DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
PHOEBE LESLIE DEAK,	:	
	:	Bar Docket No. 2010-D504
Respondent.	:	Board Docket No. 16-BD-043
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration Number: 454829)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Disciplinary Counsel alleges that Respondent, Phoebe Leslie Deak, received funds from a client to pay an expert fee, deposited those funds into her overdrawn operating account, and never paid the expert (despite repeated requests that she do so). An Ad Hoc Hearing Committee, in a Report and Recommendation dated April 4, 2017, found that the sworn proof and documentary evidence Disciplinary Counsel attached to its Motion for Default and filed with the Hearing Committee constitute clear and convincing evidence that Respondent violated Virginia Rules l.15(a)(l) and l.15(b)(5), applicable under the choice of law rule in D.C. Rule of Professional Conduct 8.5. Because Respondent engaged in misappropriation that was at least reckless, and the record contains no evidence in mitigation of sanction, the Hearing Committee recommended that Respondent be disbarred pursuant to *In re Addams*, 579 A.2d 190 (D.C. 1990) (en banc).

Neither Respondent nor Disciplinary Counsel took exception to the Report and Recommendation of the Hearing Committee,[1] and thus the Board has decided the matter based on the record. *See* Board Rule 13.5. The Board, having reviewed the record, concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record, with its conclusions of law as supported by clear and convincing evidence, including the finding that Respondent's misappropriation was at least reckless, and with the recommended sanction of disbarment.

As set forth in detail in the Hearing Committee Report, in September 2009, Respondent received a $1,500 check from her client to pay Amy McCarthy, Ph.D., an economist, to serve as an expert witness and to prepare a report for Respondent's client. Respondent deposited the client's check into her overdrawn operating account. Dr. McCarthy tried twice without success to negotiate a check written to her by Respondent. Each time, the check was dishonored because Respondent's account did not have sufficient funds. From November 19, 2009 through January 12, 2010, the balance in Respondent's operating account was less than $1,500, the amount she had been given by her client to pay Dr. McCarthy. After Dr. McCarthy filed a complaint with Disciplinary Counsel, Respondent admitted that she owed Dr. McCarthy $1,500, but "was not in a position financially to remedy the situation" due to an unspecified medical condition

[1] Respondent did not participate in proceedings before either the Hearing Committee or the Board.

during much of 2009 and early 2010. Due the demands of her cases in 2009 and 2010, Respondent asserted that she was not able to attend to "business matters," such as Dr. McCarthy's request for payment. Respondent indicated she fully intended to pay Dr. McCarthy "as soon as sufficient funds become available," which she hoped would be in the next few months after her response. As of November 2, 2016, the date of Dr. McCarthy's affidavit, Respondent had not paid Dr. McCarthy.

Respondent's unauthorized use of her client's funds, intended for Dr. McCarthy, constitutes at least reckless misappropriation. *See In re Davenport*, 794 A.2d 602, 603 (D.C. 2002) ("[M]isappropriation occurs when the balance in the account where entrusted funds are deposited falls below the amount that the attorney is required to hold on behalf of the client and/or third party."); *see also In re Anderson*, 778 A.2d 330, 339 (D.C. 2001) (holding that "conscious indifference to the consequences of [the attorney's] behavior for the security of the funds" constitutes reckless misappropriation). The record contains no mitigating evidence that would warrant a sanction other than disbarment.

For these and other reasons set forth in the Hearing Committee's Report and Recommendation, which is attached hereto and adopted and incorporated by reference, we recommend that Respondent be disbarred, the sanction mandated by *Addams*.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /DB/
David Bernstein

Dated: May 19, 2017

All members of the Board concur in this Report and Recommendation, except Mr. Kaiser, Ms. Butler and Mr. Bundy, who did not participate.

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

In the Matter of:	:	
PHOEBE LESLIE DEAK,	:	Bar Docket No. 2010-D504
	:	Board Docket No. 16-BD-043
Respondent.	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration Number: 454829)	:	

REPORT AND RECOMMENDATION

Disciplinary Counsel alleges that Respondent, Phoebe Leslie Deak, received funds from a client to pay an expert fee, deposited those funds into her overdrawn operating account, and never paid the expert (despite repeated requests that she do so). Because Respondent lives in Texas, and the conduct occurred in connection with litigation pending in Virginia, Disciplinary Counsel charged that Respondent violated D.C. Rules of Professional Conduct 1.15(a) and 1.15(e); Virginia Rules of Professional Conduct 1.15(a)(1) and 1.15(b)(5); and Texas Disciplinary Rule of Professional Conduct 1.14(a).

This matter is before the Ad Hoc Hearing Committee (the "Hearing Committee") pursuant to the default procedure of D.C. Bar R. XI, § 8(f) and Board Rule 7.8, arising from Respondent's failure to answer the Specification of Charges or to respond to Disciplinary Counsel's Motion for Default. Based upon the undisputed evidence submitted in support of Disciplinary Counsel's motion, the

Hearing Committee finds that Respondent's conduct is governed by the Virginia Rules of Professional Conduct and that Disciplinary Counsel has proven by clear and convincing evidence that Respondent engaged in at least reckless misappropriation. We recommend that she be disbarred.

PROCEDURAL HISTORY

On June 20, 2016, Disciplinary Counsel filed a Petition and Specification of Charges against Respondent, which were personally served on her on June 28, 2016. DX B, C.[1] Respondent failed to answer the Specification of Charges by the July 18, 2016 due date, or at any time thereafter. She did not participate in a telephonic pre-hearing conference held on October 6, 2016, and has never appeared in this matter *pro se* or represented by an attorney. PH. Tr. 4; Tr. 5.

On November 2, 2016, Disciplinary Counsel filed a Motion for Default, pursuant to Board Rule 7.8, supported by sworn proof of the charges in the Petition. *See* DX D, E, and F. Respondent did not respond to Disciplinary Counsel's motion. In a November 14, 2016 order, the Hearing Committee granted the motion and 1) deemed that the allegations in the Petition were admitted, subject to Disciplinary Counsel submitting *ex parte* proof by documentary evidence, sworn affidavits, and/or testimony sufficient to prove the allegations by clear and convincing evidence; 2) scheduled a hearing to determine the sufficiency of the *ex parte* proof

[1] References to Disciplinary Counsel's Exhibits shall be "DX." References to the transcript of the October 6, 2016 pre-hearing conference shall be "PH. Tr." References to the transcript of the November 23, 2016 hearing shall be "Tr."

and the appropriate sanction for November 23, 2016; and 3) required the parties to address which jurisdiction's Rules applied to Respondent's conduct.

A hearing was held on November 23, 2016, before Daniel I. Weiner, Esquire, Chair; Curtis D. Copeland, Jr., Public Member; and William J. Corcoran, Esquire, Attorney Member. Disciplinary Counsel was represented by Joseph N. Bowman, Esquire. Respondent was notified of the hearing but did not attend, either in person or through counsel. During the hearing, the Hearing Committee admitted into evidence DX A through F and 1 through 4, previously filed with the Hearing Committee.[2] Tr. 5. Following the hearing, Disciplinary Counsel filed a post-hearing brief. Respondent did not file a response.

FINDINGS OF FACT

Based upon the undisputed evidence submitted in support of Disciplinary Counsel's Motion for Default, the Hearing Committee makes the following findings of fact by clear and convincing evidence, which is evidence that produces a "firm belief" as to the fact sought to be established. *In re Cater*, 887 A.2d 1, 24 (D.C. 2005).

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on March 9, 2001, and assigned Bar number 454829. DX A. Respondent is also a member of the Texas State Bar. DX B.

[2] At the hearing, Disciplinary Counsel moved into evidence DX A through F and 1 through 13. This appears to have been a misstatement, as Disciplinary Counsel's exhibit list consists of DX A through F and 1 through 4. We note that DX 4(b) contains tabs 1-13.

2. At the time of the charged misconduct, Respondent maintained offices in the District of Columbia and Austin, Texas. *See* DX F, O'Connell Aff. ¶ 6 & Ex. 2-4.[3] The misconduct at issue occurred in Texas.

3. In 2009, Respondent hired Amy McCarthy, Ph.D., an economist, to serve as an expert witness and to prepare a report for Respondent's client, the plaintiff in the matter of *Cochran v. Holder*, Case No. 1:06CV01328 (E.D. Va.).[4] The lawsuit arose out of Mr. Cochran's discharge from the United States Marshals Service. DX D, Cochran Aff. ¶¶ 2-3; DX E, McCarthy Aff. ¶ 3; DX 1(a).

4. Based on Respondent's instructions, Mr. Cochran wrote check number 6353 on September 1, 2009, in the amount of $1,500, payable to Respondent. DX D, Cochran Aff. ¶ 5. The memorandum line on the check reflected that it was for payment of the "fee for Economic Expert (Legal)." *Id.*; DX F, O'Connell Aff. Ex 1.

5. On September 25, 2009, Respondent deposited the check in her operating account at the Frost National Bank in Austin, Texas. DX F, O'Connell Aff. ¶ 8(c) & Ex. 1.

6. When Respondent deposited Mr. Cochran's check number 6353 into her operating account, the account was overdrawn by $131.82. DX F, O'Connell Aff. ¶ 8(d) & Ex. 2. After Respondent deposited the check, the balance of Respondent's operating account increased to $1,368.18. DX F, O'Connell Aff. ¶ 8(d) & Ex. 2.

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[3] Within Disciplinary Counsel's exhibits, references to the affidavits shall be "Aff." References to exhibits attached to the affidavits shall be "Ex."

[4] The case was originally styled *Cochran v. Gonzales*, as reflected in Disciplinary Counsel's exhibits.

7. On September 28, 2009, Respondent transferred $1,200 out of her operating account and into another account ending in 8199, leaving a balance in the operating account in the amount of $168.18. DX F, O'Connell Aff. ¶ 8(e) & Ex. 2. This money did not go to Dr. McCarthy. DX E, McCarthy Aff. ¶ 12.

8. Respondent wrote check number 1063, dated October 22, 2009, to Dr. McCarthy in the amount of $1,500. On the memo line, Respondent wrote, "Cochran v. Holder, Expert Wit." The check was drawn on Respondent's operating account at the Frost National Bank in Austin, Texas. DX E, McCarthy Aff. ¶¶ 7-8; DX F, O'Connell Aff. Ex. 3.

9. On or about November 25, 2009, Dr. McCarthy attempted to deposit Respondent's check. However, the Frost National Bank dishonored the check because Respondent's account did not have sufficient funds. On or about December 9, 2009, Dr. McCarthy again attempted to deposit the check, which again was dishonored because the account did not have sufficient funds. DX E, McCarthy Aff. ¶¶ 9-10; DX F, O'Connell Aff. ¶ 8(g) & Ex. 3.

10. Respondent wrote checks to pay rent for her Texas office on November 5, 2009 (check number 1073) and on December 27, 2009 (check number 1074), from the operating account into which she had deposited Mr. Cochran's $1,500 check and from which she wrote Dr. McCarthy's check (check number 1063). DX F, O'Connell Aff. Ex. 3; DX 4(c).

11. From November 19, 2009 through January 12, 2010, the balance in Respondent's operating account was less than $1,500, the amount she had been given by Mr. Cochran to pay Dr. McCarthy. DX F, O'Connell Aff. ¶ 8(g) & Ex. 4.

12. Neither Mr. Cochran nor Dr. McCarthy authorized Respondent to use that $1,500 for anything other than paying Dr. McCarthy's fee. DX D, Cochran Aff. ¶¶ 6-8; DX E, McCarthy Aff. ¶11.

13. In 2010, Dr. McCarthy called Respondent numerous times and sent e-mail messages and letters to Respondent, trying to collect her expert fee. However, Respondent did not pay Dr. McCarthy then, and, as of November 2, 2016—the date of Dr. McCarthy's affidavit in this case—still has not paid Dr. McCarthy. DX E, McCarthy Aff. ¶ 12.

14. On November 18, 2010, Dr. McCarthy filed a complaint with Disciplinary Counsel, alleging Respondent failed to pay for her work on Mr. Cochran's case and failed to respond in any way to her multiple requests for payment. *See* DX 1 (Dr. McCarthy's 11/18/10 Bar complaint and supporting exhibits).

15. On January 9, 2011, Respondent replied to Dr. McCarthy's complaint, making the following representations:

a. She owed Dr. McCarthy $1,500.

b. She received e-mails from Dr. McCarthy in January and February 2010, but "was not in a position financially to remedy the situation."

c. Due to the ill-effects of an unspecified medical condition, during much of 2009 and early 2010, Respondent had limited energy and focused that energy on her representation of her clients, "to the detriment of the business side of [her] practice." She fell behind in her record-keeping, accounting and attending to bills.

d. Because she spent most of 2010 catching up on her client work, at the time she responded to Dr. McCarthy's disciplinary complaint in

January 2011, she had not begun "to organize [her] accounting and financial records from 2009 and 2010."

e. "In 2009, because of [her] ill health, [she] simply was not able to do enough work to maintain [her] normal flow of cases, and, correspondingly, the flow of income. [She] earned less-than-half [her] usual income in 2009 and only slightly more in 2010. The sustained drop in income drained [her] savings and left [her] with limited finances."

f. Due the demands of her cases, in 2009 and 2010, Respondent was not able to attend to "business matters," such as Dr. McCarthy's request for payment.

g. In January 2011, Respondent fully intended to pay Dr. McCarthy "as soon as sufficient funds become available," which she hoped would be in the next few months.

DX 2.

CONCLUSIONS OF LAW

A. The Virginia Rules of Professional Conduct Apply to Respondent's Misconduct.

As a member of the D.C. Bar, Respondent is subject to the disciplinary jurisdiction of the Court of Appeals, even though none of the alleged misconduct occurred in D.C. D.C. Bar R. XI, § 1(a). Pursuant to D.C. Rule of Professional Conduct 8.5(b), the choice of law rule for disciplinary cases, the Virginia Rules of Professional Conduct apply here because Respondent's misconduct occurred in connection with a matter pending before the United Stated District Court for the

Eastern District of Virginia.[5] *See, e.g.*, *In re Gonzalez*, 773 A.2d 1026, 1029 (D.C. 2001).

B. Respondent Violated Virginia Rules 1.15(a)(1) and 1.15(b)(5).

Virginia Rule 1.15(a)(1) provides in relevant part that "[a]ll funds received or held by a lawyer . . . on behalf of a client or a third party, . . . shall be deposited in one or more identifiable trust accounts."[6] On September 25, 2009, Respondent took Mr. Cochran's check to pay Dr. McCarthy and deposited it into her operating account at Frost Bank in Austin, Texas. FF 5.[7] At that point, Respondent violated Rule 1.15(a)(1) by failing to deposit the entrusted funds into an identifiable trust account.

Virginia Rule 1.15(b)(5) provides in relevant part that "a lawyer shall . . . not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal." Respondent violated Virginia Rule 1.15(b)(5) when she used the entrusted funds without Mr. Cochran's or Dr. McCarthy's permission. The first unauthorized use

[5] D.C. Rule 8.5(b)(1) provides that "[f]or conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise." The Virginia Rules apply in the United States District Court for the Eastern District of Virginia. *See* E.D. Va. Local Civ. R. 83.1(I).

[6] The Specification of Charges alleges that Respondent violated Virginia Rule 1.15(a)(1) "in that [she] failed to hold entrusted funds separate from her own property (commingling)." Virginia Rule 1.15(a)(1) does not cover commingling, which is covered by Virginia Rule 1.15(a)(3). However, Disciplinary Counsel's post-hearing brief correctly quoted the language of Virginia Rule 1.15(a)(1), as requiring that entrusted funds be deposited into a trust account. We find that Respondent received adequate notice of the charges against her because the Specification of Charges correctly cited Virginia Rule 1.15(a)(1), and Disciplinary Counsel's post-hearing brief correctly quoted from that Rule.

[7] References to the preceding Findings of Fact shall be "FF."

occurred when Respondent deposited Mr. Cochran's funds into her overdrawn operating account. FF 6. At that point, she had used $131.82 without permission. Her unauthorized use continued, as she paid her bills from these entrusted funds, again without permission. FF 10; *see also* DX 4(b-c). Thus, when Dr. McCarthy tried to negotiate the check Respondent wrote her, it was dishonored for insufficient funds. FF 9. Disciplinary Counsel established by clear and convincing evidence that Respondent engaged in the unauthorized use of entrusted funds, and thus, has proven that she engaged in misappropriation. *In re Cloud*, 939 A.2d 653, 659 (D.C. 2007) ("[M]isappropriation is 'any unauthorized use of client's funds entrusted to [an attorney], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.'") (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)).

We must now determine whether the unauthorized use was negligent, reckless, or intentional. The "central issue" in this analysis

> is *how* the attorney handles entrusted funds, whether in a way that suggests the unauthorized use was inadvertent or the result of simple negligence, or in a way that reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his behavior for the security of the funds.

In re Fair, 780 A.2d 1106, 1114-15 (D.C. 2001) (emphasis in original) (quoting *In re Anderson*, 778 A.2d 330, 339 (D.C. 2001)). We find that Respondent's conduct was at least reckless because she deposited Mr. Cochran's check into an overdrawn account (thus immediately converting his funds to her use), and then continued to use entrusted funds to pay personal expenses such as her office rent. The record

contains clear and convincing evidence that Respondent was, at best, indifferent to the safety of the entrusted funds, as she acknowledged to Disciplinary Counsel that she failed to tend to the "business" aspect of her practice in 2009 and 2010. FF 15(c); *see also* DX F, O'Connell Aff. ¶¶ 7-8; DX 4(b-c).

Respondent's failure to *ever* pay Dr. McCarthy—even after Respondent recognized that payment was required—provides further clear and convincing evidence that Respondent's unauthorized use was at least reckless. Respondent knew by February 2010 that Dr. McCarthy had not been paid. Almost a year later she told Disciplinary Counsel, "I fully intend to pay Dr. McCarthy as soon as sufficient funds become available. While I cannot yet guarantee at [sic] date by which that would occur, I would hope that it will happen within the next several months." FF 15(g); DX 2 ¶ 12. As of November 2, 2016, Respondent still had not paid Dr. McCarthy. FF 13; DX E, McCarthy Aff. ¶ 12. Thus, even if Respondent's initial failure to pay Dr. McCarthy was negligent, her failure to make any effort to pay over the last six years compels the finding that her unauthorized use reflects at least a conscious disregard for the safety of entrusted funds. *In re Utley*, 698 A.2d 446, 448-49 (D.C. 1997) (twenty-one-month delay in returning fee taken by mistake in probate matter "ripened" into a reckless or intentional misappropriation); *Anderson*, 778 A.2d at 339 (failure to pay a bill "despite knowledge that it remained unpaid," would support a finding of at least reckless misappropriation).

RECOMMENDED SANCTION

Absent extraordinary mitigating circumstances, disbarment is the presumptive sanction for reckless or intentional misappropriation. *In re Addams*, 579 A.2d 190,

191 (D.C. 1990) (en banc). We have found that Respondent's misappropriation was at least reckless. The record contains no evidence of any mitigating circumstances, much less evidence of "extraordinary" mitigation. We thus recommend that Respondent be disbarred.

CONCLUSION

The sworn proof and documentary evidence Disciplinary Counsel attached to its Motion for Default and filed with the Hearing Committee constitute clear and convincing evidence that Respondent violated Virginia Rules 1.15(a)(1) and 1.15(b)(5). Because Respondent engaged in misappropriation that was at least reckless, and the record contains no evidence in mitigation of sanction, we recommend that Respondent be disbarred. *See Addams*, 579 A.2d at 191.

AD HOC HEARING COMMITTEE

/DIW/
Daniel I. Weiner, Chair

/CDC/
Curtis D. Copeland, Jr., Public Member

/WJC/
William J. Corcoran, Attorney Member

Dated: April 4, 2017