THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of:	:	
	:	
RACHAEL MOSHMAN,	:	
	:	Board Docket No. 21-ND-003
Respondent.	:	Disciplinary Docket No. 2017-D211
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 980349)	:	

REPORT AND RECOMMENDATION
OF HEARING COMMITTEE NUMBER TWO
APPROVING PETITION FOR NEGOTIATED DISCIPLINE

I. PROCEDURAL HISTORY

This matter came before Hearing Committee Number Two on December 14, 2021, for a limited hearing on a Revised Petition for Negotiated Discipline (the "Petition"). The Office of Disciplinary Counsel was represented by Assistant Disciplinary Counsel Jerri Dunston. Respondent, Rachael Moshman, was represented by Abraham Blitzer.

The Hearing Committee has carefully considered the Petition for Negotiated Discipline signed by Disciplinary Counsel, Respondent, and Respondent's counsel, the supporting affidavit submitted by Respondent (the "Affidavit"), and the representations during the limited hearing made by Respondent, Respondent's counsel, and Disciplinary Counsel. The Hearing Committee also has fully considered the Chair's *in camera* review of Disciplinary Counsel's files and records

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

and *ex parte* communications with Disciplinary Counsel. For the reasons set forth below, we approve the Petition, find the negotiated discipline of a seven-month suspension, with thirty days stayed in favor of one year of probation with conditions, is justified and recommend that it be imposed by the Court.

II. FINDINGS PURSUANT TO D.C. BAR R. XI, § 12.1(c) AND BOARD RULE 17.5

The Hearing Committee, after full and careful consideration, finds that:

1. The Petition and Affidavit are full, complete, and in proper order.

2. Respondent is aware that there is currently pending against her an investigation into allegations of misconduct. Tr. 18-19[1]; Affidavit ¶ 2.

3. The allegations that were brought to the attention of Disciplinary Counsel were that, after being appointed as a Conservator for an incapacitated adult ward, Respondent misappropriated funds from the Ward and otherwise mishandled the Ward's estate. Petition at 1-2.

4. Respondent has freely and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true. Tr. 11-12, 23; Affidavit ¶ 6. Specifically, Respondent acknowledges that:

> (1) Respondent Rachel A. Moshman is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on April 14, 2008 and assigned Bar Number 980349. Respondent is also admitted to practice, but inactive, in Virginia and Maryland.
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> (2) On April 2, 2012, a petition was filed for the appointment of a conservator and guardian for Inza Coleman, an incapacitated elderly resident of the District of Columbia. On May 24, 2012, the District of

[1] "Tr." Refers to the transcript of the limited hearing held on December 14, 2021. We note that this transcript is incorrectly dated December 15, 2021.

Columbia Superior Court, Probate Division appointed Respondent as the Special Conservator for Ms. Coleman pending further proceedings. On June 14, 2012, Respondent was appointed as the Permanent Conservator for Ms. Coleman. Ms. Coleman's daughter was appointed as Guardian.

(3) Respondent was removed as Conservator by court order dated February 5, 2016. By that same order, a Successor Conservator was appointed.

(4) On March 5, 2014, Respondent wrote Check No. 1033 on her Ward's PNC Checking Account ending in X6433 in the amount of $2,437.00 to pay for Respondent's rent. Respondent kept a bag that contained checkbooks, including the Ward's, her own, and her family's checkbooks, and wrote her rent check on the Ward's checkbook by mistake. Respondent immediately replaced the funds on May 16, 2014 when she discovered the erroneous payment while writing the next check on the Ward's account. Respondent also stopped keeping her Ward's checkbook in the same bag as her personal checkbooks.

(5) In August 2013, Respondent secured a payment of $184,000 on her Ward's behalf. The payment jeopardized the Ward's ability to continue to qualify for Medicaid to pay for her stay in the nursing home where she resided. Respondent undertook to spend down some of the Ward's assets so that she could re-qualify. Such efforts included paying off the mortgage on the Ward's home and establishing a special needs trust. Respondent also decided to seek reimbursement for funds she had provided to the Ward's guardian to pay for outings and trips with the Ward, or for other expenses of the Ward when there was insufficient time to retrieve money from the Ward's account. Prior to 2014, Respondent had never sought reimbursement for these expenditures.

(6) On September 23, 2014, Respondent wrote herself a check, Check No. 1043, on her Ward's PNC Checking Account X6433 for $2,627.50 as reimbursement for expenses she paid on behalf of the Ward. Part of the reimbursement, as set forth in the memo line of the check, was for "1/6/14 – locksmith services."

(7) Respondent's records did not reflect and she did not remember that her assistant had paid the locksmith to change the locks on the Ward's home so that the gas company could obtain access, and

that Respondent had written Check No. 1028 on her Ward's PNC Checking Account No. X6433 on January 14, 2014 to reimburse her assistant. Respondent over-reimbursed herself $523.58 for the locksmith.

(8) When she was appointed as Conservator in May 2012, Respondent was provided with a check for $794.91 that The Hartford Company had already sent to the Ward, Ms. Coleman, dated March 14, 2012. Respondent did not deposit the check in the Ward's checking account because she wanted to confirm the circumstances under which the check was issued. Instead, she placed the check in [her] client file. The check remained in Respondent's client file[] until she was removed as the Ward's Conservator in 2016. By then, the check had become stale and was not honored when the Successor Conservator finally presented it for payment. Ultimately the Successor Conservator recovered the funds.

(9) Respondent received or obtained a check from Bank of America payable to the Ward dated March 27, 2014 for $5,855.00. Respondent did not deposit the check in the Ward's checking account. Instead, believing that the check could be deposited at a later date and because the $184,000 she had recovered for the Ward was already jeopardizing the Ward's ability to continue to qualify for Medicaid, Respondent put the check in her client file[]. The check remained in the file until Respondent was removed as the Ward's Conservator in 2016. At that time, the check had become stale and was not honored when the Successor Conservator finally presented it for payment. The Successor Conservator ultimately recovered the funds.

(10) Respondent also received or obtained a check from Bank of America payable to the Ward dated April 15, 2014 for $451.41. Respondent did not deposit the check in the Ward's checking account. Again, believing that the check could be deposited at a later date, Respondent put the check in her client file[]. The check remained in the file until Respondent was removed as the Ward's Conservator in 2016. Once again, the check had become stale and was not honored when the Successor Conservator finally presented it for payment. Ultimately, after the Successor Conservator was unable to get the check reissued,

the Court ordered Respondent to reimburse the Ward's estate, and Respondent promptly did so.

Petition at 3-6.

5. Respondent is agreeing to the disposition because Respondent believes that she cannot successfully defend against discipline based on the stipulated misconduct. Tr. 18; Affidavit ¶ 5.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition for Negotiated Discipline. Affidavit ¶ 7. The only promise included in the Petition is Disciplinary Counsel's agreement not to pursue any additional charges or sanction arising out of the conduct described in the Petition. Petition at 7. Respondent confirmed during the limited hearing that there have been no other promises or inducements other than those set forth in the Petition. Tr. 23.

7. Respondent has conferred with her counsel. Tr. 14-15; Affidavit ¶ 1.

8. Respondent has freely and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction set forth therein. Tr. 11-12, 21-23; Affidavit ¶ 6.

9. Respondent is not being subjected to coercion or duress. Tr. 23-24; Affidavit ¶ 6.

10. Respondent is competent and was not under the influence of any substance or medication that would affect her ability to make informed decisions at the limited hearing. Tr. 15-16.

11. Respondent is fully aware of the implications of the disposition being entered into, including, but not limited to, the following:

> a) she has the right to assistance of counsel if she is unable to afford counsel;
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> b) she will waive her right to cross-examine adverse witnesses and to compel witnesses to appear on her behalf;
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> c) she will waive her right to have Disciplinary Counsel prove each and every charge by clear and convincing evidence;
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> d) she will waive her right to file exceptions to reports and recommendations filed with the Board and with the Court;
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> e) the negotiated disposition, if approved, may affect her present and future ability to practice law;
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> f) the negotiated disposition, if approved, may affect her bar memberships in other jurisdictions; and
>
> g) any sworn statement by Respondent in her Affidavit or any statements made by Respondent during the proceeding may be used to impeach her testimony if there is a subsequent hearing on the merits.

Tr. 14-15, 27-30; Affidavit ¶¶ 9-10.

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be a seven-month suspension, with thirty days stayed in favor of one year of probation with the following conditions:

> (a) Respondent must take the Basic Training and Beyond two-day course offered by the District of Columbia Bar and must take an additional two hours of pre-approved continuing legal education related to the maintenance of trust accounts, record keeping, and/or safekeeping client property, and Respondent must certify and provide documenting proof that she has met these requirements to the Office of Disciplinary Counsel within six months of the date of the Court's final order; and

> (b) Respondent must meet with Dan Mills, Esquire, the Manager of the Practice Management Advisory Service of the District of Columbia Bar (or his successor) in person or virtually within two months of the date of the Court's final order. At that time, Respondent must execute a waiver allowing Mr. Mills and/or his designee (an assigned practice monitor) to communicate directly with the Office of Disciplinary Counsel regarding her compliance. When Respondent meets with Mr. Mills or his designee virtually or in person, she will make any and all records relating to her practice available for his review. Respondent shall ask Mr. Mills or his designee to conduct a full assessment of Respondent's business structure and her practice, including but not limited to reviewing financial records, client files, engagement letters, supervision and training of staff, and responsiveness to clients. Respondent shall also ask Mr. Mills or his designee to advise her about how to maintain complete records relating to maintenance of client funds and monitor her compliance with all of Mr. Mills' and/or his designee's recommendations. Respondent shall adopt all such recommendations and institute them when she resumes practice following her suspension. At the end of her suspension, Respondent shall begin her one-year probation. During her probation, Respondent shall consult regularly with Mr. Mills or his designee on the schedule he or she establishes. Respondent must be in full compliance with Mr. Mills' and/or his designee's requirements for a period of twelve consecutive months. Respondent shall ask Mr. Mills and/or his designee to confirm whether Respondent has been in full compliance for twelve consecutive months. After such confirmation, Respondent must sign an acknowledgement that she is in compliance with Mr. Mills' and/or his designee's requirements and file the signed acknowledgement with the Office of Disciplinary Counsel. This must be accomplished no later than seven business days after the end of Respondent's period of probation.

Petition at 7-9; Tr. 21-23. Respondent and Disciplinary Counsel also agree that if probation is revoked, Respondent will be required to serve the remaining thirty days of her suspension. Petition at 7. Respondent further understands that she must file with the Court an affidavit pursuant to D.C. Bar R. XI, § 14(g) in order for her suspension to be deemed effective for purposes of reinstatement. Tr. 30.

13. The only aggravating factor cited in the Petition is that Respondent violated multiple Rules. Petition at 12; Tr. 25.

14. In mitigation of sanction, the Hearing Committee has taken into consideration that Respondent: (a) has no prior disciplinary history; (b) was an inexperienced probate practitioner; (c) did not collect any fees in the Coleman matter; (d) has cooperated with Disciplinary Counsel; and (e) has expressed remorse. Petition at 12; Tr. 24-25.

15. This matter was referred to Disciplinary Counsel from the Probate Court; thus, there was no complainant who would have been entitled to notice of the limited hearing pursuant to Board Rule 17.4(g). Tr. 12.

III. DISCUSSION

The Hearing Committee shall recommend approval of a petition for negotiated discipline if it finds that:

> (1) The attorney has knowingly and voluntarily acknowledged the facts and misconduct reflected in the petition and agreed to the sanction set forth therein;
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> (2) The facts set forth in the petition or as shown at the hearing support the admission of misconduct and the agreed upon sanction; and
>
> (3) The sanction agreed upon is justified. . . .

D.C. Bar R. XI, § 12.1(c)(1)-(3); *see also* Board Rule 17.5(a)(i)-(iii).

A. Respondent Has Knowingly and Voluntarily Acknowledged the Facts and Misconduct and Agreed to the Stipulated Sanction.

The Hearing Committee finds that Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the

sanction therein. Respondent, after being placed under oath, admitted the stipulated facts and charges set forth in the Petition, and denied that she is under duress or has been coerced into entering into this disposition. *See supra* Paragraphs 8-9. Respondent understands the implications and consequences of entering into this negotiated discipline. *See supra* Paragraph 11.

Respondent has acknowledged that any and all promises that have been made to her by Disciplinary Counsel as part of this negotiated discipline are set forth in writing in the Petition and that there are no other promises or inducements that have been made to her. *See supra* Paragraph 6.

B. The Stipulated Facts Support the Admissions of Misconduct and the Agreed-Upon Sanction.

The Hearing Committee has carefully reviewed the facts set forth in the Petition and established during the hearing, and we conclude that they support the admissions of misconduct and the agreed-upon sanction. Moreover, Respondent is agreeing to this negotiated discipline because she believes that she could not successfully defend against the misconduct described in the Petition. *See supra* Paragraph 5.

With regard to the second factor, the Petition states that Respondent violated Rules of Professional Conduct 1.1(a) (competent representation), 1.3(c) (reasonable promptness), and 1.15(a) (negligent misappropriation). Petition at 6.

The evidence supports Respondent's admission that she violated Rules 1.1(a) and 1.3(c) in that after Respondent was appointed as Conservator in May 2012, she was provided three checks for the Ward's benefit. First, she received a check for

$794.91 that the Hartford Company had previously sent to the Ward, but did not deposit the check in Ward's checking account because she wanted to confirm the circumstances under which the check was written. *See supra* Paragraph 4(8). Second, she received or obtained a check from Bank of America payable to the Ward dated March 27, 2014 for $5,855, which Respondent did not deposit in the Ward's checking account because she believed it could be deposited at a later date and that the $184,000 Respondent had recovered for the Ward was already jeopardizing the Ward's ability to qualify for Medicaid. *See supra* Paragraph 4(9). Finally, she received or obtained a check from Bank of America payable to the Ward dated April 15, 2014 for $451.41, which she also did not deposit the Ward's checking account because she believed that it could be deposited at a later date. *See supra* Paragraph 4(10).

Instead, Respondent placed the checks in the Ward's client file, where they remained until Respondent was removed as the Ward's Conservator in 2016. *See supra* Paragraphs 4(8)-(10). By then, the checks had become stale and were not honored when the successor conservator presented them for payment. *Id.* The Successor Conservator was only able to get the first two checks reissued. *Id.* Respondent's handling of the checks demonstrated a lack of "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation," *see* Rule 1.1(a), as well as a failure to "act with reasonable promptness in representing a client," *see* Rule 1.3(c).

The evidence also supports Respondent's admission that she violated Rule 1.15(a) in handling her Ward's finances and her Ward's checking account. On March 5, 2014, Respondent wrote a check on her Ward's PNC checking account ending in X6433 in the amount of $2,437 to pay for Respondent's rent. *See supra* Paragraph 4(4). She wrote the check on the Ward's checkbook, instead of her own, by mistake. *Id.* Respondent immediately replaced the funds in the Ward's account when she discovered the erroneous payment when she wrote the next check on the Ward's account. *Id.* Later, she accidentally double-reimbursed herself for locksmith services she obtained on behalf of the Ward. *See supra* Paragraphs 4(6)-(7). Thus, on two occasions, Respondent negligently failed to appropriately safeguard funds entrusted to her on behalf of the Ward, in violation of Rule 1.15(a).

C. The Agreed-Upon Sanction Is Justified.

The third and most complicated factor the Hearing Committee must consider is whether the sanction agreed upon is justified. *See* D.C. Bar R. XI, § 12.1(c); Board Rule 17.5(a)(iii) (explaining that hearing committees should consider "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"); *In re Johnson*, 984 A.2d 176, 181 (D.C. 2009) (per curiam) (providing that a negotiated sanction may not be "unduly lenient"). Based on the record as a whole, including the stipulated circumstances in

mitigation, the Hearing Committee Chair's *in camera* review of Disciplinary Counsel's investigative file and *ex parte* discussion with Disciplinary Counsel, and our review of relevant precedent, we conclude that the agreed-upon sanction is justified and not unduly lenient, for the following reasons:

Respondent's conduct while serving as Ms. Coleman's Conservator violated the following Rules of Professional Conduct the District of Columbia: Rule 1.1(a) – failure to act competently in her service as a Conservator; Rule 1.3(c) – failure to act with reasonable promptness; Rule 1.15(a) – negligent misappropriation of entrusted funds. Disciplinary Counsel and Respondent have agreed that the sanction to be imposed in this matter is a seven-month suspension, with thirty days stayed in favor of a one-year period of probation, with conditions. The Petition for sets forth the conditions of the negotiated disposition. Petition at 7-9. The misappropriation that occurred in this case was negligent because it does not reflect any of the hallmarks of reckless misappropriation:

> the indiscriminate commingling of entrusted and personal funds; a complete failure to track settlement proceeds; total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition; the indiscriminate movement of monies between accounts; and the disregard of inquiries concerning the status of funds.

See In re Anderson, 778 A.2d 330, 338 (D.C. 2001). Rather, it more aligned with the hallmarks of *negligent* misappropriation: "a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and an honest or inadvertent but mistaken belief that entrusted funds have been properly

safeguarded." *See In re Abbey*, 169 A.3d 865, 872 (D.C. 2017). The typical sanction for negligent misappropriation is a six-month suspension. *See In re Kline*, 11 A.3d 261, 265 (D.C. 2011); *In re Edwards*, 870 A.2d 90, 94 (D.C. 2005); *see also, e.g.*, *In re Hollingsworth*, No. 19-BG-414 (D.C. June 13, 2019) (per curiam) (approving a petition for negotiated discipline and imposing a six-month suspension with three months stayed in favor of probation for negligent misappropriation).

The stipulated facts in this matter establish that the instances of misappropriation were inadvertent, and corrected, once Respondent discovered them. Respondent has not denied that the misappropriations occurred, and she has fully and freely admitted the misconduct and embraced the disciplinary process of the District of Columbia Bar.

The stipulated facts also establish that the Respondent's conduct exhibited a lack of competence and diligence. Without additional violations or substantial aggravating factors, such conduct would normally result in a non-suspensory sanction. *See, e.g.*, *In re Shelnutt*, 719 A.2d 96 (D.C. 1998) (per curiam) (public censure for violations of Rules 1.1(b), 1.3(c), and 1.4(b)); *In re Hanny*, Bar Docket No. 31-97 (BPR June 13, 2000) (Board reprimand for violations of Rules 1.1(a), 1.3(a), 1.3(c) and 1.4(a)); *In re Scott*, Bar Docket No. 2014-D250 (Letter of Informal Admonition, Jan. 4, 2016) (informal admonition for violations of Rules 1.1(a) and (b) and 1.3(a) and (c)).

In this matter, although Respondent has no prior disciplinary history and her misconduct involved only one case, she failed to deposit the Ward's checks on at

least three occasions. On one of the occasions, the Ward was prejudiced when the bank refused to honor the stale check. Although Respondent ultimately repaid the Ward's estate, her conduct was harmful to the Ward.

In mitigation, the Committee has considered that Respondent has no prior disciplinary history; she was an inexperienced probate practitioner; she did not collect any fees for her handling of the Coleman matter; she has cooperated with Disciplinary Counsel and has not denied the conduct.

Based on the precedent set forth above and the balance of aggravating and mitigating factors, the Hearing Committee believes that if this case were to proceed as a contested matter, Respondent would not receive a sanction significantly more serious than a seven-month suspension. Accordingly, the Hearing Committee concludes that the agreed-upon sanction of a seven-month suspension, with thirty days stayed in favor of one year of probation with conditions, is justified and not unduly lenient. *See* D.C. Bar R. XI, § 12.1(c)(3); Board Rule 17.5(a)(iii); *Johnson*, 984 A.2d at 181; *see also In re Mensah*, 262 A.3d 1100, 1103-05 (D.C. 2021) (per curiam) (explaining how a "justified" sanction in the negotiated discipline context may be more lenient than the sanction that might be imposed for the same misconduct in a contested case, but it may not become "completely unmoored" from sanctions imposed in comparable contested-discipline cases).

IV. CONCLUSION AND RECOMMENDATION

It is the conclusion of the Hearing Committee that the discipline negotiated in this matter is appropriate.

For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved and that the Court impose a seven-month suspension, with thirty days stayed in favor of one year of probation with the conditions stated in Paragraph 12, *supra*.

HEARING COMMITTEE NUMBER TWO

William Corcoran

William J. Corcoran, Esquire
Chair

Robin J Bell

Dr. Robin Bell
Public Member

Leonard Evans, Esquire
Attorney Member