation." *In re Harris-Lindsey*, Bar Docket No. 384-02, at 8 (BPR July 1, 2010) (Board Report on Petition for Negotiated Discipline). That position was not adopted by the Court, and we support the Board's contrary decision in *Mensah* that reckless misappropriation cases should not be *excluded* from negotiated discipline. Our reading of Rule XI, Section 12.1 requires a case-by-case determination of whether the agreed-upon sanction is "justified" and not "unduly lenient," *see In re Johnson*, 984 A.2d 176, 181 (D.C. 2009), and any standard for reviewing petitions for negotiated discipline that avoids such an analysis is contrary to the meaning of the Rule.

[3] The majority asserts that we are "applying the wrong standard." *See* Majority Report at 10. We are applying the governing unduly lenient standard, whereas the majority's position is that if the parties enter into negotiated discipline for a reckless misappropriation, it can *never* be unduly lenient if the sanction is three years' suspension with fitness. Their position defeats the purpose of a hearing committee's or the Court's involvement in approving the agreed-upon sanction.

"volume of false vouchers and the fact that the practice continued over four years"). In *Tun*, the Court noted that it had not accepted a prior hearing committee's approval of a negotiated sanction of a nine-month suspension because the agreed upon sanction was "an inadequate reflection of 'the number of violations'"[4] and the aggravating circumstances in the stipulated facts ("'the extended time period during which [the violations] took place'"). *In re Tun*, 26 A.3d 313, 314 n.2 (D.C. 2011) (per curiam) (alteration in original) (quoting Board Report). We find that similar reasons exist here for rejecting the Amended Petition.

An approach that fails to consider a hearing committee's important role in differentiating the seriousness of the misconduct (*e.g.*, number of reckless misappropriations over a protracted period and additional rule violations, the existence of significant aggravating factors and limited mitigating factors) potentially gives Disciplinary Counsel an unfettered role because a negotiated three-year's suspension with fitness would always be approved as justified and not unduly lenient. Even if the majority's policy arguments had merit, the majority's proposed default sanction of a three-year suspension with fitness for reckless misappropriation cases brought through negotiated discipline is inconsistent with current negotiated case law and Rule XI, Section 12.1. *See also* Board Rule 17.5(a)(iii).

[4] The Court noted that Tun had violated Rules 1.5(a) & (f), 3.3(a)(1), 8.4(c), and 8.4(d). *Tun*, 26 A.3d at 314 n.1. In Tun's second petition, the agreed-upon sanction of an 18-month suspension, *inter alia*, doubled the ordered length of suspension from the earlier petition, and the Court accepted the hearing committee's recommendation approving the sanction of the longer suspension. *Id*. at 314-15.

We also disagree with the majority that "no reasonable respondent would enter into negotiated discipline" in a reckless misappropriation case unless they were certain that it would be approved. *See* Majority Report at 14. The first respondents to agree to negotiated discipline did so when the Court had not yet developed the standards for approving petitions through case law. Indeed, of the twelve petitions for negotiated discipline initially filed in 2008-09[5] (immediately following the adoption of the negotiated discipline rules), five were rejected[6], yet respondents have continued to attempt to negotiate a disposition.

A respondent who faces a possible contested proceeding for reckless misappropriation will weigh the evidence and decide if it is likely that Disciplinary Counsel's evidence is sufficiently clear and convincing, and the respondent will then consider whether he or she would come out ahead (lesser sanction, saving of litigation costs, expeditious resolution, etc.) with a negotiated sanction. Every respondent who enters into negotiated discipline risks the same possibility of the

[5] This number excludes a petition that was filed but withdrawn before a limited hearing could be held. *See* Order, *In re Fox*, Bar Docket Nos. 226-00 *et al*. (Hearing Committee granting motion to withdraw petition on Nov. 24, 2009).

[6] *See* Order, *In re Fitzgerald*, No. 11-BG-717 (D.C. Sep. 16, 2011) (per curiam) (Court adopting the Board's recommendation to reject the petition for failure to include critical mitigating facts); *Harris-Lindsey*, 19 A.3d at 784 (Court order rejecting the petition due to a "serious question . . . on the face of the record" whether the misappropriation at issue was negligent or reckless); Order, *In re Tun*, No. 09-BG-804 (D.C. Jan. 21, 2010) (per curiam) (Court adopting the Board's recommendation to reject the petition because the sanction did not adequately reflect the seriousness of the misconduct); Order, *In re Beane*, No. 09-BG-862 (D.C. Jan. 21, 2010) (per curiam) (Court adopting the Board's recommendation to reject the petition due to an inadequate statement of promises). *In re Butler*, Bar Docket Nos. 2007-311 *et al.*, at 2 (HC Rpt. May 1, 2009) was rejected by a hearing committee because the agreed upon sanction was "not justified." The filings and proceedings thereinafter involving Butler (including a consent disbarment) are of no moment here.

proposed sanction being rejected and then having a sworn affidavit of admissions that can be used for impeachment in a subsequent contested proceeding.[7] Respondents who face a presumptive sanction of disbarment in a contested proceeding may decide that the risk of admitting to reckless misappropriation is worth it, especially if the evidence is difficult to dispute.[8] If the Court agrees that negotiated discipline should be available in cases of reckless misappropriation, future respondents will be able to gauge the risks of stipulating to reckless misappropriation by reviewing the Court's opinions in this case, *Mensah*, and future cases. The majority points out Respondent's "willingness to immediately accept a sanction" (Majority Report at 2), but that willingness is not unique. It is an inherent aspect of *every* negotiated discipline and for which a respondent obtains a departure from the strict comparability standard applied in contested cases; it has never, however, guaranteed a respondent the benefit of an agreed-upon sanction.

Accordingly, we describe below why the seriousness of the overall misconduct and the additional Rule violations lead us to conclude that the agreed-upon sanction of a three-year suspension with fitness is unduly lenient in this case.

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[7] In many ways, this is no different than when a judge does not approve a plea agreement in a criminal proceeding. It is a risk that a criminal defendant must take in order to get a potentially lesser sentence in exchange for admitting wrongdoing.

[8] In addition to the benefit of a significantly shorter suspension period, many respondents may wish to avoid the stigma associated with disbarment and pursue a negotiated disposition when their conduct involves reckless misappropriation. *See In re Brown*, Bar Docket Nos. 318-00 & 383-00, at 9 (BPR Nov. 30, 2001) ("[T]here is a significant difference between the level of opprobrium that attaches to a lawyer who has been disbarred, on the one hand, and to a lawyer who has been suspended, on the other"), *recommendation adopted*, 797 A.2d 1232 (D.C. 2002) (per curiam).

In addition, although the parties agree that mitigating circumstances exist, we conclude that the stipulated facts are not sufficient to support a finding that mitigating factors outweigh the apparent aggravating factors.[9]

I. The Stipulated Facts Show the Very Serious Nature of the Violations Beyond the Three Reckless Misappropriations.

A hearing committee's discretion to make findings in a negotiated discipline matter is confined to ascertaining that "the facts stated in the petition or demonstrated at the hearing support the admission of misconduct," and its ability to draw conclusions of law is limited to determining that the "[agreed upon] sanction is justified." *Johnson*, 984 A.2d at 181 (citing D.C. Bar R. XI, § 12.1(c)). In this instance, the stipulated facts show the seriousness of the nature of the violations, the multiple Rule violations that were often repeated, the numerous clients (more than ten) affected by Respondent's misconduct, and the fact that the misconduct was difficult to detect due to Respondent's lack of forthrightness.

A. Respondent's Violations of Rule 1.15(a), 1.5(b) and 1.7(b)(4) for His Handling of Client Funds and His Trust Account

In June 2014, Respondent was the sole signatory on a D.C. IOLTA or trust account for his law firm, The Cava Legal Group (of which he was the only member), at Wells Fargo. Respondent concedes that he did not maintain a general ledger or

[9] As in *Mensah*, Disciplinary Counsel and Respondent agree that the extraordinary mitigating circumstances necessary to overcome the presumptive sanction of disbarment, if the reckless misappropriations were proven, do not exist in this matter. *See* Amended Petition at 22 (citing *In re Bach*, 966 A.2d 350, 366 (D.C. 2009)). However, as explained in our Concurrence in *Mensah*, Mensah's compelling mitigating circumstances, absence of aggravating circumstances, and limited misconduct justify a negotiated discipline sanction of a three-year suspension with fitness. *See Mensah*, Board Docket No. 19-ND-011, at 5-6 (BPR July 19, 2021) (Concurring Statement).

client ledgers for funds deposited or withdrawn for at least a two-year period (March 2017 to March 2019).

Respondent committed at least three reckless misappropriations involving clients Leo, Kebede, and Sijuwade. He repeatedly allowed his trust account balance to fall below the amount held in trust for clients and third parties, he failed to keep accurate records to track settlement proceeds, he received at least two overdraft notices, and he moved funds between his trust and personal accounts indiscriminately, resulting in repeated commingling of entrusted and personal funds. *See In re Abbey*, 169 A.3d 865, 872 (D.C. 2017) (hallmarks of reckless misappropriation include "indiscriminate commingling"; "a complete failure to track settlement proceeds"; "total disregard of the [trust account]" "resulting in a repeated overdraft condition"; "indiscriminate movement of monies between accounts"; and disregarding "inquiries concerning the status of funds." (citation omitted)). For this conduct, he admits that he violated Rule 1.15(a) in multiple matters. Respondent further acknowledges that he did not provide written fee agreements to clients from whom he received advanced fees that he deposited in his trust account. For this conduct, he admits that he violated Rule 1.5(b).

The Amended Petition describes *additional misconduct* related to his handling of entrusted funds beyond the three reckless misappropriations, commingling, record-keeping, and written fee agreement violations. For instance, Respondent took larger fees for himself than reflected in the settlement statements that were provided to his clients (*e.g.*, taking $2,800 instead of $2,665 in fees and costs for the Onuoha

settlement; paying himself $14,850 instead of the $12,180 in the Cole, Adetobi, and Taylor settlement; taking $2,800 instead of $2,200 for the Mendez settlement; paying himself $9,100 in fees instead of $5,445 in the Dabankah settlement).[10] HC Rpt. at 4-6. He similarly did not always pay medical providers the amounts reflected in the settlement statements approved by his clients (*e.g.*, paying the medical providers $200 less than reflected in the Ponce settlement statement and paying the medical providers $300 less than reflected in the Oba settlement statement). The reduced payments to medical providers were collected by Respondent as his "referral fees" but these fees were never disclosed to or approved by his clients. For the self-payment of referral fees, Respondent admits that he violated Rule 1.7(b)(4). *See infra* at 12.

B. Respondent's Violations of Rule 8.1(b) and 8.4(d) for Not Fully Cooperating During the Initial Stages of the Investigation

The parties agree that Respondent violated Rule 8.1(b) (knowingly failing to respond reasonably to Disciplinary Counsel's lawful demands for information). As evidence supporting that charge, the Amended Petition includes the following stipulated facts: (1) during Disciplinary Counsel's investigation, Respondent did not

[10] The excess attorney fees and the reduced payments to medical providers are described in detail in the stipulated facts but not charged as dishonesty in violation of Rule 8.4(c). *See, e.g.*, *In re Ukwu*, Bar Docket No. 68-06 at 22, 28 (BPR May 13, 2009) (finding dishonesty where respondent did not advise client that he "took a sum greater than shown on that [settlement] statement or that he did not pay the medical expenses [as] shown on the statement."), *recommendation adopted where no exceptions filed*, 980 A.2d 1227 (D.C. 2009) (per curiam). We consider the conduct only in the context of addressing the "seriousness of the conduct" and the "prejudice to the client" sanction factors. *See, e.g.*, *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)) (factors the Court considers in determining the appropriate sanction)).

provide complete records or information explaining many of his deposits and withdrawals reflected in his trust account bank records; (2) he responded to some inquiries by stating he would provide further information but then failed to do so; (3) he "gave conflicting stories" when explaining a $3,500 withdrawal from his trust account; (4) he claimed earned fees were the source of funds that he used for advancing funds and paying his personal expenses, but had no contemporaneous records to support this claim; and (5) he never identified the account in which he deposited a $2,000 payment he received on behalf of a client, which he took as part of his fees. In general, Respondent's responses to Disciplinary Counsel's inquiries and subpoenas "were incomplete and often raised additional questions." HC Rpt. at 4, 13-14. Notably, Respondent did not respond to Disciplinary Counsel's question about whether he maintained client ledgers until months had passed, and when asked about the "referral fees" he was paid from medical providers, he failed to respond to Disciplinary Counsel's request for additional information and documents about those funds. *Id*. at 13.

Because of Respondent's failure to fully cooperate during the investigation and his incomplete and inconsistent responses to Disciplinary Counsel, the parties both agree that "the expenditure of additional and considerable resources" was required by the Office of Disciplinary Counsel and the completion of the investigation was ultimately delayed. HC Rpt. at 14. And, as a result, Respondent seriously interfered with the administration of justice in violation of Rule 8.4(d).

C. Respondent's Violations of Rule 1.7(b)(4) Related to Undisclosed and Unapproved "Referral Fees" from Medical Providers and His Undisclosed Private Employment When a Federal Employee.

The parties agree that Respondent engaged in impermissible conflicts of interest when he (1) as discussed above, entered into agreements with his clients' medical providers to receive some of the money deducted from the clients' share of the personal injury settlement without disclosing the agreements to his clients or seeking their informed consent and (2) assisted clients in preparing INS forms while he was a full-time employee with the federal government. *See* HC Rpt. at 11. In regard to the latter of conflict of interest, as a federal employee with the U.S. Patent and Trademark Office, Respondent was barred from acting as counsel for others in matters before federal agencies. *Id*. at 19.

II. The Stipulated Facts Do Not Support a Finding of Mitigating Factors Sufficient to Make the Agreed-Upon Sanction Not Unduly Lenient.

Pursuant to D.C. Bar Rule XI, Section 12.1(c) and Board Rule 17.5(a), a hearing committee must find that "[t]he sanction agreed upon is justified taking into consideration the record as a whole, including . . . any circumstances in aggravation and mitigation that appear in the investigative file, and relevant precedent." The assessment of whether a sanction is justified may involve '"not only an examination of relevant precedent but [also] an evaluation of subtle, as well as obvious, strengths and weaknesses of the case, including issues with . . . aggravating and mitigating circumstances, and the respondent's disciplinary contacts."' *In re Beane*, Bar Docket Nos. 340-07, et al., at 6 (BPR Dec. 22, 2009) ("*Beane I*") (quoting Disciplinary Counsel), *recommendation adopted*, Order, No. 09-BG-862 (D.C. Jan. 21, 2010)).

As noted above, in *Addams*, the Court explained that "as a matter of course, the mitigating factors of the usual sort . . . will suffice to overcome the presumption of disbarment only if they are especially strong and, where there are aggravating factors, they substantially outweigh any aggravating factors as well." *Addams*, 579 A.2d at 191 (citing *In re Reback*, 513 A.2d 226, 233 (D.C. 1986) (en banc)). Disciplinary Counsel and Respondent agree that the mitigating factors here are not sufficiently extraordinary to overcome the presumption of disbarment if the matter were to proceed to a contested hearing, but both suggest that they are of the "usual sort." We, however, find that the stipulated facts do not provide evidence of mitigating factors of even the "usual sort." In contrast to the mitigating factors in *Mensah*, which involved two reckless misappropriations he self-reported and fewer Rule violations (Rules 1.15(a) and 1.5(e) impacting only two clients), here, the record also demonstrates that Respondent did not completely cooperate with the disciplinary investigation. Moreover, significant aggravating factors are apparent on the face of this record which were not applicable in *Mensah*.[11]

Despite the stipulated facts related to the lack of cooperation, discussed above, and the conceded violations of Rules 8.1(b) and 8.4(d), the parties include

[11] The majority comments that the criminal justice system "has long and routinely recognized substantial mitigation in acceptance of responsibility" (Majority Report at 9), but the majority fails to address the stipulated facts related to Respondent's violations of Rules 8.4(d) (serious interference with the administration of justice) and 8.1(b) (knowingly failing to respond reasonably to Disciplinary Counsel's lawful demands for information) in connection with Disciplinary Counsel's investigation of the underlying misconduct.

Respondent's "cooperation" as a mitigating factor. Yet, the internal inconsistency is apparent in the Amended Petition itself:

> Although Respondent was not completely cooperative during the investigation, he responded to numerous inquiries from Disciplinary Counsel. He also provided substantial records, although not complete records, which he admitted he did not maintain at the time of the misconduct. Respondent has acknowledged that he did not respond to further inquiries after agreeing to do so, but says he does not have any further information or documents to provide.

Amended Petition at 21 ("Mitigating Circumstances").

We also question the parties' agreement that it is a factor in mitigation of sanction if the reckless misappropriations "were temporary takings." Amended Petition at 21 (Mitigating Circumstances). The Court has not distinguished temporary takings as a mitigating factor in misappropriation cases. *See In re Gray*, 224 A.3d 1222, 1229 (D.C. 2020) (per curiam) ("[E]ven temporary unauthorized use for the lawyer's own purposes is misappropriation, ..." "It does not matter that the lawyer has sufficient funds on hand to pay the money back, or even whether the lawyer replenishes the trust account with his own funds without the client finding out that the money was missing." (citation omitted)).

We note that the parties state as a mitigating factor that Disciplinary Counsel could not prove that misappropriated funds had not been returned, and *not* that Respondent actually had reimbursed his clients or third parties the amounts owed to them. *See* Amended Petition at 21 (Mitigating Circumstances). We also are unpersuaded by the proposed mitigating factor that "no client or third party ever complained about Respondent," where it is undisputed that Respondent did not

disclose either his retention of medical "referral fees" or his fees taken in amounts in excess of that approved by clients in the settlement statements. *Id*. at 21-22. Clients logically would have assumed that the settlement statements accurately reflected the amounts that medical providers were paid for their medical bills and the amounts Respondent took as his fees, and, therefore, have no basis to complain. *See Ukwu*, Bar Docket No. 68-06, at 22 (Board Report May 13, 2009) (finding dishonesty where respondent failed to advise clients that the settlement statements were, in fact, not accurate). While, here, Respondent's collection of "referral fees" from medical providers and excess payments for his fees were less egregious than what occurred in *Ukwu*, the absence of prior complaints from clients should not be treated as a mitigating factor when Respondent admittedly never disclosed the discrepancies to his clients. *See In re Lee*, 95 A.3d 66, 77 (D.C. 2014) (per curiam) (the fact it was "not the client that was upset" is not a mitigating factor in misappropriation cases).

In contrast with the Hearing Committee Report in *Mensah*, we cannot ignore the fact that, here, neither the Amended Petition nor the Report and Recommendation includes a stipulation that no aggravating factors exist or ascribe the absence of aggravating factors as a factor to be considered in mitigation. *Compare In re Mensah*, Board Docket No. 19-ND-011, at 8 (¶ 15), 16 (HC Rpt. Sept. 17, 2020), *with In re Agwumezie*, Board Docket No. 20-ND-005, at 16 (¶ 13) (HC Rpt. Feb. 5, 2021). This omission does not appear to be inadvertent as the stipulated facts well support a finding, as discussed above, of multiple aggravating

factors: (1) the misconduct is serious and repeated (at least three reckless misappropriations, multiple trust account violations, and misconduct related to the retention of referral fees and attorney fees that were undisclosed in settlement statements); (2) a large number of clients were affected by the misconduct (more than ten identified in the stipulated facts); (3) Respondent's lack of forthrightness with his clients and employer made the misconduct harder to detect, *see, e.g.*, *In re Howes*, 52 A.3d 1, 16 (D.C. 2012), and (4) his additional misconduct in violating Rules 1.5(b), 1.7(b)(4), 8.1(b) and 8.4(d). Each of these aggravating factors are apparent on the face of the record, but the Hearing Committee failed to account for them. *See, e.g.*, *In re Bailey*, 146 A.3d 384 (D.C. 2016) (per curiam) (Court finding no error in a hearing committee's recommended approval of the negotiated discipline of a two-year suspension with fitness for negligent misappropriation involving three clients upon a full consideration of both the aggravating and mitigating factors). Although Respondent acknowledged his wrongful conduct in the negotiated proceedings and has no prior disciplinary history, those two factors alone are not sufficient, in our mind, to suggest that the agreed-upon sanction is not unduly lenient.

While we decided in *Mensah* that extraordinary mitigating circumstances are not required to warrant a sanction less than disbarment in the context of negotiated discipline, here, the stipulated facts lead us to conclude that the serious nature of the violations and the apparent aggravating factors make this particular reckless misappropriation case inappropriate for negotiated discipline. The majority declines

to address the nature of the misconduct but, instead, focuses its analysis of the justifiability of the sanction on the question of whether a fitness requirement is sufficient to protect the public. *See* Majority Report at 4-6.[12] Fitness can be a significant bar to re-entry to the practice of law, but it is not unsurmountable, even when a disbarred attorney seeks to resume the practice of law. *See, e.g.*, *In re Howes*, 160 A.3d 509 (D.C. 2017) (per curiam) (prosecutor who violated Rules 3.3(a), 3.4(c), 3.8(e), 8.4(a), 8.4(b), 8.4(c), and 8.4(d) successfully demonstrated his fitness to resume the practice of law after Court's disbarment for "disregard for the laws of our jurisdiction affect[ing] the liberty interests of many and the safety of our larger community," *see Howes*, 52 A.3d at 25). A lengthy suspension also serves to protect the public, and the additional two years of suspension from a disbarment (as opposed to the proposed negotiated three-year suspension) is justified where a respondent has engaged in at least three reckless misappropriations, multiple Rule violations affecting several clients, and conduct involving aggravating circumstances that outweigh the mitigating circumstances. *Cf*. *In re Tun*, Bar Docket No. 273-06, at 14 (recommending the rejection of a nine-month negotiated discipline but finding that

[12] The majority additionally relies on the notion that an earlier suspension through negotiated discipline (opposed to a later disbarment through a Court opinion) better protects the public. Majority Report at 7-8, & n.6. But this may be overstating the benefit and the risk. There will always be a delay between the misappropriation and the sanction because Disciplinary Counsel must fully investigate the matter. For example, the misappropriation in *Mensah* occurred more than three years ago, and, here, Respondent admittedly did not maintain any ledger for his trust fund starting in March 2017, and his three reckless misappropriations occurred approximately three years ago. It is important to recognize that additional misconduct by a respondent while disciplinary charges are pending is not ignored, and procedures already exist that permit Disciplinary Counsel to file amended Specification of Charges or new charges if a respondent continues to violate the Rules of Professional Conduct. *See, e.g*., Board Rule 7.1 & 7.21.

an eighteen-month suspension would be justified in any modified petition); *Tun*, 26 A.3d 313 (Court subsequently approving the amended petition for negotiated discipline). If it were true that fitness was all that was needed to protect the public, the separate sanction of disbarment would not exist.[13]

Finally, fitness alone does not suffice to "maintain the integrity of the profession," *Reback*, 513 A.2d at 231, which is an important purpose of lawyer discipline that must be upheld, even if we agreed that a fitness requirement might adequately protect the public. *See, e.g.*, *Addams*, 579 A.2d at 196 ("[T]his 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."). Treating all reckless misappropriation cases the same, as long as Disciplinary Counsel agrees to proceed through negotiated discipline, might risk a public perception of favoritism or an overly tolerant attitude toward conversion of client funds that the Court sought to avoid in *Addams*. *Id.* at 193-94; *see also id.* at 197 (summarizing approvingly a New Jersey opinion finding that "neither cooperation with the disciplinary body

[13] Contrary to the majority's characterization of our argument, our dissent is based on our view of what is required by D.C. Bar Rule XI and the Court's precedent, not a desire to "punish" Respondent. The seriousness of the stipulated conduct and the existence of aggravating circumstances often warrant a more severe sanction, not because of a desire to punish but to ensure that the negotiated sanction is not unduly lenient. *See, e.g.*, Order, *In re Cappell*, No. 19-BG-135 (D.C. Mar. 12, 2019) (Court finding the proposed discipline of a ninety-day suspension with all but thirty-days stayed in favor of one-year probation to be "too lenient based upon Respondent's disciplinary history and the nature of the current misconduct" and remanding for "a determination [of] whether a fitness requirement should be imposed."); *see also In re Murdter*, 131 A.3d 355, 357-58 (D.C. 2016) (per curiam) ("Disciplinary Counsel is legitimately concerned with not 'punishing' attorneys who are genuinely remorseful and committed to remediation, but that concern cannot be at the expense of deterring a lawyer's gross indifference, as exemplified here, to duties owed both clients and the court.").

(which is already required by the ethical rules) nor contrition is sufficient to put at risk 'the continued confidence of the public in the integrity of the bar and the judiciary'" (quoting *In re Wilson*, 409 A.2d 1153, 1156-57 (N.J. 1979))).

The majority also heavily relies on the benefits to the disciplinary system of allowing negotiated discipline with automatic three-year suspensions with fitness for all reckless misappropriation cases. *See* Majority Report at 13 (noting the reduced burden on Hearing Committees, the Board, and Court). And while we do not disagree that there are benefits in saved resources with such automation, as we have already noted, the Rules and precedent do not allow for such shortcuts. The Hearing Committee and the Court must conduct the difficult analysis required to determine if a sanction is justified. *See* D.C. Bar R. XI, § 12.1(c) & (d); Board Rule 17.5(a)(iii).

Finally, we disagree with the majority's statement that "[i]t is highly unlikely that any lawyer will find the difference between [a three-year suspension with fitness and disbarment] to be so different as to lose its deterrent effect." Majority Report at 7. The stigma of a sanction of disbarment has a greater deterrent effect – a fact the Court has recognized in misappropriation and flagrant dishonesty cases. *See, e.g.*, *In re White*, 11 A.3d 1226, 1233 (D.C. 2011) (per curiam); *In re Bach*, 966 A.2d 350, 351-52 (D.C. 2009). The difference in sanction between a lengthy suspension with fitness and disbarment has warranted the Court's attention in comparing serious dishonesty with flagrant dishonesty cases. *See, e.g.*, *In re Daniel*, 11 A.3d 291, 301 (D.C. 2011) (three-year suspension with fitness for serious dishonesty that "d[id] not reach the level of misconduct of attorneys whom [the Court] ha[s] disbarred."

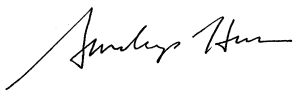
(citation omitted)); *In re Pennington*, 921 A.2d 135, 141 (D.C. 2007) (disbarment reserved for quasi-criminal misconduct that reflects a "continuing and pervasive indifference to the obligations of honesty in the judicial system"). For obvious reasons, an attorney would want to be treated as a suspended rather than a disbarred attorney. Given the stigma of disbarment and its greater deterrent effect, we do not agree with the majority's claim that "[t]he only lenity in the agreed-upon sanction is that Respondent will be eligible to make his case for reinstatement two years sooner . . . ." Majority Report at 3.

Accordingly, notwithstanding the deference afforded to Disciplinary Counsel's judgment by D.C. Bar Rule XI, Section 12.1 in negotiated matters, the serious nature of the overall stipulated misconduct and the insufficiency of the purported mitigating circumstances lead us to recommend that the Court not approve the Amended Petition. The number of Rule violations (including the number of affected clients), among the other aggravating factors put this negotiated discipline in an entirely different level than the stipulated facts in *Mensah*, which involved fewer Rule violations, misconduct affecting only two clients who were made whole upon respondent's discovery of the misappropriations, a respondent who "has been entirely forthcoming and cooperative," and the absence of any aggravating factors. *Mensah*, Board Docket No. 19-ND-011, at 16 (HC Rpt. Sept. 17, 2020); *see id*. at 2 (¶ 3), 8-9 (¶¶ 15, 16).

"Anyone who looks at the public record, including the complainant, should be able to understand from the Petition and the Hearing Committee's report the

events that constituted misconduct and the basis for the conclusion that the agreed sanction adequately protects the courts, the public and the profession." *In re Fitzgerald*, Board Docket No. 11-ND-001, at 6-7 (BPR July 29, 2011) (the Court must have all of the information necessary to determine whether a proposed sanction is justified), *recommendation adopted*, Order, No. 11-BG-717 (D.C. Sept. 16, 2011). Although we sympathize with the majority's concern about efficiencies and limited court resources, the Amended Petition does not establish that a sanction of a three-year suspension with a fitness requirement is justified and not unduly lenient given the stipulated misconduct and the limited mitigating circumstances. *See Addams*, 579 A.2d at 195 ("The circumstances [where disbarment will not be the appropriate discipline] are likely to be limited . . . it must be clear that giving effect to mitigating circumstances is consistent with protection of the public and preservation of public confidence in the legal profession.").

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Sundeep Hora

Vice Chair Pittman and Ms. Blumenthal join this Separate Statement.