DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
QUINNE HARRIS-LINDSEY,	:	
	:	
Respondent.	:	D.C. App. No. 09-BG-946
	:	Bar Docket No. 384-02
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Membership No. 451238)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY
ON PETITION FOR NEGOTIATED DISCIPLINE

This matter comes before the Board on Professional Responsibility (the "Board") upon referral by the D.C. Court of Appeals (the "Court") for analysis regarding whether the negotiated discipline recommended by an Ad Hoc Hearing Committee[1] is proportionate to the disbarment ordered in *In re Bach*, 966 A.2d 350 (D.C. 2009). The Board recommends that the negotiated discipline be rejected because the record suggests a substantial question whether the underlying conduct constitutes a reckless misappropriation, for which disbarment is the presumptive sanction.

I. PROCEDURAL HISTORY

On February 20, 2009, Bar Counsel filed a Specification of Charges alleging that Respondent had engaged in intentional or reckless misappropriation in violation of Rule 1.15(a), and conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), among other alleged misconduct. During a status conference held by telephone on April 10, 2009, the parties informed the Hearing Committee Chair that they were attempting to negotiate the discipline in this matter. During that status call, the Hearing Committee Chair indicated that

[1] Report and Recommendation of the Ad Hoc Hearing Committee Approving Corrected Petition for Negotiated Discipline (Aug. 12, 2009), hereafter "HC Rpt."

any petition for negotiated discipline should set forth the reasons that Bar Counsel decided not to pursue charges of intentional or reckless misappropriation and instead proposed to treat the matter as one involving negligent misappropriation.

On May 15, 2009, the parties submitted a Petition for Negotiated Discipline charging Respondent with, among other violations[2], three instances of negligent misappropriation.[3] The Petition explained the basis for Bar Counsel's decision not to pursue the charges of intentional or reckless misappropriation.[4] On June 30, 2009, Bar Counsel filed a Consent Motion to File Corrected Petition for Negotiated Discipline, amending the Petition to correct typographical and citation errors and redact confidential information. The Hearing Committee granted Bar Counsel's motion and accepted the Corrected Petition for filing in place of the original.[5] HC Rpt. at 1 n.1.

The Chair communicated *ex parte* with Bar Counsel and reviewed Bar Counsel's investigative file *in camera*, pursuant to D.C. Bar R. XI, § 12.1(c) and Board Rule 17.4(h). The Hearing Committee thereafter conducted the limited hearing prescribed by D.C. Bar R. XI, § 12.1(c) and Board Rules 17.4 and 17.5, after which it approved as justified the sanction agreed upon by the parties: a one-year suspension, with six months stayed, and a one-year period of

[2] The stipulated facts and the violations charged are set forth in their entirety in the Hearing Committee's Report and Recommendation.

[3] The Petition was assigned to the same Hearing Committee convened to consider the contested matter since the hearing on Bar Counsel's Specification of Charges had not yet commenced. *See* Order, *In re Rigas*, Bar Docket No. 148-06 at 12 n.6 (BPR Mar. 11, 2009) (permitting the same hearing committee convened to hear Bar Counsel's Specification of Charges to consider a Petition for Negotiated Discipline in the interest of judicial efficiency, notwithstanding the contrary provision of Board Rule 17.4(c), which the Board noted it intended to amend).

[4] We commend the Chair for requiring Bar Counsel to explain the change in its assessment of the misconduct. A petition's contents should reflect the objective of the process: to permit review of Bar Counsel's exercise of discretion. A petition should thus include the information that a Hearing Committee and ultimately the Court would reasonably consider relevant in evaluating the propriety of a proposed sanction. Dismissal of pending charges related to the same event is inherently relevant to evaluating a proposed negotiated discipline, whatever the reason, and should always be disclosed in a petition. *Cf. In re Johnson*, 984 A.2d 176, 179-80 (D.C. 2009) (per curiam) (Bar Counsel should disclose promise not to bring additional charges related to the events described in the petition for negotiated discipline.).

[5] The Hearing Committee made an additional redaction in the last line of page three in order to remove confidential material that was mistakenly included in the Corrected Petition. HC Rpt. at 1 n. 1.

probation, to be concurrent with the suspension, on the conditions that Respondent (1) attend a general continuing legal education class and provide proof of attendance to Bar Counsel; and (2) consult with the D.C. Bar's Practice Management Advisory Service in the event that she decides to enter private practice.

Upon review of the Hearing Committee's recommendation, the Court referred the matter to the Board "to state briefly its views on whether, taking everything into account, the recommended negotiated discipline is proportionate to the disbarment ordered in *In re Bach*, 966 A.2d 350 (D.C. 2009)." Order, *In re Harris-Lindsey*, No. 09-BG-946 (D.C. Aug. 26, 2009). Bar Counsel requested leave to brief the issue. The Board granted Bar Counsel's motion and set a briefing schedule in an order dated September 17, 2009. In its brief, Bar Counsel reiterates its view that the conduct was merely negligent, that Respondent credibly explained that the misappropriations in this case resulted from her misunderstanding of the probate court rules, and that the agreed-upon sanction is justified. Brief of Bar Counsel ("BC Brief") at 5-6. Bar Counsel also urges that the conduct in this case is less egregious than the conduct in *In re Bailey*, 883 A.2d 106 (D.C. 2005), where the Court found the misappropriation to be negligent, despite the fact that the attorney, with the consent of his client, deliberately borrowed entrusted funds owed to third-party medical providers. BC Brief at 12.

II. STIPULATED FACTS[6]

Respondent represented a family member who served as guardian for her minor son; the estate consisted of insurance proceeds. Withdrawals from the estate's bank account required the signatures of both the guardian and Respondent. With the guardian's consent, Respondent

[6] This summary of relevant facts is limited to those facts bearing directly on the misappropriation charge. Respondent and Bar Counsel have stipulated to additional facts sufficient to demonstrate violations of: Rule 1.15(a) and D.C. Bar R. XI, § 19(f), failure to maintain complete records of entrusted funds; Rule 8.4(d), conduct that seriously interferes with the administration of justice; Rule 1.1(a) and (b), incompetence; Rule 1.3(a), lack of zealousness and diligence; Rule 1.3(c), failure to act with reasonable promptness; and Rule 1.5(f), collection of a fee prohibited by law, and therefore unreasonable.

withdrew funds from the estate for her fees in 1995 and 1996, before learning from court administrative personnel that such withdrawals required prior court approval. She reported this error to the court in an estate accounting filed in March 1997, explaining her misunderstanding and noting that she had reimbursed the estate. After the check that she drew to do so was dishonored, she made the reimbursement some three weeks later. Nothing in the record suggests that Respondent took any further action to familiarize herself with the court rules or procedures applicable to her representation of the guardian.

One year later, in a petition seeking ratification of expenditures, Respondent acknowledged that in 1997 she had allowed the guardian to withdraw funds for estate expenses (a bond to secure the estate's assets) and expenses of the minor (childcare, school supplies, etc.), before learning that prior court approval was also necessary for those disbursements. Although the Probate Court ultimately ratified these expenses, by order dated March 11, 1998, it admonished the guardian "not to expend estate assets without prior court authorization." A copy of the order was sent to Respondent. The Petition is silent as to whether Respondent received it.

Nevertheless, Respondent, with the guardian's consent, withdrew $2,250 in October 1999 without obtaining court approval. The subsequent accounting described the disbursement as a cost of administering the estate and characterized it as an assignment of the guardian's commission to Respondent as fees for her legal services during the preceding five years. Respondent subsequently stated to the Probate Court and to Bar Counsel that she did not understand that prior court authorization was necessary for payment of administrative expenses and guardian's commissions. The court in October and November 2001 ordered Respondent to redeposit the funds, but she did not have the means to do so.

In November 2001, Respondent filed a "Memorandum of Explanation" and a request for ratification of her fees. She stated that the unauthorized withdrawal occurred because "she was

unfamiliar with the requirement to obtain court approval because she 'erroneously made the distinction between administrative expenses and expenditures.'" Petition ¶ 14. Probate Division personnel "informed me that my understanding with respect to administrative expenses and attorneys fee[s] was erroneous and suggested that the money be deposited into the account." *Id.*

The Probate Court declined to ratify the payments in June 2002 and awarded Respondent nothing for this work. Respondent told Bar Counsel that she did not learn of the June 2002 order until she received Bar Counsel's inquiry in September 2002. She was unable to reimburse the estate until December 2003. The guardian thereafter discharged Respondent, and she has been paid nothing for her work.

Based on the foregoing facts, Bar Counsel filed a Specification of Charges alleging, *inter alia*, that Respondent misappropriated the funds intentionally or recklessly in violation of D.C. Rule of Professional Conduct 1.15(a) and violated Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Prior to a hearing on these charges, the parties agreed on a negotiated discipline, and Bar Counsel submitted a Petition for Negotiated Discipline, subsequently corrected, based on a charge of negligent misappropriation.

The Petition sets forth at pages 8-15 the reasons that Bar Counsel came to believe that Respondent was merely negligent, *i.e.*, that she had an honest, albeit mistaken, belief that no prior court approval was necessary when she withdrew the funds. The Petition notes that circumstantial evidence—Respondent was unfamiliar with the probate rules because she had never before practiced in the Probate Division,[7] undertook the representation at the behest of a family member, obtained the consent of the guardian before each of the withdrawals, and disclosed the withdrawals completely in her accountings—is consistent with negligence. Petition

[7] Respondent was admitted to the Bar of the District of Columbia in 1996. Prior to that time, she represented the guardian based on *pro hac vice* admission.

at 9-10. Having communicated with Respondent in person, Bar Counsel credits her description of her state of mind at the time. *Id*. at 10. Bar Counsel believes that a hearing committee would likely find Respondent to be credible, and that, as a result, Bar Counsel would be unable to present clear and convincing evidence of a more culpable state of mind. *Id*.

The Petition explains further that the original allegation concerning Respondent's dishonest state of mind vis-à-vis the misappropriation depended in part on another allegation, since disproven, that Respondent reimbursed the estate in 1997 with funds taken from another account held by the estate. *Id*. at 8-9. Upon review of Respondent's financial records, Bar Counsel is satisfied that the reimbursement came from her personal funds. *Id*. at 9. Finally, evidence corroborates Respondent's assertion that she delayed reimbursing the estate after being ordered to do so in late 2001 because she lacked the means and made the reimbursement when she was able. *Id*. at ¶¶ 14, 20; HC Rpt. at 17-18 and Confidential Appendix; Transcript of Limited Hearing conducted on July 7, 2009 ("Tr.") at 32-33.

Having reached these conclusions, Bar Counsel represented at the limited hearing that if the negotiated discipline is not approved, it would amend the Specification of Charges to eliminate the allegations of intentional or reckless misappropriation and dishonesty and would not seek a greater sanction than the one negotiated by the parties. HC Rpt. at 10 n.6; Tr. at 25-29.

The Hearing Committee conducted the colloquy required by Board Rule 17.5 and did not otherwise examine Respondent. It deferred to Bar Counsel's conclusion about her credibility:

> Bar Counsel now believes both that Respondent's conduct was based on her lack of experience and unfamiliarity with the relevant rules of the court and that Respondent honestly believed that she had the authority to withdraw the funds from the estate when she took them. Petition at 10. The Hearing Committee finds it significant that Bar Counsel reached this conclusion and accepts that Respondent had a truly held but inaccurate understanding that

> she was entitled to withdraw the funds without prior court approval.

HC Rpt. at 17 (citing Petition at 11-12). The Hearing Committee also noted that the withdrawals were made with the complete and contemporaneous approval of the guardian and that Respondent reimbursed the estate when she was able to do so. *Id*. In a Confidential Appendix, the Hearing Committee expanded upon these determinations. For these reasons, the Hearing Committee agreed that it was appropriate to treat the case as one involving negligent misappropriation and concluded that the agreed-upon suspension of six months—a one-year suspension with six months stayed—was justified.

III. ANALYSIS

In a negotiated discipline, the ultimate task of the hearing committee is to evaluate the propriety of the sanction and to reject the petition if that sanction is unduly lenient. *Johnson*, 984 A.2d at 181. Bar Counsel and our hearing committees have been operating, thoughtfully and conscientiously, in unexplored territory, and the early cases have uncovered unanticipated issues and identified subjects about which practical guidance is needed. So it is with this case. The Court has not yet addressed whether Bar Counsel and a respondent may negotiate a sanction other than disbarment when the respondent has committed reckless or intentional misappropriation. *Cf. In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc) (disbarment is the presumptive sanction for reckless or intentional misappropriation). Neither the Court nor the Board has yet addressed the vexing issue of how a hearing committee reviewing a petition for negotiated discipline in a misappropriation case should determine whether a particular sanction is justified when the conduct falls into the gray area between negligent and reckless misappropriation. The degree of deference to be accorded to Bar Counsel in negotiating discipline remains unsettled, especially, where, as here, the propriety of the sanction may turn on

the respondent's intent and a necessary assessment of the respondent's credibility. This case exemplifies the difficulties posed by these questions.

The Court's direction to compare this case to *In re Bach* requires that we take up these issues and make recommendations as to how a hearing committee should proceed when considering a negotiated discipline that may involve more than simple negligence. Generally, the Board believes that negotiated discipline should be available in cases of misappropriation that clearly involves simple negligence. Consistent with *Addams*, absent extraordinary circumstances, the parties should not be free to negotiate a sanction other than disbarment in clear cases of reckless or intentional misappropriation. Where the record presents a substantial issue as to whether misappropriation was reckless or worse, the negotiated discipline process will ordinarily be too limited to allow the necessary fact-finding. This is such a case.

A. Respondent's conduct raises a serious issue of recklessness.

Respondent has persuaded Bar Counsel that she withdrew estate funds in 1995, 1996 and 1999 while under a good-faith but mistaken belief that prior court approval was not required. A long line of cases, including *In re Travers*, 764 A.2d 242 (D.C. 2000), establishes that disbursements made in good faith and in ignorance of the proper procedures, without more, fall within the category of negligent misappropriation, which generally results in a six-month suspension. *See also In re Herbst*, 931 A.2d 1016, 1017 (D.C. 2007) (per curiam); *In re Anderson*, 778 A.2d 330 (D.C. 2001). The first two unauthorized payments appear to fit comfortably within that category. Respondent was newly admitted to the Bar, had no experience in the Probate Court, did not know that prior authorization was required, believed that she had earned the fees, took them with the approval of the guardian and restored the money when she learned of her mistake of law. *See generally In re Berryman*, 764 A.2d 760, 770-72 (D.C. 2000) (collecting cases finding negligent misappropriation where attorney was under honest but

mistaken belief that he or she was entitled to use of funds that were required to be maintained in trust).

The third payment, however, is problematic.[8] The Probate Court's March 11, 1998 order placed Respondent on notice that no estate assets could be disbursed without court authorization, identifying no exceptions. Respondent asserts that she did not understand the order as a complete prohibition of future withdrawals but instead believed that administrative expenses and commissions were exempt. The order, however, insofar as it is quoted in the Petition, is direct and unambiguous—"not to expend estate assets without prior court authorization." Moreover, the order was issued in part because of an unauthorized administrative expense, *i.e.*, the bond. The Probate Court's order distinguishes this case from the common run of negligent misappropriation cases because it gave Respondent reason to know (or at least to suspect) that the withdrawal was improper.

Eighteen months after the order, Respondent and the guardian withdrew funds for what they later described as an expense of administering the estate. The withdrawal was a roundabout way of compensating Respondent for her legal services by assignment of the guardian's commissions, rather than filing the fee petition that she knew to be necessary. Having twice learned that her understanding of the probate rules was imperfect, Respondent did not seek guidance from the court's administrative staff, who had advised her with respect to prior expenditures. She did not repay the estate for more than two years after being ordered to do so. After investigation, Bar Counsel believed that these facts warranted a charge of reckless or intentional misappropriation and, upon reviewing Bar Counsel's files, a Contact Member agreed.

[8] There were four disbursements from the estate: three to pay Respondent and one for expenses of the minor and the estate. The misappropriation charge pertains only to the three payments to Respondent.

Reckless misconduct, the Court has explained, "requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person." *In re Romansky*, 825 A.2d 311, 316 (D.C. 2003) (quoting 57 AM. JUR. 2d Negligence § 302 (1989)); *see also In re Anderson*, 778 A.2d 330, 338 (D.C. 2001) (reckless misappropriation is established where the attorney acts with "unacceptable disregard for the safety and welfare of entrusted funds . . . ."). Where a respondent has disbursed funds knowing that his or her actions may be improper, the Court has characterized the misappropriation as reckless. In *In re Utley*, 698 A.2d 446 (D.C. 1997), the Court found reckless misappropriation because the respondent made a third withdrawal of estate funds without court approval after being advised by the Probate Division that two such prior withdrawals were improper. "[I]n light of this third act of payment despite court requests to return the earlier two unapproved payments, we cannot characterize these deliberate acts as the product of simple negligence." *Id*. at 450. Here, Respondent was aware that her prior unauthorized withdrawals were improper, and the Probate Court's order clearly indicated that prior approval was needed for further disbursements. These facts raise a substantial question as to whether Respondent disregarded a known risk that her use of the funds from the third disbursement was improper; if so, she committed a reckless misappropriation.

The Petition does not squarely address the serious issue presented by the 1999 withdrawal after the Court's order, nor does it explain why that withdrawal was not an act of reckless misappropriation. Instead, it focuses on the reasons that Bar Counsel does not have clear and convincing evidence of *intentional* misappropriation (Petition at 11-12), and dismisses the issue of recklessness in a footnote, observing that Respondent: (1) as privately retained counsel, was not required to certify her familiarity with the probate rules; (2) was a novice before the Probate Court; (3) obtained the guardian's consent for the disbursements; and (4) was not

dishonest. Petition at 12 n.8. But if, as the Petition states, the standard is whether Respondent had an "objectively reasonable, albeit erroneous, belief that [her] actions were proper" (Petition at 13) (citing *In re Evans*, 578 A.2d 1141, 1142, 1144 (D.C. 1990)), it is not clear why those facts are more probative on the issue of recklessness than Respondent's disregard of the 1998 court order and her knowledge regarding the prior violations.

In short, a closer examination of recklessness and a more fully developed record are essential in order to determine whether the agreed-upon sanction is justified. The Board expresses no opinion as to the ultimate result of that fact-finding or the legal conclusions to be reached thereupon.[9]

B. Where credibility is dispositive in a misappropriation case, fact-finding is required.

Credibility presents special difficulties, as this case illustrates. We agree with the Hearing Committee that Bar Counsel's views about a Respondent's credibility merit serious consideration. HC Rpt. at 17 ("The Hearing Committee finds it significant that Bar Counsel reached [the] conclusion" that Respondent's conduct was based on her lack of experience and unfamiliarity with the relevant rules of the Court and that Respondent honestly believed that she had the authority to withdraw the funds from the estate when she took them, and "accepts that Respondent had a truly held but inaccurate understanding that she was entitled to the withdraw the funds without prior court approval."). But plenary deference to Bar Counsel's credibility determinations in a misappropriation case is inconsistent with the premise of negotiated discipline, that a hearing committee and the Court can effectively review the exercise of Bar Counsel's discretion based on a limited record.

[9] Respondent's state of mind is not the only issue that must be considered in order to determine whether the sanction is justified. As the Hearing Committee noted, there exists an unresolved question of law as to whether an attorney who is a joint signatory of an estate account is "entrusted" with the funds in that account within the meaning of the case law on misappropriation. HC Rpt. at 17 n.7. The Board takes no position on this issue.

In a misappropriation case, the sanctions are essentially pre-determined, and a wide gap separates the six-month suspension typically meted out for negligent misconduct from the disbarment that presumptively follows from reckless or intentional conduct. Because Bar Counsel's discretion is circumscribed by the *Addams* rule, a hearing committee must take particular care to examine the clarity and adequacy of the record before approving a sanction predicated on simple negligence. The committee must understand why Bar Counsel agreed to a less culpable mental state, should seek an explanation of any conflicting evidence in the record, and may examine Bar Counsel *ex parte* on that subject. Further, the committee must make a judgment about whether additional fact-finding would be of assistance in evaluating the proposed sanction.

Because the sanction for misappropriation turns so critically on the respondent's state of mind, the respondent's credibility will often be determinative. Absent an opportunity to examine the respondent, there may as a practical matter be no way for a hearing committee to conduct a meaningful review of Bar Counsel's assessment of the respondent's credibility. *See, e.g.*, *In re Temple*, 629 A.2d 1203, 1208-09 (D.C. 1993) (the Court and the Board defer to a hearing committee's credibility findings precisely because "the fact finder who hears the evidence and sees the witnesses is in a better position to make [credibility] determinations, having the benefit of those critical first-hand observations of the witness' demeanor or manner of testifying which are so important to assessing credibility."). Moreover, complete deference to Bar Counsel's credibility determinations under these circumstances comes close to a presumption in favor of approving a petition for negotiated discipline. *Cf. Johnson*, 984 A.2d at 180 ("[T]here is no automatic presumption that a negotiated petition for discipline should be approved."). Where the objective facts raise serious issues about the degree of a respondent's culpability and the proposed sanction would not be justified unless the respondent is credible, the sanction should

ordinarily not be approved without testing the respondent's credibility (*e.g.*, through vigorous cross-examination), fact-finding that lies outside the proper scope of a limited hearing in a negotiated discipline case. To be sure, there may be cases in which the respondent's state of mind at the time of the misconduct is so clearly corroborated by extrinsic evidence that his or her culpability can be examined without the need for testimony and credibility determinations. Experience in contested cases suggests, however, that this situation will be rare.[10]

In this case, for example, the Petition and Bar Counsel's brief advert to certain conversations in which Probate Division personnel explained to Respondent the requirement for court authorization prior to any withdrawals from the Estate. The first took place in or about early 1997:

> After paying herself fees in February 1996, Respondent had a conversation with an employee in the office of the Probate Division of the Superior Court and learned that she needed prior court approval to do so. As a result of that conversation, on or about March 21, 1997, in the Second Accounting of estate assets that Respondent filed on Ms. Fulwood's behalf, Respondent reported to the Superior Court that:
>
> > Counsel erroneous[ly] withdrew attorney['s] fees without the Court's prior approval on 12/27/95 and 2/27/96. Counsel was unaware that said fees required Court approval. Upon being advised that Court approval was required, Counsel re-imbursed the Estate account the sum stated above.

Petition ¶ 8. The second is described in Respondent's Memorandum of Explanation to the Probate Court in 2001, in which she asserted that "she was unfamiliar with the requirement to obtain court approval because she 'erroneously made the distinction between administrative

[10] A similar issue is presented in cases of moral turpitude where the respondent's state of mind often makes the difference between a short suspension and mandatory disbarment. *See In re Rigas*, Bar Docket No. 148-06 (BPR May 28, 2010). In *Rigas*, the Board concluded that moral turpitude cases could be the subject of negotiated discipline provided the hearing committee can "evaluate independently Bar Counsel's decision that a particular criminal conviction does not involve moral turpitude on the facts or that the proof is insufficient." *Id.* (attaching Order, *Rigas*, Bar Docket No. 148-06 at 5).

expenses and expenditures'", and that Probate Division personnel corrected that misunderstanding. *Id*. at ¶ 14 ("[Personnel at the probate division] informed me that my understanding with respect to administrative expenses and attorneys fee[s] was erroneous and suggested that the money be deposited into the account."). Although the Petition nowhere states that Probate Division personnel ever misinformed Respondent about the need for prior authorization, Bar Counsel's brief seems to imply it: "Respondent explains that she had understood the Probate Division employee to say that the required prior court approval pertained to certain types of disbursements but not others (for example, she did not believe that prior court approval was necessary to pay estate taxes from estate assets), and that she misunderstood what constituted an acceptable withdrawal." BC Brief at 5-6.

With commendable candor, Bar Counsel states that, although Bar Counsel finds Respondent credible, "there is no way to predict whether a Hearing Committee would discredit Respondent's explanation on the issue . . . ." Petition at 11. The Board believes that this is precisely the kind of issue on which fact-finding is essential. If Respondent's communications with the Probate Division bear substantially on her state of mind, the record regarding them should be developed more fully. To the extent that the account of these conversations comes exclusively from Respondent, an assessment of her credibility by a fact-finder becomes critical. The same is true of whether she received and read the March 11, 1998 order of the Probate Court.

C. Like *Bach*, this case may be subject to the *Addams* rule.

In *Bach*, the Court reaffirmed its intention to apply "unyieldingly" the *Addams* rule that disbarment is ordinarily the only appropriate sanction in cases of intentional or reckless misappropriation. *Bach*, 966 A.2d at 352. The misappropriation in that case was intentional—the respondent admitted that he knew the rules, understood what they required, and decided to

withdraw the funds nevertheless so that a claim by the ward's nursing home would not exhaust the estate before he was paid. In disbarring him, the Court emphasized that Mr. Bach knew that he was doing something prohibited by law. *Id*. He did not testify in the disciplinary proceeding and presented no evidence tending to show that he acted out of a truly held, but erroneous, understanding that he was entitled to the funds in advance of court authorization. Having established that he misappropriated the funds knowing that he was not entitled to do so, the virtually irrebuttable presumption of *Addams* required that he be disbarred.

Although the respondents in *Bach* and in this case have each referred to conversations with personnel in the Probate Division, the respective records are so sparse that it is possible to identify issues but not to draw meaningful conclusions. At various times in his proceedings, Mr. Bach contended that he withdrew the funds prematurely based in part on assurances from a Probate Division auditor that his fee petition had been, or shortly would be, approved by the Court. *Id*. at 358 (appended Board Report). Because he neither testified nor submitted evidence in support of that contention, there was no need to consider whether that conversation would have rendered his unauthorized disbursement negligent rather than intentional if the probate auditor's advice conflicted with the court rules.

In contrast to *Bach*, the record in this case does not appear to suggest intentional misappropriation. But like *Bach*, the precise substance of whatever conversations took place between Respondent and court personnel is unclear. A hearing committee will be best suited to ensure that the factual record on this issue is fully developed and to consider whether any misunderstanding by Respondent was in good faith and reasonable. It may prove necessary to reach the issue left unanswered by *Bach*, especially in light of the March 11, 1998 order of the Probate Court.

Although the intentional misappropriation in *Bach* involved a more culpable state of mind than the potentially reckless misconduct in this case, this is not a distinction that makes a difference given the sanction analysis adopted by the Court in *Addams* and its progeny. Only with additional fact-finding can it be determined whether Respondent's conduct was negligent or reckless, the critical determination from which the sanction follows.

IV. CONCLUSION

For the foregoing reasons, the proposed negotiated discipline in this case should be rejected.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /DJJ/
Deborah J. Jeffrey

Dated: July 1, 2010

All members of the Board concur in this Report and Recommendation except Mr. Mercurio, who has filed a Separate Statement concurring and dissenting in part, and Mr. Frank, who has filed a Separate Statement concurring and dissenting in part, which is joined by Ms. Cintron.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

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A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 451238)	:	

SEPARATE STATEMENT OF MEMBER MERCURIO

The Court has requested that we "state briefly [the Board's] views on whether, taking everything into account, the recommended negotiated discipline is proportionate to the disbarment ordered in *In re Bach*, 966 A.2d 350 (D.C. 2009)." Order, *In re Harris-Lindsey*, App. No. 09-BG-946 (D.C. Aug. 26, 2009) (per curiam). If this negotiated discipline matter had involved a charge of intentional misappropriation, as in *Bach*, or even a reckless misappropriation, the recommended sanction obviously would not be proportionate to the disbarment ordered in *Bach.* Bar Counsel advised the Hearing Committee, however, that his further investigation of pending charges of intentional or reckless misappropriation and dishonesty has established that those charges are "baseless." HC Rep. pp. 16-17.[1] The Committee, after its review of the record and an *ex parte* conference with Bar Counsel, accepted that determination and explicitly regarded charges of intentional or reckless misappropriation and dishonesty as not a part of this negotiated discipline proceeding. *See*, *e.g.*, *id*. at 2, 10-11 n.6; Tr. 26-29. Responding to the Court's question thus requires consideration of whether, in the circumstances of this matter, the Committee properly disregarded those charges in reaching its conclusion that the sanction proposed for the remaining charges in this matter is justified.

[1] "HC Rep." refers to the Report and Recommendation of the Ad Hoc Hearing Committee ("Hearing Committee Report") issued on August 12, 2009.

In my view, the Committee's report, including its Confidential Appendix, does not sufficiently explain the Committee's finding that a dismissal of the charges of intentional or reckless misappropriation and dishonesty is warranted. But for the reasons stated herein, I would submit that the Petition for Negotiated Discipline be remanded for the purpose discussed below, not rejected outright. *See infra* at 5-6.

The basic issue on which I differ with the majority is whether a hearing committee in a negotiated discipline case should give any deference to a determination by Bar Counsel that a pending charge should be dismissed as baseless. In our disciplinary system, if Bar Counsel, after a complete investigation, determines that a complaint should not be referred for disciplinary action, he has the authority, subject only to prior approval of a Contact Member, to "dispose of [the] matter[] . . . by dismissal." D.C. Bar R. XI, § 6(a)(3); *see also id*. at § 8(b).[2] The Contact Member's authority to approve or disapprove Bar Counsel's proposed disposition must be exercised as follows:

> In approving, rejecting, or suggesting modification of the recommendation of Bar Counsel [to dismiss or institute formal charges in an investigated matter], the Contact Member shall give *due deference to the expertise of Bar Counsel in disciplinary matters* and to the responsibility of Bar Counsel to allocate the investigative and prosecutorial resources of Bar Counsel's office.

Board Rule 2.12 (emphasis added); *see also* Board Rule 2.16 (same direction regarding due deference in Board Contact Member review of diversion agreements).

[2] Contact Members are routinely assigned by the Board, through the Executive Attorney, "to review and approve or suggest modifications of recommendations by Bar Counsel for dismissals, informal admonitions, and the institution of formal charges." D.C. Bar R. XI, § 4(e)(5); *see also id*. at § 6(a)(3). In a case of disagreement between Bar Counsel and the Contact Member, the matter is "referred by the Executive Attorney to the Chairperson of a Hearing Committee other than that of the Contact Member for decision." *Id*. at § 5(d). "The decision of the Hearing Committee Chairperson to whom the matter is referred shall be final." *Id*.

No sound reason has been given for depriving Bar Counsel in negotiated discipline cases of the measure of deference accorded his recommendation under Board Rule 2.12. The majority, however, would accord Bar Counsel no deference whatsoever in this matter. Further, the majority would establish a rule that Bar Counsel's determination should be given no deference in virtually every case in which a hearing committee believes that "objective facts raise serious issues about the degree of respondent's culpability and the proposed sanction would not be justified unless the respondent is credible . . . ." Majority Report p. 12.

Each year, hundreds of investigated matters are dismissed by the Bar Counsel-Contact Member process.[3] No existing rule or other authority impedes Bar Counsel from determining that a case be dismissed based entirely upon his judgment that the respondent credibly denies the misconduct that might be charged.[4] On the contrary, Bar Counsel may, and undoubtedly does, make that determination in many cases, and his determination is reviewed with "due deference [given] to the expertise of Bar Counsel in disciplinary matters." Board Rule 2.12.

The requirement that Contact Members defer to Bar Counsel's expertise makes sense. That expertise in disciplinary matters, Bar Counsel's familiarity with the circumstances his investigation has revealed, his experience in cross-examining respondents in disciplinary

[3] Dispositions of matters involving alleged misconduct by dismissal, informal admonition and referral of charges in the past five years are as follows:

	2005	**2006**	**2007**	**2008**	**2009**
Dismissals	337	288	320	408	410
Informal Admonitions	27	30	38	24	14
Referral of Charges	20	35	38	41	35

See Monthly Reports of Hearing Committees, Contact Member Review (December 2005, 2006, 2007, 2008, 2009).

[4] In fact, Bar Counsel is required by statute and Court rule to prosecute only those complaints that he can state, under oath, are true. Disciplinary proceedings in the District of Columbia must start with "written charges", filed "*under oath*." D.C. Code § 11-2503(b); D.C. Bar R. XI, § 8(c) (emphasis added). The form of oath customarily used by Bar Counsel reads: "I do affirm that I verily believe the facts stated in the Specification of Charges to be true." As the Court held in *In re Morrell*, 684 A.2d 361 (D.C 1996), an "oath by Assistant Bar Counsel that probable cause exists to refer the charges to a hearing committee . . . does not fulfill the oath requirement of § 11-2503(b) . . . ." *Id*. at 366.

hearings and his ability to interview the respondent in person, thus observing his demeanor, enable Bar Counsel to make sound judgments about whether the respondent is telling the truth. And that judgment, if accepted by a Contact Member or a hearing committee considering a negotiated discipline, provides a reliable basis for dismissing disciplinary cases. "[V]igorous cross-examination" by Bar Counsel in a contested, public hearing, which the majority wrongly assumes is the only reliable test of a respondent's credibility (*see* Majority Report p. 13), in fact, provides no better basis for determining whether a respondent is telling the truth than a judgment of Bar Counsel, based on his private "cross-examination", or perhaps several private examinations of the respondent, during the course of the investigation. Formal cross-examination before a tribunal is necessary when Bar Counsel is skeptical concerning what a respondent has told him during an investigation, but resort to a full disciplinary hearing with cross-examination and all the other procedures designed to resolve disputed cases is hardly needed when Bar Counsel has determined that a complaint is without basis. The majority's recommendation would preclude negotiated discipline in an untold number of cases and thus impede the usefulness of negotiated discipline procedures by adding yet another rule narrowing the circumstances in which negotiated discipline can be utilized. *See* Orders, *In re Rigas*, Bar Docket No. 148-06 (BPR May 28, 2010) (Separate Statement of Member Mercurio pp. 2-3) and (BPR Mar. 11, 2009) (Separate Statement of Member Mercurio pp. 3-5).

Last December, the Court rejected a previous encroachment on Bar Counsel's discretion proposed by the dissenting hearing committee chair in *In re Johnson*, 984 A.2d 176 (D.C. 2009). The charges of professional misconduct identified in the petition for negotiated discipline were drawn from the "findings of the United States District Court in *Gov't of Rwanda v. Rwanda Working Group*, 227 F.Supp.2d 45 (D.C. Cir. 2002)", a case that arose out of the respondent's

representation of "the Government of Rwanda at the beginning of a tragic period of bloody upheaval in that nation." *Johnson*, 984 A.2d at 177. The Committee Chair's dissent was based on his contention that the "decisions of the United States District Court and the United States Court of Appeals"—the judicial opinions in the case from which the charges in the negotiated discipline petition had been drawn—"might reasonably support a far more extensive series of disciplinary charges than those Bar Counsel ha[d] agreed to" and stated in the negotiated discipline petition.[5] The Court rejected that contention, explaining as follows:

> We agree with both the majority and the Chair that a committee's review must be thorough and there is no automatic presumption that a negotiated petition for discipline should be approved. However, we cannot agree with the Chair's further assertion that a hearing committee's historic power to draw broad conclusions of law remains its function in the context of a negotiated discipline and thus allows it to question Bar Counsel's decision not to bring certain charges.
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> * * * * *
>
> A committee's discretion to make findings in this context is limited to ascertaining that "[t]he facts *set forth in the petition or as shown at the hearing* support the admission of misconduct." Its ability to draw conclusions of law is now similarly limited to determining that "[t]he sanction agreed upon is justified." We agree with the majority in this case that some consideration may be given to what charges might have been brought, but only to ensure that Bar Counsel is not offering an unduly lenient sanction—the ultimate focus must be on the propriety of the sanction itself.

Id. at 180-81 (emphasis in original, footnotes omitted).

Consistent with the limited discretion envisioned for the negotiated discipline hearing committee in *Johnson*, hearing committees considering negotiated discipline cases, in my view, should not be directed to usurp the role of Bar Counsel by ignoring his judgment that a charge should not be brought, without giving that judgment the "due deference to the expertise of Bar Counsel in disciplinary matters" that Bar Counsel's recommendations regarding the disposition

[5] Bar Counsel agreed not to pursue any other charges stemming from the respondent's conduct described in the federal courts' opinions.

of investigated matters are generally accorded. Refusing "due deference," however, is exactly what the majority wishes the Committee to do, not only in this matter, but in a whole class of matters that meet a definition that the majority offers based on nothing but its own authority.

The only reason the recommendation in this matter presently before the Court should not be approved, in my view, is that the Committee's report does not adequately explain why it has accepted Bar Counsel's conclusion that Respondent is telling the truth when she stated that, based upon her conversations with employees in the probate office, she believed that, in general, certain estate expenditures required prior court approval, but that the administrative fee withdrawn by the guardian in this matter needed no such approval. Corrected Petition p. 11; HC Rep. pp. 8, 17; *see also* Confidential Appendix p. 2. To my mind, that she had such an erroneous understanding is not implausible. The Committee's report, however, does not state whether Respondent gave Bar Counsel or the Committee any explanation of her resolution of the apparent contradiction between what she thought she was told by the probate office employees and the Probate Court's order of March 11, 1998, in which the judge "admonished the guardian [Respondent's client] 'not to expend estate assets without prior court authorization.'" Corrected Petition p. 4, ¶ 10.

In my view, the question the Court has asked the Board to address in this matter would be best resolved by a remand of this matter to the Committee for a closer examination of the issue identified above.

By: _____/JPM/_____
James P. Mercurio

Dated: July 1, 2010

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
QUINNE HARRIS-LINDSEY,	:	
	:	D.C. App. No. 09-BG-946
Respondent.	:	Bar Docket No. 384-02
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Membership No. 451238)	:	

SEPARATE STATEMENT OF MEMBER FRANK

I concur in the Board's recommendation that the Court reject the Ad Hoc Hearing Committee's recommendation, but write separately because I think the discussion in the majority opinion concerning the credibility determinations and when a hearing committee may or may not accept Bar Counsel's determination of credibility is unnecessary. I also agree with Mr. Mercurio's view that requirements imposed by the majority are inconsistent with the Court's decision in *In re Johnson* 984 A.2d 176, 180-81 (D.C. 2009), are difficult to reconcile with the deference our rules require be given to Bar Counsel by Contact Members, and would undermine the use of negotiated dispositions to expedite disciplinary actions. Adoption of the majority's requirements effectively eviscerate the potential for negotiated dispositions in any but the rarest of misappropriation cases.

I do not think we need reach any of those matters here. From my perspective, this case is simple and relatively straightforward. While the Hearing Committee stated that "[t]he stipulated facts and the Hearing Committee Chair's *ex parte* review of Bar Counsel's file support Respondent's admission that the misappropriation was negligent and that Bar Counsel could not prove that it was intentional or reckless . . .", Hearing Committee Report at 15, neither the Report

nor the Confidential Appendix adequately explains the basis for that conclusion. Thus, I believe a question remains on the face of the record whether Respondent acted recklessly in continuing to take funds from the estate after she had been advised by court officials that she needed approval from the Court and after the Probate Court admonished her not to expend any funds without approval. The Petition for Negotiated Discipline did not address that issue and, without any record to support Bar Counsel's determination that Respondent was only negligent, the Hearing Committee could not have a sufficient basis for finding that the negotiated disposition was justified. On that basis, I would recommend that the Court reject the negotiated discipline here.

By: /TDF/
Theodore D. Frank

Dated: July 1, 2010

Ms. Cintron joins in this Separate Statement.