THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
July 19, 2021

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| In the Matter of: | : | |
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| PAUL T. MENSAH, | : | D.C. App. No. 20-BG-560 |
| | : | Board Docket No. 19-ND-011 |
| Respondent. | : | Disc. Docket No. 2017-D286 |
| | : | |
| A Member of the Bar of the | : | |
| District of Columbia Court of Appeals | : | |
| (Bar Registration No. 480889) | : | |

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

In *In re Addams*, the en banc Court of Appeals reaffirmed the presumption laid out in prior cases that – absent a narrow set of extraordinary circumstances – every case of intentional or reckless misappropriation should result in disbarment. 579 A.2d 190, 191 (D.C. 1990) ("[I]n 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."); *see also In re Lee*, 95 A.3d 66, 77 (D.C. 2014) (per curiam) (same). Since *Addams* was decided in 1990, the Court found extraordinary circumstances in only one case that did not involve *Kersey* mitigation, *In re Hewett*, 11 A.3d 279 (D.C. 2011).

When *Addams* was decided, our disciplinary system did not have a process for negotiated discipline. We now do, and it is set out in D.C. Bar R. XI, § 12.1. Among other requirements, negotiated discipline allows Disciplinary Counsel and a respondent to agree on the facts constituting misconduct and the sanction to be

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

imposed, subject to a hearing committee's *ex parte* communication with Disciplinary Counsel and in camera review of its investigative file to understand the basis for the agreed upon sanction.

In this case, Disciplinary Counsel and Respondent have agreed that Respondent engaged in reckless misappropriation and should be suspended for three years with a requirement that Respondent demonstrate fitness to practice law before being readmitted, instead of disbarment, the sanction that would be required under *Addams* if the case were litigated and the Court determined that Respondent engaged in reckless or intentional misappropriation. A Hearing Committee approved this agreed-upon sanction. The Court of Appeals referred the case to us for our views "as to the appropriateness of the recommended sanction in light of this court's precedent." Order, *In re Mensah*, D.C. App. No. 20-BG-560 (D.C. Dec. 16, 2020) (per curiam).

We recommend that the Court accept this negotiated discipline because the agreed-upon sanction is not unduly lenient and it satisfies the purpose of imposing a disciplinary sanction: "to protect the public and the courts, safeguard the integrity of the profession, and deter respondent and other attorneys from engaging in similar misconduct." *In re Cater*, 887 A.2d 1, 17 (D.C. 2005).

## I. The Standards for Evaluating a Sanction

*In re Johnson*, one of the earliest Court of Appeals decisions to apply Section 12.1, recognized that there are limits on the agreement that the parties may reach, as it observed that

> a hearing committee will recommend approval of a negotiated discipline if it finds that (1) the attorney knowingly and voluntarily acknowledges the facts and misconduct stated in the petition and agrees to the sanction it identifies, (2) the facts stated in the petition or demonstrated at the hearing support the admission of misconduct and the agreed-upon sanction, and (3) that sanction is justified.

984 A.2d 176, 180-81 (D.C. 2009) (per curiam). We consider only the last factor here.

*Johnson* 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. *Johnson* observed that "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).

This standard for evaluating the priority of a sanction differs from the standard in a contested case. In a contested case, the "sanction determinations are governed by the comparability standard of D.C. Bar R. XI, § 9(h)(1)," which provides that the sanction must not "foster a tendency toward inconsistent dispositions for comparable conduct" or "otherwise be unwarranted." *In re Murdter*, 131 A.3d 355, 359 n.1 (D.C. 2016) (per curiam) (appended Board Report).

If we were to apply the standard from a contested case, the conclusion would be easy; *Addams* would require disbarment for Respondent's reckless misappropriation. *In re Gray*, 224 A.3d 1222, 1229 (D.C. 2020) (per curiam) ("As it relates to the sanction of disbarment under *Addams*, the decision is binary: either

a misappropriation results from mere negligence (no automatic disbarment), or from a higher degree of culpability, including both intentional and reckless misappropriation (virtually automatic disbarment).").

However, under the standard for a negotiated discipline case of whether the agreed-upon sanction is "justified" (that is not unduly lenient), we conclude that a broader range of considerations is appropriate. When we consider this broader range of facts, we conclude that a three-year suspension with a requirement that fitness be shown is a justified sanction.

## II. Considerations of Whether the Sanction is Justified

We begin with Disciplinary Counsel's argument that, in essence, the difference between three years with fitness and disbarment is outweighed by the advantages to the disciplinary system and the profession as a whole in resolving this case quickly. Broadly speaking, we agree, but that does not fully resolve the issue.

The practical effect between a three-year suspension with fitness and disbarment is that the former permits the lawyer to petition to rejoin the Bar two years earlier than the latter. *See* D.C. Bar R. XI, § 16(a) (a disbarred attorney "may not apply for reinstatement until the expiration of at least five years from the effective date of the disbarment"). But two years is not the entire difference between the two sanctions. There is an additional public statement that comes from disbarment that is not captured by the mere amount of time the lawyer is unable to practice law. *See, e.g.*, *In re Grossman*, 940 A.2d 85, 87 n.3 (D.C. 2007) (per curiam) (recognizing that "disbarment" carries with it an opprobrium distinct from the period

of suspension). This public statement of the strongest possible disapproval of the lawyer's conduct is substantial and, thus, we do think the difference between the sanction under *Addams* and the sanction agreed on here is qualitatively greater than Disciplinary Counsel described. Though we do agree that the practical effect is the same.

We evaluated the sanction in light of the purpose of imposing a disciplinary sanction: "to protect the public and the courts, safeguard the integrity of the profession, and deter respondent and other attorneys from engaging in similar misconduct," *Cater*, 887 A.2d at 17, and the Court's instructions in *Johnson* that the agreed-upon sanction is not unduly lenient, *Johnson*, 984 A.2d at 181. We are also mindful that in cases of misappropriation the integrity of the profession and the public's faith in attorney's duties as fiduciaries is a significant factor justifying disbarment. *In re Cloud*, 939 A.2d 653, 664 (D.C. 2007) (explaining that the Court "has historically held that disbarment is warranted in cases of reckless misappropriation because such conduct undermines 'the public's faith that attorneys will fulfill their duties as fiduciaries in handling funds entrusted to them . . . .'" (quoting *In re Pierson*, 690 A.2d 941, 948 (D.C. 1997)). And as the Court has recognized, "[t]he appearance of a tolerant attitude toward known embezzlers would . . . undermine public confidence in the integrity of the profession and of the legal

system whose functioning depends upon lawyers." *Addams*, 579 A.2d at 193 (quoting *In re Quimby*, 359 F.2d 257, 258 (D.C. Cir. 1966) (per curiam)).[1]

We recommend that the Court accept the three-year suspension with fitness for reckless misappropriation because it protects the public and the courts, safeguards the integrity of the profession, deters Respondent and other attorneys from engaging in similar misconduct, and is not unduly lenient.[2]

First, the fitness requirement will ensure the protection of the public and the courts because Respondent will not be allowed to resume the practice of law until the Court determines that he has the "moral qualifications, competency, and learning in law required for readmission to the practice of law, and that 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." *See In re Stanback*, 913 A.2d 1270, 1271 (D.C. 2006) (per curiam) (granting reinstatement following disbarment arising out of intentional misappropriation); *see also In re Mba-Jonas*, 118 A.3d 785, 787-88 (D.C. 2015) (per curiam) (denying reinstatement following reciprocal suspension arising out of negligent misappropriation); *In re Fair*, 780 A.2d 1106, 1116 n.25 (D.C. 2001) (imposing a fitness requirement in a negligent misappropriation case "principally to allow respondent to demonstrate the adequacy

[1] Both *Addams* and *Quimby* involved intentional misappropriation, and the Court in *Quimby* found that the misconduct at issue met the elements of the crime of embezzlement. *See Quimby*, 359 F.2d at 258.

[2] To the extent that approval of the petition for negotiated discipline depends on factors outside the scope of this Report and Recommendation, the Board adopts the Hearing Committee's in-depth analysis of the particular facts and circumstances of the case.

of her procedures that will be followed to prevent a repetition of mishandling of client funds"). This is the same showing that would have to be made for someone seeking reinstatement after disbarment, and thus addresses *Cloud*'s concern, noted above, that the public must have faith that members of the Bar are able to fulfill the fiduciary duties entrusted to them. Respondent will not be readmitted to the Bar until he proves by clear and convincing evidence that he "has the moral qualifications, competency, and learning in law required for readmission," and that 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)(1).

Second, the agreed-upon sanction safeguards the integrity of the profession because the public, any aggrieved clients, and Respondent have a final disposition of the matter far more quickly than they would were this matter to proceed through a contested hearing, review by the Board, and final decision by the Court. A lawyer who admits to misappropriation in a negotiated disposition is, therefore, much more quickly removed from a position of handling entrusted funds, and the public is more quickly protected from the lawyer. And we find that quickly suspending an attorney willing to admit to reckless misappropriation and, thereby, removing their access to entrusted funds provides protection to the public and fosters confidence in our system's ability to address these violations decisively.

There is also another aspect of a sanction of a three-year suspension and fitness when an attorney willingly accepts responsibility for the misconduct that

maintains the public's confidence in the legal profession – the wise use of the Court's resources. When a matter is quickly resolved with a negotiated discipline, hundreds of hours of volunteer time from members of the Hearing Committee and the Board will be avoided. Likewise, those in the Office of Disciplinary Counsel and the Court will avoid using limited resources to prosecute and adjudicate a matter that is not contested, thus allowing those resources to be better spent on contested cases in the disciplinary system.

Finally, the three-year suspension is a serious consequence that has real and lasting effect on a respondent. It is the second highest sanction available under D.C. Bar R. XI, § 3(a), and by accepting it as an sanction in this case it continues to send the message to the Bar that misappropriation is a serious violation that will have serious consequences. For that reason, we do not find it unduly lenient.

The Hearing Committee considered Respondent's acceptance of responsibility for his misconduct, as well as the other mitigating factors, in recommending that the Court approve this petition for negotiated discipline. We recognize, as did the Hearing Committee, that these are mitigating factors "of the usual sort," which are insufficient to reduce the sanction under a strict *Addams* application in a contested case. *Addams*, 579 A.2d at 191. Notably though, *Addams* did not bar consideration of mitigating facts; instead it warned that "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." *Id.* at 195. For the reasons set forth above, we find that it does.

Our concurring colleagues disagree with us only in that they would find that a sanction of three years with fitness *could* be justified – and is so in this case – but would not be justified in all negotiated discipline cases involving reckless misappropriation. Much of the difference between the views of this majority and the concurring members turns on whether a three-year suspension is appropriate on the facts of the other case issued today, *In re Agwumezie*, Board Docket No. 20-ND-005 (BPR July 19, 2021). For the reasons set out there, our conclusion is that for all cases of reckless misappropriation in which Disciplinary Counsel agrees to reach a negotiated disposition, a sanction of three years with fitness is a justified sanction under both the law involving negotiated discipline and for sound policy reasons. Though this is set out in more detail in that Report.

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. Mr. Hora, joined by Vice Chair Pittman and Ms. Blumenthal, submits a Separate Concurring Statement, which provides a different basis for approving the petition for negotiated discipline.

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SEPARATE CONCURRING STATEMENT OF MR. HORA

We agree with the majority's conclusion that *In re Addams* does not preclude negotiated discipline in reckless misappropriation cases and its recommendation that the Petition for Negotiated Discipline in this case should be approved.

But whereas the majority believes that a three-year suspension with a fitness requirement, under any circumstances, is not unduly lenient in reckless misappropriation cases brought through negotiated discipline, and that such a sanction will always "protect the public and the courts, safeguard the integrity of the profession, and deter respondent and other attorneys from engaging in similar misconduct," *see* Majority Report at 5 (quoting *In re Cater*, 887 A.2d 1, 17 (D.C. 2005)), we believe that the seriousness of the misconduct and mitigating and aggravating factors must be analyzed in each case. *See* D.C. Bar R. XI, § 12.1(c)(2) (providing that a hearing committee "shall recommend to the Court approval of a petition for negotiated discipline if it finds that," *inter alia*, "*[t]he facts set forth in the petition* or as shown at the hearing support . . . the agreed upon sanction"

(emphasis added)); *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc) ("[M]itigating 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").

Our position, and the majority's counterargument, are explained in greater detail in the Board's Report and Recommendation and our accompanying Dissent in *In re Agwumezie*, Board Docket No. 20-ND-005 (BPR July 19, 2021), which was also remanded to the Board for its view as to the appropriateness of a negotiated three-year suspension with fitness for reckless misappropriation and other misconduct. In both cases, the respondents would face disbarment if they were brought outside of the negotiated discipline regime and Disciplinary Counsel carried its burden of proving reckless misappropriation in a contested hearing; thus, the stipulated sanctions are inherently lenient given the respondents' admission of having engaged in reckless misappropriation. But the Court permits a less severe sanction in negotiated discipline cases, as long as they are "justified" and not "unduly lenient." Here, based on the specific facts of this case, we find that a three-year suspension with fitness is justified and not unduly lenient. In *Agwumezie*, which involved more egregious misconduct, additional aggravating factors, and the absence of compelling mitigating factors, it would be unduly lenient to impose a sanction short of disbarment.

Because it is omitted from the majority report in the Report and Recommendation, we provide a brief factual summary below and explain our

conclusion that a three-year suspension with fitness is justified and not unduly lenient in this case.

## I. Factual Summary

The Petition for Negotiated Discipline is based on Respondent's handling of client funds in two matters as well as his record-keeping practices. As emphasized by Disciplinary Counsel, the disciplinary investigation arose from an "unrelated overdraft of the IOLTA," which caused its office to issue a subpoena for Respondent's financial and accounting records. *See* Disciplinary Counsel's Statement as to the Appropriateness of the Sanction at p. 3. In response to the subpoena, Respondent admitted that he did not maintain the relevant trust account records, and he also hired a bookkeeper to review his IOLTA account. *Id*. at pp. 3-4; HC Rpt. at 6, 8. It was Respondent who brought the two misappropriations described below to the attention of Disciplinary Counsel. HC Rpt. at 8.

In Count I, Respondent represented a client, Autumn Kennedy, in a personal injury case following a referral from another attorney, John Stringfield. HC Rpt. at 3. The referral by Mr. Stringfield obligated Respondent to share his fees with Mr. Stringfield. *Id.* Respondent paid Mr. Stringfield 40% of his eventual fee, without informing Ms. Kennedy of their arrangement, which violated Rule 1.5(e) (fee division). HC Rpt. at 3, 10-11. After he reached a settlement with Ms. Kennedy's insurance company and deposited the settlement funds in his trust account, Respondent made a series of withdrawals that caused the balance in the account to drop below what he was required to hold in trust on behalf of Ms. Kennedy and third

parties, in violation of Rule 1.15(a) (reckless misappropriation). HC Rpt. at 3-5, 12-13. The balance first fell below the amount he was required to hold in trust on May 16, 2017. Between May 19 and November 7, 2017, Respondent gradually paid Ms. Kennedy and the third parties the amounts to which they were entitled, in most cases by sending funds from his operating account. HC Rpt. at 3-5.[1]

In Count II, Respondent represented Compest Solutions, Inc., in a breach of contract matter. HC Rpt. at 5. After he reached a settlement with the opposing party, Respondent deposited each of the three installment payments into his trust account, with the last installment deposited on or before September 29, 2017. *Id.* On October 3, 2017, Respondent withdrew $3,200 from his trust account, leaving a balance of $2,466.94 – $848.06 less than the $3,315 he was required to hold in trust for Compest Solutions, in violation of Rule 1.15(a) (reckless misappropriation). HC Rpt. at 5-6, 12-13. On October 17, 2017, Respondent paid Compest Solutions the remaining $3,315 with funds from his operating account. HC Rpt. at 6.

In Count III, Respondent was unable to comply with Disciplinary Counsel's subpoena for two years of financial and accounting records for his trust account because he failed to keep such records, in violation of Rule 1.15(a) (record-keeping). HC Rpt. at 6, 13.

[1] The Petition states that Respondent failed to hold sufficient funds in his trust account as late as July 5, 2017, but does not specify whether he continued to do so through November 7, 2017. *See* HC Rpt. at 4.

## II. Mitigating and Aggravating Factors

The Hearing Committee took into consideration several mitigating factors: (1) Respondent cooperated with Disciplinary Counsel[2]; (2) Respondent hired a bookkeeper to provide an accounting of his trust account after Disciplinary Counsel brought the problem to his attention; (3) Respondent had been working long hours as a contract attorney for the past six years, while maintaining a part-time law practice, to support his family; (4) Respondent took complete responsibility for his misconduct and expressed remorse; (5) all clients and third parties ultimately received all of the settlement funds to which they were entitled; and (6) Respondent did not have a record of prior discipline. HC Rpt. at 8-9, 13. It is also significant that both clients and all of the third parties appeared to receive their settlement funds in a reasonably timely fashion[3], and none of them filed a disciplinary complaint against Respondent.

The Petition does not cite any aggravating factors; however, we consider the fact that Respondent admitted to reckless misappropriation in two separate matters

[2] While cooperation with Disciplinary Counsel and acceptance of responsibility are inherent in every negotiated discipline case, we recognize that the admission to a reckless misappropriation has greater consequences for a respondent and suggests a significant acceptance of responsibility. *See In re Agwumezie*, Board Docket No. 20-ND-005, at 8-9 (BPR July 19, 2021). Here, Respondent also went beyond a normal acceptance of responsibility by bringing the misappropriations to Disciplinary Counsel's attention. His actions stand in stark contrast to those of the respondent in *Agwumezie*, who initially gave incomplete and inconsistent responses to Disciplinary Counsel's subpoenas and questions, in violation of Rules 8.1(b) and 8.4(d), before belatedly cooperating in the context of the negotiated discipline proceedings. *See In re Agwumezie*, Board Docket No. 20-ND-005, at 13-14 (HC Rpt. Feb. 5, 2021).

[3] Respondent was not charged with a failure to promptly pay clients and third parties under Rule 1.15(c).

to be one such factor. Under different circumstances, a three-year suspension with fitness would be unduly lenient in a case involving multiple instances of reckless misappropriation. *See, e.g.*, *Agwumezie*, Board Docket No. 20-ND-005, Dissent at 12-21 (BPR July 19, 2021). In this case, however, both misappropriations occurred during the same time frame in late 2017 and arose from Respondent's general mismanagement of his trust account during that period, rather than discrete actions specific to either individual case. Therefore, while disregard for the safety of entrusted funds appeared to last for at least half a year, we do not see the sort of "repeated" misconduct that the Court views as a serious aggravating factor. *See, e.g.*, *In re Bradley*, 70 A.3d 1189, 1195 (D.C. 2013) (per curiam).

On balance, we find that the mitigating factors in this case substantially outweigh any aggravating factors. *See generally Addams*, 579 A.2d at 191 ("[M]itigating 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 the aggravating factors as well").

## III. Analysis

The threshold issue in this case is whether cases involving reckless misappropriation, absent "extraordinary circumstances," may *ever* be the subject of negotiated discipline. For the reasons stated in the majority report, we believe they should. But now we must also consider whether a three-year suspension with a fitness requirement is justified in this particular case.

To guide our analysis, we balance the Court's precedent establishing a presumptive sanction of disbarment for reckless misappropriation in contested cases with the more recent adoption of negotiated discipline rules that do not require the strict comparability standard employed to determine the appropriate sanction in contested cases. *Compare* D.C. Bar Rule XI, § 9(h)(1) ("[T]he 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"), *and Addams* 579 A.2d at 191 ("We now reaffirm that in virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence"), *with* D.C. Bar Rule XI, § 12.1(c) ("The Hearing Committee conducting the review shall recommend to the Court approval of a petition for negotiated disposition if it finds that," *inter alia*, "[t]he sanction agreed upon is justified"), *and* Board Rule 17.5(a) (clarifying that a "justified" sanction is one that is "not unduly lenient, 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," and that it "does not have to comply with the sanction appropriate under the comparability standard set forth in D.C. Bar R. XI, § 9(h)"), *and In re Johnson*, 984 A.2d 176, 181 (D.C. 2009) (per curiam) (providing that a negotiated sanction may not be "unduly

lenient"). *See also In re Gray*, 224 A.3d 1222, 1235 (D.C. 2020) (per curiam) (noting, in a contested case, that "exercise of discretion to impose lesser sanctions in cases of intentional or reckless misappropriation with sympathetic facts would come at a steep cost" and "should not be undertaken lightly").

The Court has not yet reconciled these competing considerations. Therefore, in considering whether the agreed-upon lenient sanction in this case is "undue," we look to an analogous portion of the *Addams* decision in which the Court placed limitations on the types of extraordinary cases that might rebut the presumption of disbarment, even for cases involving intentional misappropriation.[4] *See Addams*, 579 A.2d at 195 ("The circumstances are likely to be limited, however, and . . . should not be read too broadly." (internal citation omitted)). First, the Court "reaffirm[ed] that it is appropriate for the court to consider the surrounding circumstances regarding the misconduct and to evaluate whether the mitigating factors are highly significant and, where there are aggravating factors, they substantially outweigh any aggravating factors such that the presumption of disbarment is rebutted." *Id.* Second, the Court stated that "[i]n all events, 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." *Id.*

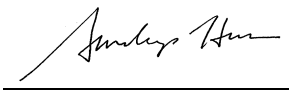
[4] Though the parties agree that there are no such extraordinary circumstances here, we operate on the assumption that the negotiated discipline process may also serve as a way to rebut the presumption of disbarment; thus, negotiated discipline may be considered an extraordinary circumstance in itself. In that case, the Court's reasoning behind imposing those limitations apply equally here.

This case meets both criteria. First, as explained above, the mitigating factors – particularly Respondent's immediate efforts to remedy the problems with his accounting practices and the fact that no client or third party was harmed by the misconduct – substantially outweigh any aggravating factors. Second, a three-year suspension with a fitness requirement will adequately protect the public, since, as explained in the majority report, *see, e.g*., Majority Report at 5-7, Respondent has already taken significant steps to bring his handling of entrusted funds into compliance with the Rules, and he will need to demonstrate his understanding of his obligations if he applies for reinstatement after his three-year suspension has passed.[5] Finally, such a sanction will also maintain public confidence in the Bar because the published decisions in this case do not risk a public perception that the Court is adopting a "tolerant attitude toward known embezzlers."[6] *See Addams*, 579 A.2d at 193 (quoting *In re Quimby*, 359 F.2d 257, 258 (D.C. Cir. 1966)).

[5] As recognized by the Hearing Committee, in response to Disciplinary Counsel's subpoena, Respondent immediately acknowledged his failure to keep adequate records of his handling of entrusted funds, proceeded to hire a bookkeeper to conduct an accounting to determine if any client funds were missing, and deposited personal funds into his IOLTA account to return funds that were misappropriated. HC Rpt. at 6, 8. By contrast, Mr. Agwumezie knowingly failed to respond to Disciplinary Counsel's requests for information, his responses to Disciplinary Counsel's subpoenas were "incomplete and often raised additional questions," and at the time of the limited hearing, he still had not accounted for the several referral fees that he kept for himself. *Agwumezie*, Board Docket No. 20-ND-005, HC Rpt. at 13. For these clear differences, as well as the additional Rule violations and aggravating factors in *Agwumezie*, we concluded that a three-year suspension with a fitness requirement was not sufficient to protect the public in that case. *See Agwumezie*, Board Docket No. 20-ND-005, Dissent at 17-18.

[6] We note that the risk of undermining public confidence in the Bar is at present in every negotiated discipline case, regardless of the misconduct involved, because it permits the imposition of lenient sanctions. Nevertheless, in adopting Rule XI, § 12.1, the Court determined that the benefits of adopting a negotiated discipline regime outweighed that concern.

Having considered the record as a whole, including the seriousness of the misconduct and aggravating and mitigating factors, as required by the negotiated discipline rules, as well as relevant precedent in contested reckless misappropriation cases, we find that a three-year suspension with a fitness requirement is justified and not unduly lenient in this case.

By: 

Sundeep Hora

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