DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
	)	
ANTHONY GRAHAM, SR.,	)	Bar Docket No. 422-97
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Bar Counsel has filed a petition charging Respondent with violations of three provisions of the District of Columbia Rules of Professional Conduct (the "Rules"). The charged violations relate to Rule 1.15(a) (commingling funds by failing to hold client funds separately from the attorney's own funds), Rule 1.15(b) (having received funds in which a third party had an interest, failing promptly to notify that third party of the receipt of funds or deliver the funds to the third party) and Rule 1.17(a) (failure to segregate client funds and to deposit such funds in a specially designated account bearing the title "trust account" or "escrow account").

Respondent is a member of the Bar of the District of Columbia Court of Appeals (the "Court"), having been admitted on December 10, 1990. These charges arose from Respondent's representation of certain clients at Capitol Hill Legal Services, the firm in which Respondent is a partner. Respondent's actions, which form the basis for the charges took place during the period of March 1997 through October 1997. An evidentiary hearing was held on February 12, 1999, before Hearing Committee Number Seven (the "Committee"). This matter comes before the Board on Professional Responsibility (the "Board") on review of the Proposed Findings of Fact, Conclusions of Law and Recommendation as to Sanction of the Committee issued on June 26, 2000 (the "Committee Report"). The Committee Report is attached and the Proposed

Findings of Facts set forth therein are adopted by the Board. In the Committee Report, the Committee recommended that Respondent be publicly censured. Neither Bar Counsel nor Respondent filed exceptions to the Committee Report. The Board agrees with the Committee's recommended sanction.

CONCLUSIONS OF LAW

Bar Counsel has charged Respondent with violating Rules 1.15(a), 1.15(b) and 1.17(a) which provide, in relevant part, as follows:

> Rule 1.15 ("Safekeeping Property"):
>
> (a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution which [meets certain requirements] . . . Complete records of such account funds . . . shall be kept by the lawyer . . . .
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> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person . . . [A] lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive . . . .
>
> Rule 1.17 ("Trust Account Overdraft Notification"):
>
> (a) Funds coming into the possession of a lawyer that are required by these rules to be segregated from the lawyer's own funds . . . shall be deposited in one or more specially designated accounts at a financial institution. The title of each such account shall contain the words trust account or "escrow account," as well as the lawyer's or the lawyer's law firm's identity.

The Committee found that Respondent violated each of the three Rules specified above. The Board agrees with this conclusion but disagrees with respect to the Committee's finding of a violation with respect to one specific count of the Specification of Charges brought by Bar Counsel (the "Specifications") as explained below.

A. Respondent Violated Rules 1.15(a) and 1.17(a)

The Committee found that Respondent violated Rule 1.15(a) and Rule 1.17(a) in each of the instances described in Count I (Jonda Morton-Smith, client), Count II (Sharon and Lawrence Tucker, clients), Count III (Lionel Proctor, client) and Count V (Carla Morrison, client) of the Specifications. The Committee found no violation of either rule in the instance described in Count IV (Gwendolyn Campbell, client) of the Specifications. The Board agrees with all these findings except with respect to Count V of the Specifications, where the Board finds that there was not sufficient evidence to find a violation of Rule 1.15(a) or Rule 1.17(a).

Counts I and III

Respondent has acknowledged violating the prohibition against commingling for the conduct underlying the charges in Counts I and III.[1] In those instances, Respondent either deposited, or authorized the deposit of, funds belonging to clients into his firm's operating account (the "Operating Account"), which Respondent knew contained general funds belonging to the law firm. In the Morton-Smith matter, the funds were deposited directly into the Operating Account; in the Proctor matter, they were transferred from the escrow account maintained by the Respondent's firm (the "Escrow Account") into the Operating Account before being disbursed

[1] In his brief, Respondent acknowledges, with respect to Count I, a violation of "Rule 1.15(c)," and, with respect to Count III, a "violation of the rule against commingling." Respondent's Proposed Findings of Fact, Conclusions of Law, and Recommendation As To Sanction, dated May 3, 1999, at 5 and 8. The Specifications charge violations, in each case, of Rule 1.15(a) rather than Rule 1.15(c).

from the Operating Account to Mr. Proctor. The Board agrees that these activities constitute violations of Rule 1.15(a) and Rule 1.17(a). In the Morton-Smith matter, the funds were never deposited into the required escrow or trust account; in the Proctor matter, Respondent was responsible for removing the funds from the Escrow Account and depositing them in the Operating Account before distributing them to the client.

Count II

In the case of Count II, Respondent argues that "the attorney's money and the client's money were never in the attorney's account at the same time," owing to the fact that the initial settlement check from the adverse party, which was payable to Respondent's clients, was returned for insufficient funds. Respondent's Proposed Findings of Fact, Conclusions of Law, and Recommendation As To Sanction, dated May 3, 1999 ("Respondent's Brief") at 6-7. Respondent had deposited the settlement check in the Operating Account and issued a check to Mrs. Tucker on the Operating Account, which cleared notwithstanding the fact that the settlement check was later returned unpaid. A replacement settlement check was ultimately issued to Respondent. Respondent argues that the check he issued to Mrs. Tucker was, in essence, an advance from Respondent of Mr. and Mrs. Tucker's share of the settlement, and that "when Respondent received the re-issued settlement check it was Respondent's money. Thus, as a matter of law there was no commingling . . . ." Id. at 7.

The Board does not agree. As Bar Counsel rightly notes, commingling occurred when Respondent initially deposited the Tuckers' settlement check in the Operating Account and the bank credited the Operating Account with those funds. By any reasonable measure, the funds which were credited to the account with respect to the settlement check were, at least in part, clients' funds. These funds became part of the balance of an account that also contained the

firm's funds. The fact that the settlement funds were later withdrawn by the bank when the settlement check was returned unpaid, and the fact that there were adequate other funds in the account to cover the check which Respondent had issued to the clients, is a contingency which does not excuse the initial commingling.

Indeed, it is the very fungibility of cash funds, upon which Respondent relies to make his argument, that supports the rule against commingling. Respondent argues that the funds he distributed to Mrs. Tucker from the Operating Account, which originally belonged to the firm, became by virtue of that distribution, his clients' funds. Correspondingly, he argues, the funds which ultimately came into the account from the settlement check, which were to have been his clients', became by virtue of the earlier distribution, his firm's property. This designation and re-designation of ownership of funds creates a risk of loss to the client which is prevented by the simple segregation of client funds from the lawyer's own funds. As the Court has stressed, "the purpose of the rule against commingling [is] not only to prevent the more serious offense of misappropriation, but also to avoid the possibility of unintentional loss of a client's funds due to circumstances beyond the control of the attorney." In re Ross, 658 A.2d 209, 211 (D.C. 1995) (citing In re Hessler, 549 A.2d 700, 702 (D.C. 1988)). The mere fact that such re-designation of ownership did not result in harm to the client, in a given instance, does not forgive it. The Board finds that Respondent's activities with respect to the Tuckers' funds constituted a violation of Rule 1.15(a).

Likewise, in the Tucker matter, Respondent made no attempt to safeguard the Tuckers' funds by placing them in an escrow or trust account, as required by Rule 1.17(a). The Board therefore also finds a violation of Rule 1.17(a) in this instance.

Count IV

The Committee found no violation of either rule on the part of Respondent with respect to the activities underlying Count IV, the Gwendolyn Campbell matter. In this instance, the salient fact is that Gwendolyn Campbell was, at all relevant times, the client of another attorney at Capitol Hill Legal Services. Respondent's activity with respect to Ms. Campbell was limited to his providing the second of two required signatures on an Operating Account check that was made payable to Ms. Campbell as a disbursement of settlement funds to her. Respondent testified that he had no knowledge of the facts and circumstances surrounding his partner's representation of Ms. Campbell, the settlement of her case, or the handling of the settlement funds. The Board does not find that Bar Counsel has proven any facts inconsistent with Respondent's testimony.

Bar Counsel argues that Respondent violated the rule against commingling with respect to Ms. Campbell, even though "[he] did not possess her entrusted funds," when "he allowed his legal fees and other funds to be deposited in the same account where he knew his firm had deposited Ms. Campbell's funds." Bar Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation As To Sanction, dated April 2, 1999[2] ("Bar Counsel's Brief") at 20. The Board disagrees with this assignment of responsibility. As the Committee points out in its Report, both Rule 1.15(a) and Rule 1.17(a) "speak[] to the responsibility of an individual lawyer." Committee Report at 11. Rule 1.15(a) pertains to "property of clients or third persons that is in the lawyer's possession in connection with a representation" and Rule 1.17(a) to "funds coming into the possession of a lawyer that are required by these rules to be segregated from the lawyer's own funds." No evidence has been presented that Respondent ever had possession over

the Campbell settlement funds, nor that such funds were connected to any representation of Campbell by Respondent. Bar Counsel expressly concedes that there was no possession by Respondent. Since possession is an element of both Rules, the Board finds no violation of either with respect to Count IV.[3]

Count V

In the matter underlying Count V, Respondent admits receiving a settlement check in the case in which he represented his client, Carla Morrison, but states that "he did not deposit the check into his operating account nor did he cause another to deposit the check into his operating account." Respondent's Brief at 10. Respondent testified that he received a settlement check upon settling Ms. Morrison's case, mailed Ms. Morrison the settlement check for her signature, and scheduled an appointment at his office for Ms. Morrison to exchange the endorsed settlement check for a disbursement check from Capitol Hill Legal Services. Respondent further testified that "because [Ms. Morrison] didn't show up on time, I had to leave, I signed the check, left word for one of my partners to issue her this and get the check from them and that was what happened. She came in, she have [sic] issued a check and the check that she had was received." Hearing Transcript at 111. On cross-examination, Respondent disclaimed any knowledge as to what happened to the settlement check after he mailed it to his client, including any knowledge as to whether he or any of his partners ever received back, or for that matter even saw, the endorsed settlement check which his client was to have returned to the firm. Id. at 138-39. Respondent did stipulate that the settlement check was deposited in the Operating Account. Joint

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[2] Mistakenly dated April 2, 1998 on the Certificate of Service.

[3] The Board also notes, with the Committee, that no evidence was presented showing that Respondent had supervisory responsibility over whoever in his firm represented Campbell and obtained possession of the Campbell settlement funds. Committee Report at 11.

Stipulation ¶ 33. It is not clear from the record that Respondent was responsible for the eventual deposit of the settlement check into the Operating Account before disbursement to the client of her share of the settlement proceeds. Therefore, the Board finds that Bar Counsel has failed to satisfy its burden of establishing violations of Rule 1.15(a) and Rule 1.17(a) with respect to Count V.

B. Respondent Violated Rule 1.15(b)

Bar Counsel has charged Respondent with a violation of Rule 1.15(b) only with respect to Count I, the Morton-Smith matter.

In that matter, Respondent and his client executed an assignment and authorization ("A&A") in June 1996 in favor of Neurodiagnostics Associates ("Neurodiagnostics"), one of Ms. Morton-Smith's medical providers. That A&A, together with a bill for medical services rendered to Ms. Morton-Smith, which Neurodiagnostics forwarded to Respondent in September 1996, put Respondent on actual notice that Neurodiagnostics had an interest in any funds that Ms. Morton-Smith might receive in settlement of her case. In May 1997, Respondent received a settlement check in connection with that case, and later that month made disbursements from the settlement funds to certain of Ms. Morton-Smith's medical providers, overlooking Neurodiagnostics. By Respondent's own testimony, he did not review Ms. Morton-Smith's case file in order to determine to whom he should issue checks, but relied on his notations on the outside jacket of the file. That situation continued even after Ms. Morton-Smith telephoned Respondent to complain that she had received a call from a medical provider or providers with respect to an unpaid bill. Respondent did not pay the Neurodiagnostics bill until late September, 1997 — more than a month after Bar Counsel informed him by letter that Ms. Morton-Smith had filed a complaint and that Bar Counsel was investigating the matter.

Joint Stipulation ¶ 10; BX2. By his own testimony, he only "went back through [his] files to see what [Ms. Morton-Smith] was talking about" after receiving the complaint from Bar Counsel. Hearing Transcript at 140.

Rule 1.15(b) requires that a lawyer "shall promptly notify" any third party with an interest in funds received by the lawyer that those funds have been received, and also that the lawyer "shall promptly deliver" to the third party any funds to which that party is entitled. Here, Respondent did neither with respect to Neurodiagnostics. The Court found a violation of Rule 1.15(b) in Ross, even though at least a portion of the delay between receipt of settlement funds and payment of a third party claim in that case was attributable to clerical error. See Ross, 658 A.2d at 209. While Respondent's neglect of the Neurodiagnostics bill may have been similarly attributable, at least for a time, to his faulty system for noting outstanding third party claims, such negligence cannot provide a defense.

Rule 1.15(b) is clear: a lawyer "shall" provide prompt notice and delivery. As the Court recognized in Ross, there is no bright line test for determining whether an action taken is "prompt." Id. at 211. However, the Board finds that the four-month delay in this case, where eventual payment was prompted only by Bar Counsel's intervention, falls short of any reasonable definition of "prompt." Respondent's brief does not specifically address the charged violation of Rule 1.15(b), but merely asserts that Respondent handled the Morton-Smith matter "competently and expeditiously" and that all of his actions were "honest and forthright." Respondent's Brief at 5. Without more, such assertions cannot mitigate the fact of the delay. Accordingly, we agree with the Committee that Respondent violated Rule 1.15(b) in his handling of the Morton-Smith matter.

SANCTION

Past cases involving commingling have resulted in a range of sanctions, from mere reprimand by the Board to disbarment. As the Court has recognized, "[t]he imposition of sanctions in bar discipline, as with criminal punishment, is not an exact science but may depend on the facts and circumstances of each particular proceeding." In re Fair, No. 99-BG-1518 at 17 n.24 (D.C. Sept. 13, 2001) (quoting In re Haupt, 422 A.2d 768, 771 (D.C. 1980)). In general, however, the Court recognizes seven factors that may be used to distinguish among cases in determining an appropriate sanction. Those factors include the following: (a) the seriousness of the conduct at issue; (b) the prejudice, if any, to the client which resulted from the conduct; (c) whether the conduct involved dishonesty and/or misrepresentation; (d) the presence or absence of violations of other provisions of the disciplinary rules; (e) whether the attorney has a previous disciplinary history; (f) whether or not the attorney acknowledged his or her wrongful conduct; and (g) circumstances in mitigation of the misconduct. See Report and Recommendation of the Board appended to the Court's opinions in In re Jackson, 650 A.2d 675, 678-79 (D.C. 1994) (per curiam), and In re Hill, 619 A.2d 936, 939 (D.C. 1993) (per curiam).

(a) Seriousness of the Misconduct

The Court has clearly stated that commingling, even alone, constitutes a serious breach of an attorney's ethical obligations:

> One of the most basic rules of fiduciary conduct is that the fiduciary must not commingle his own property with that held by him belonging to another. In particular, fiduciary funds must be kept separate and deposited in a special account.

In re Hessler, 549 A.2d 700 (D.C. 1988). In Hessler, the Court explained that the dangers incident to commingling include both misappropriation by the attorney (whether intentional or unintentional) and unintentional loss caused by "circumstances beyond the control of the

attorney." Id. at 702 (quoting Clark v. State Bar, 246 P.2d 1, 5 (1952)) (citation omitted). Client funds that have been placed in an attorney's account may, for example, be taken by creditors of the attorney, or may be subject to the bank's right of setoff. Id. Given these risks, the Hessler Court pointedly "emphasize[d] the ban against commingling to alert the bar that in future cases of even 'simple commingling,' a sanction greater than public censure may well be imposed." Id. at 703.

Considerations in determining the seriousness of an attorney's commingling include whether the commingling was (i) inadvertent or knowing, (ii) an isolated instance or protracted, (iii) with or without injury to the client. See Osborne, 713 A.2d 312, 313 n.2 (D.C. 1998) (per curiam). Here, the evidence has shown that the commingling was knowing and intentional. Respondent acknowledged that the Escrow Account was too difficult to use, so that by default he and his partners chose to deposit client funds into the Operating Account. Hearing Transcript at 116-18. It is not surprising, given Respondent's intentional reliance on the Operating Account, that the commingling in this case was also protracted, lasting for approximately six months.[4]

In cases in which there has been no misappropriation, as the Committee points out in its Report, the sanctions that have been imposed have varied depending on the duration of the commingling. Committee Report at 14. The Board adds in this regard that the respondent's intent with respect to the misconduct has likewise affected the sanction in these cases. For example, in the two cases cited in the record before us in which the violations were brief and unintentional, the sanction imposed was a Board reprimand. In In re Curtis, Bar Docket No. 366-95

[4] Although the record is not clear as to when Respondent terminated his improper use of the Operating Account, the record shows that Respondent deposited the Morton-Smith settlement check in the Operating Account in early May 1997 and that as late as mid-October 1997, the Operating Account was still being used in this manner, when the Respondent caused the Proctor funds to be transferred from the Escrow Account to the Operating Account.

(BPR Oct. 11, 1996), the Board issued a reprimand to an attorney whose violations were limited to the very first representations in her career, and "were the result of her erroneous belief that she had set up an appropriate separate account for client funds and her misunderstanding of the nature of unearned fees." Curtis, Board Report at 2-3. Similarly, in In re Jones, Bar Docket No. 486-94 (BPR June 18, 1997), the Board reprimanded an attorney who was found to have commingled client funds in a single instance, having noted that the attorney "does not normally practice personal injury litigation, [] was unaware of the special rules regarding client trust accounts, and [whose] violation was the result of 'at worst mere negligence.'" Jones, Board Report at 2.

Unlike the Curtis and Jones cases, Respondent knowingly and intentionally commingled client funds with law firm funds on an ongoing basis. In such cases, public censure has been the minimal sanction imposed. For example, in In re Osborne, 713 A.2d at 312, the Court ordered public censure together with the requirement that Osborne complete a course in professional responsibility. In that case, Osborne had been aware of the practices of his firm's bookkeeper, constituting commingling, for eighteen months without acting to correct them. The Court noted that the Board had "recommended a sanction of public censure instead of a Board reprimand because the commingling extended over a long period of time." Id. at 313. See also In re Ingram, 584 A.2d 602 (D.C. 1991) (per curiam) (public censure ordered when commingling lasted for approximately six months); In re Gilchrist, 488 A.2d 1354 (D.C. 1985) (public censure ordered when commingling lasted for over three months).

Another variable affecting the seriousness of the misconduct is the degree to which the attorney, despite commingling client funds with his own or his firm's funds, keeps careful records related to all such funds. As a practical matter, careful record-keeping may serve to

safeguard against unintentional misappropriation of client funds by the attorney. Here, the evidence on this question is mixed. Respondent for the most part kept accurate books and records and made prompt disbursements to his clients and to third parties having an interest in client funds, using financial software to keep close tabs on the funds in the Operating Account. However, the Respondent's record-keeping system was not adequate to fully protect the interest of Neurodiagnostics, which was not timely paid. Failure to keep account of payments due and payable from client funds aggravates the dangers of commingling those funds.

(b) Prejudice to the Client

As the Committee noted in its Report, "[t]he only client that had any difficulty because of Respondent's practice of using his Operating Account was Ms. Morton, and that was temporary until Respondent paid the bill." Committee Report at 13. Bar Counsel described the effect Respondent's delay had on Ms. Morton-Smith in greater detail: "In failing to notify or to pay Neurodiagnostics in May 1997, when he received the settlement funds, Respondent exposed his client to a collection action by Neurodiagnostics to collect its medical fee." Bar Counsel's Brief at 27-28. The Board would add that Ms. Morton-Smith was forced to turn to Bar Counsel for resolution of the Neurodiagnostics matter, resulting in her required participation in these proceedings, which constituted a time commitment that she could not have foreseen when she retained Respondent.

(c) Conduct Involving Dishonesty and/or Misrepresentation

Bar Counsel has not alleged that Respondent's conduct involved dishonesty and/or misrepresentation, nor did the Committee find any "suggestion" to the contrary. Bar Counsel's Brief at 28; Committee Report at 13. The Board agrees that Respondent was not acting in a dishonest manner or with any intent to harm or deceive his clients.

(d) Violations of Other Disciplinary Rules

Respondent has been found to have violated three provisions of the Rules: Rule 1.15(a), Rule 1.15(b) and Rule 1.17(a).

However, this case involves no allegation that Respondent misappropriated client or third party funds, either intentionally or negligently.[5] Misappropriation is the companion violation that, when present, inevitably results in disbarment or suspension. See, e.g., In re Anderson, 778 A.2d 330 (D.C. 2001) (six-month suspension for negligent misappropriation of client funds, with inadequate record-keeping); In re Addams, 579 A.2d 190 (D.C. 1990) (en banc) (disbarment for intentional misappropriation).

(e) Prior Disciplinary History

Respondent was admitted to practice in 1990, and prior to the current proceedings was not the subject of any disciplinary action.

(f) Respondent's Acknowledgement Of Misconduct

In his brief, Respondent acknowledges two instances of commingling, albeit characterizing those violations as merely "technical." While Respondent has not conceded each of Bar Counsel's allegations, the Board is mindful that, as the Court has stated, "respondents in disciplinary matters are entitled to a presumption of innocence and should be allowed to assert all possible defenses." Jackson, 650 A.2d at 679. Respondent has cooperated with the disciplinary process. His brief notes that he is "sensitive to his ethical obligations" and that "his firm is now using a trust account to hold client funds so that there will not be a recurrence of the problem."

[5] The Court has defined misappropriation as "any unauthorized use of client's funds entrusted to [the lawyer], 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." Anderson, 778 A.2d at 335 (quoting In re Harrison, 461 A.2d 1034, 1036 (D.C. 1983)). The burden is on Bar Counsel to prove the requisite level of intent. Fair, slip op. at 6.

Respondent's Brief at 12. The Board is satisfied that Respondent has recognized the import of these proceedings with respect to his fiduciary duties.

(g) Circumstances In Mitigation

As the Committee notes in its report, at the time of the violations that are the subject of these proceedings, Respondent "was just establishing the law firm in a low income neighborhood." Committee Report at 13. In his brief, Respondent elaborated on this point, noting that his firm "was a small new firm concentrating in CJA [Criminal Justice Act] work and just starting to do personal injury cases." Respondent's Brief at 12. The Committee also pointed to Respondent's subsequent proper use of a trust account as a mitigating factor. Committee Report at 15.

Analysis

The cases comparable to the instant case which involve knowing and protracted commingling without misappropriation fall generally into two classes: those in which public censure is ordered, and those in which a harsher sanction is imposed.

(a) Public Censure

The first class of comparable cases includes Osborne, Gilchrist, and Ingram. Bar Counsel relies primarily upon Osborne in recommending that Respondent be publicly censured. Reply of Bar Counsel to Respondent's Proposed Findings of Fact, Conclusions of Law and Recommendation As To Sanction at 5. In that case, the Court imposed a public censure and ordered completion of a course in professional ethics. Osborne, 713 A.2d at 313. Osborne, who conceded commingling, had been aware for approximately eighteen months that his firm's bookkeeper was depositing client funds as well as advanced fees into the firm's trust account, and was using checks drawn on the same account to pay the attorney's operating expenses. Id.

As in this matter, there was no misappropriation of client funds, excellent account records were kept, and the attorney, who cooperated with Bar Counsel, was making a contribution to his community, and had no prior disciplinary record.

Similarly, in In re Parsons, 678 A.2d 1022 (D.C. 1996) (per curiam), the Court publicly censured an attorney who commingled funds over a period of five days, with "no misappropriation . . . no withholding of funds, and no harm to the client." Parsons, Bar Docket No. 72-91 at 5 (BPR Feb. 1, 1996). Public censure was also imposed in Ingram, where the attorney commingled client funds in his personal bank account for six months, and then kept the funds in a file cabinet for several more months — conduct which the Court found was "exceedingly close to deserving the imposition of discipline beyond a public censure." Ingram, 584 A.2d at 602. Despite the risk to the client funds, the Court accepted the Board's recommendation as to sanction because the conduct at issue had occurred before the issuance of the Court's warnings in Hessler, and on the level of discipline imposed in similar cases. See also Gilchrist, 488 A.2d at 1354, in which the Court credited the Board's conclusion that Bar Counsel had failed to establish misappropriation, and therefore ordered public censure as being consistent with precedent; In re Artis, No. M-103-81 (D.C. Feb. 25, 1982), in which public censure was ordered for a commingling unaccompanied by misappropriation, even though the attorney failed to keep adequate records of client funds in his possession; and In re Teitelbaum, 686 A.2d 1037 (D.C. 1996) (per curiam), in which public censure was imposed based on commingling that did not result in injury to the client. Finally, in In re Millstein, 667 A.2d 1355 (D.C. 1995) (per curiam), the Court imposed public censure and ordered the completion of a course in professional ethics in a case of simple commingling, with no misappropriation or other prejudice

to the client. The Board in Millstein had recommended the ethics course in response to the aggravating effect of the attorney's ignorance of the Rules. Id. at 1356.

The foregoing cases, taken together, represent a baseline class of cases in which an attorney engages knowingly and for a certain time period in commingling, without lasting negative effect to the client. As the Board stated in its report in Parsons, "Where no harm to the client is shown, and there are no other aggravating factors, public reprimands and censures remain within the acceptable range of penalties." Parsons, Board Report at 3-4.

(b) Brief Suspension

The second set of comparable cases involves conduct substantially similar to that in the first set, with the difference being the presence of additional violations. These additional violations result in the imposition of heightened discipline — often a thirty-day suspension. For example, in Ross, the Court adopted the Board's recommended sanction of a thirty-day suspension for an attorney who had commingled client funds in his general operating account and had failed promptly to pay a third party medical provider. Ross, 658 A.2d at 209. The attorney received a settlement check in connection with a personal injury representation, deposited it in his operating account, disbursed the client's share to the client, and instructed his secretary, twice over several months, to prepare a check to the medical provider. Id. at 210. Eventually, the medical provider, who had been calling Ross's office with requests for payment during the intervening months, reached Ross himself by telephone. However, it was only following a complaint to Bar Counsel that the medical provider received payment, eleven months after Ross had received the settlement funds, and nearly three months after the provider's conversation with Ross himself. Id. The Court agreed with the Board that a brief suspension rather than censure was called for, given (i) the fact that Ross's misconduct had occurred after the Court issued its

warning about commingling in Hessler, and (ii) the additional violation of Rule 1.15(b), the failure to deliver funds promptly to a third party. Id. at 211; see also In re Ukwu, 712 A.2d 502 (D.C. 1998) (thirty-day suspension, suspended pending compliance with recommendations of the District of Columbia Lawyer Practice Assistance Committee, in case of commingling of client funds and failure to maintain proper financial records).

The Board agrees with the Committee that public censure is the appropriate sanction for Respondent. In light of the absence of any misappropriation, the critical question is whether all of the facts and circumstances incident to Respondent's misconduct place it in the baseline category of commingling cases, or push it into that category in which brief suspension is warranted. The Board finds that while this is a close question, on balance, Respondent's case is distinguishable from those that justified suspension.

The leading case in that category is Ross. Although Respondent, like Ross, was found to have violated Rule 1.15(b) in addition to Rule 1.15(a), the Board finds the underlying conduct in Ross to have been more egregious. Respondent acted more responsibly with respect to the delayed medical payment than did Ross: (a) upon receiving settlement funds, Respondent himself promptly issued checks paying Ms. Morton-Smith's medical bills and expenses (albeit overlooking the bill of Neurodiagnostics), whereas Ross apparently charged his secretary, who suffered from medical and emotional problems, with drafting a letter and preparing a check to his client's medical provider; (b) the overall time frame between receipt of settlement funds and payment of the medical provider was eleven months in the case of Ross, but only four months in the case of Respondent; and (c) most importantly, once Respondent received actual and specific notice of the unpaid Neurodiagnostics bill, with the letter from Bar Counsel, he delivered the payment to Neurodiagnostics within approximately one month's time. By contrast, Ross became

aware of the non-payment approximately five months after settlement, at which time he simply renewed his instructions to his secretary, who had failed to implement them in the first place. Ross, 658 A.2d at 210. Later, Ross was again put on actual and specific notice of the non-payment when a representative of the medical provider told him about it directly approximately seven months following the settlement. Nonetheless, he took no action, and the medical provider was not paid until three months later, following the filing of the complaint against Ross with Bar Counsel. Id. As the Court stated, referring to the conversation between Ross and the medical provider's representative, "[h]aving been given such notice, Mr. Ross could have and should have taken more aggressive steps to make sure that the check was sent as soon as possible." Id. at 211-12.

The Committee characterized Respondent's behavior with respect to the Neurodiagnostics bill as an "inadvertent" violation of Rule 1.15(b), based on Respondent's apparent belief that all of the medical providers had been paid. Committee Report at 12. Respondent testified that when Ms. Morton-Smith advised him that she was receiving calls from a medical provider or providers about an unpaid bill, he asked her to have that medical provider call him directly, and that no one did. Once he received notice by way of the letter from Bar Counsel, he acted within a reasonably short period of time. The Committee found that the Rule 1.15(b) violation "should not enhance the severity of the sanction" because it was based on negligence. Committeee Report at 15. It found Respondent's conduct to be more closely comparable to that in In re Eaton, Bar Docket No. 310-95 (BPR June 3, 1997), in which an assignment and authorization in favor of a medical provider was misfiled, resulting in a finding that the attorney violated Rule 1.15(b) through his negligence. In that case, an informal admonition was imposed. The Board agrees that Respondent's handling of the Neurodiagnostics

claim is closer to the conduct in Eaton than Ross, and declines to recommend a suspension based on the Rule 1.15(b) violation.

CONCLUSION

For the foregoing reasons, the Board agrees with the conclusion of the Committee that Respondent violated Rule 1.15(a), Rule 1.15(b) and Rule 1.17(a), and further agrees with the Committee's recommendation that the Court publicly censure Respondent.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Roger A. Klein

Dated: November 16, 2001

All the members of the Board concur in this report and recommendation except Ms. Ossolinski, who did not participate.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEEE NUMBER SEVEN

In the Matter of:	)	
	)	
ANTHONY GRAHAM,	)	Bar Docket No. 422-97
	)	
Respondent.	)	

PROPOSED FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDATION AS TO SANCTION

This matter was heard by Hearing Committee Number Seven on February 12, 1999. The Committee was composed of Nancy Crisman Esquire, Chair, Elizabeth Sarah Gere, Esquire, and Ernestine Coghill-Howard, public member. Transcript February 12, 1999 (hereinafter "Tr."). Donna DeSilva, Esquire, represented Bar Counsel and Samuel McClendon, Esquire represented Respondent.

Bar Counsel charged Respondent with violation of three provisions of the District of Columbia Rules of Professional Conduct with respect to his law firm's representation of Ms. Jonda-Morton Smith, Mr. and Mrs. Lawrence Tucker, Mr. Lionel Proctor and Ms. Gwendolyn Campbell. Respondent was charged with violation of (1) Rule 1.15(a), commingling funds by failing to hold client funds separate from his own funds, (2) Rule 1.15(b), having received funds in which a third party had an interest, failing to notify that third party of the receipt of funds or delivering the funds to the third party, (3) Rule 1.17(A), failing to segregate client funds and to deposit such funds in a specially designated account bearing the title "trust account" or "escrow account."

Ms. Jonda Morton Smith, complainant, testified on behalf of Bar Counsel, and Respondent testified on his own behalf. At the hearing, Bar Counsel and Respondent

entered into stipulations of fact. Tr. 35-37.[1] All of Bar Counsel's exhibits and Respondent's exhibits were admitted into evidence. JS p. 9-15.

Having considered the testimony and exhibits submitted, the Committee recommends that Respondent be publicly censured.

I. PROPOSED FINDINGS OF FACT

1. Anthony Graham, Esquire, is a member of the District of Columbia Bar, having been admitted on December 10, 1990 and assigned Bar number 426073. JS 1.

2. Respondent's law firm opened a general business account with Citibank, Account Number 66712025 in October 1996 (the "Operating Account"). RX 4; Tr. 85-86. The firm at the same time opened an escrow account with Citibank, Account No. 66711991 (the "Escrow Account"). RX 3. The escrow account was difficult to work with so the firm generally stopped using it. Tr. 85-91.

3. Respondent is a partner at the law firm, Capitol Hill Legal Services. Tr. at 132.

COUNT I

4. On May 29, 1996, Respondent undertook to represent Jonda H. Morton-Smith in connection with a claim for damages, including personal injuries, based on an accident that occurred on May 9, 1996. JS 1, Tr. 38-40.

5. From May 14 to September 16, 1996, Ms. Morton-Smith sought medical treatment and evaluation from physicians at Neurodiagnostic Associates. An assignment and authorization in favor of Neurodiagnostic Associates, executed by Ms. Morton-Smith on June 1, 1996, provided:

> …I hereby direct my attorney to withhold from any settlement or judgment secured by reason of my claim, an amount

[1] The Joint Stipulations (hereinafter JS) are found at the end of the transcript.

> sufficient to pay NEURODIAGNOSTIC ASSOCIATES, P.C. in full for their services rendered me.

JS 3, BX 11 at 62-63.

6. Respondent signed the assignment and authorization executed by Ms. Morton Smith in favor of Neurodiagnostic Associates on June 1, 1996, stating:

> I, the undersigned attorney for the patient referred to above, hereby agree to comply fully with the foregoing "Assignment and Authorization."

JS 4, BX 11 at 62-63.

7. On September 20, 1996, Neurodiagnostic Associates forwarded to Respondent a bill in the amount of $383.92 for medical services provided to Ms. Morton-Smith from May 14 through September 16, 1996. JS 5; BX at 64.

8. In May 1997, Respondent received a check for $8,100.00 from Allstate Insurance Co. in settlement of Ms. Morton-Smith's accident claims ("the Morton Settlement Check"). On May 13, 1997, the Morton Settlement Check, together with a check for legal fees received from Leo Shepard, were deposited in the Operating Account. Prior to the deposits the balance in the Operating Account stood at $4754.32 JS 6.

9. On May 13, 1997, check number 1043 in the amount of $2,736.75, payable to Jonda Smith, with the notation "Personal Injury Action, Morton v. McAllister" was drawn on the Operating Account. JS 8; BX 26 p. 606, 617. Also on the same day, check 1044, in the amount of $1,385.00, payable to Herbert Stevens, with the notation "assignment of [funds] as per Jonda Morton" was written. JS 8 BX 26 at 640-641.

10. On May 22, 1997, Respondent wrote Operating Account check number 1050, in the amount $45.50 payable to Smart Corp. for medical records regarding J. Morton. JS 8. On May 22, 1997, Respondent wrote Operating Account check number 1051, in the

amount of $500.00, payable to himself. Id., BX 27 at 680. His records reflect that check number 1051 was in payment of "bal-assgn J. Mort." JS at 3; BX 22 at 573. On May 27, 1997, Respondent wrote Operating Account check number 1053, in the amount of $433.69, payable to OCI. JS 8; BX 22 at 573; BX 27 at 680. Respondent's records reflect that check number 1053 was in payment of medical bills for Ms. Morton. Id. Respondent did not review his file to see if there were any other medical bills due but relied on notations on the jacket of the file. Tr. 141.

11. Sometime in May 1997, Ms. Morton telephoned Respondent to inform him that she had received telephone calls from her medical providers, advising that they had not been paid. Tr. 52, 55-56, 100-101; BX 6 at 13. Ms. Morton and Respondent gave conflicting testimony as to their conversation. Ms. Morton testified that Respondent "told me he paid all my bills, he wasn't going to pay any more bills." Tr. 56. Respondent testified that he told her to have the doctors call him and that he was never called. Tr. 100-101, 140.

12. In July 1998, the Office of Bar Counsel opened an investigation based on Ms. Morton's complaint that she was getting calls about an unpaid bill. BX 1; JS 9. Bar Counsel notified Respondent of the complaint by letter dated August 13, 1997. BX 2; JS 9. Respondent replied by letter dated September 24, 1998. BX 3, 4; JS 9.

13. On September 22, 1997, Respondent wrote Operating Account check number 1079 in the amount of $383.92, payable to Neurodiagnostic Associates, with the notation "50355 Jonda Morton." JS 10; BX 22 at 576; BX 30 at 747, 766, 775.

14. From May 13, 1997, when the Morton settlement check was deposited, until September 22, 1997, when Respondent made the final distribution of the Morton

settlement funds, Respondent wrote or authorized numerous checks from the Operating Account for his firm's expenses including a legal secretary, lease payments, Bell Atlantic, Pepco, attorney earnings and Sprint Spectrum. BX 22 at 573; BX 26 at 606, 619, 625, 630, 642, 678; BX 27 at 656, 678; BX 30 at 747. During the same time period, Respondent caused or authorized to be deposited in the Operating Account funds belonging to himself or Capitol Hill Legal Services. BX 22 at 573-574; 26 at 606, 633-38; 27 at 646; 28 at 688, 696-700, 710-714; 29 at 717, 727-744; 30 at 747, 751, 754-57.

COUNT II

15. On October 29, 1996, Respondent was retained to represent Sharon and Lawrence Tucker in connection with a contract dispute for services performed by Ausal Restoration & Management ("Ausal"). JS 14. In June 1997, Respondent received a check for $5,400.17 from Ausal in settlement of Ms. Tucker's case, which was deposited in the Operating Account on June 11, 1997. JS 14.

16. By letter dated June 11, 1997, Respondent notified Mr. and Mrs. Tucker that he had received the settlement funds, confirmed that legal fees of $500.00 would be withheld from the settlement funds in accordance with their agreement and stated that the Tuckers could pick up a check at any time. JS 24.

17. On June 13, 1997, Respondent caused to be drawn Operating Account check number 1062 in the amount of $4,900.17, payable to Sharon Tucker. Citibank honored check number 1062 on June 19, 1997. JS 16. On the same date, Citibank honored Operating Account checks numbered 1061 and 1057, payable to Pepco and Jesse and Eva Clark, respectively, and signed by Respondent for payment of expenses of his law firm. BX 27 at 646, 666, 668, 682 and 684.

18. On June 16, 1997, the Tucker Settlement check was returned unpaid. On June 25, 1997, Respondent received a replacement check that he deposited in the Operating Account. JS 17.

COUNT III

19. Prior to May 1997, Irving Foster, the managing attorney for Capitol Hill Legal Services, provided representation to Lionel Proctor in civil litigation related to the distribution of property from an estate. JS 19. On or about May 30, 1997, a settlement agreement was reached under which the contested property was to be sold and funds distributed to Mr. Proctor and another heir. JS 19.

20. When Mr. Foster disappeared, Respondent agreed to assist Mr. Proctor in the distribution of funds received from the sale of the property. On October 7, 1997, a deposit of $16,000 relating to the Proctor matter was made to the Escrow Account. JS 20.

21. On October 17, 1997, Respondent caused the $16,000 of Proctor Funds to be transferred from the Escrow Account to the Operating Account. JS 23. Prior to the transfer, the Operating Account balance stood at $8,714.65 including funds belonging to the law firm. Id.

22. On October 17, 1997, Respondent caused to be drawn on the Operating Account checks numbered 1090-1093 in connection with the distribution of the Proctor funds. JS 24; BX 31 at 779, 816-19, 824. Respondent withheld $300 of the Proctor funds for legal fees, which remained in the Operating Account. JS 25.

COUNT IV

23. Prior to May 1997, another Capitol Hill Legal Services attorney provided legal representation to Gwendolyn Campbell. JS 27. She was not represented by Respondent. Tr. at134.

24. On October 9, 1997, the firm received a check from State Farm Fire and Casualty Company in the amount of $2,900 in settlement of Ms. Campbell's matter. Ms. Campbell was notified that her settlement funds were received. JS 28.

25. On October 10, 1997 the Campbell Settlement check was deposited in the Operating Account. Prior to the deposit of the Campbell settlement check, the Operating Account balance stood at $9,262.16 including funds belonging to the law firm. JS 29.

26. On October 13, 1997, Operating Account check number 1088 in the amount of $2,060 was issued to Gwendolyn Campbell from the Campbell Settlement funds. $840 in legal fees were withheld. JS 30.

COUNT V

27. Prior to May 1997, Respondent represented Carla Morrison. JS 32. On October 17, 1997, Respondent received a check in settlement of Ms. Morrison's case from Progressive Northern Insurance Company in the amount of $1,600, which was deposited in the Operating Account. Prior to the deposit of the Morrison settlement check, the Operating account balance stood at $7,114.65 including funds belonging to the law firm. JS 33; BX 22 at 574.

28. On October 17, 1997, Respondent caused to be drawn Operating Account check number 1094 in the amount of $1,067, made payable to Carla Morrison. Citibank

honored check number 1094 on October 22, 1997 from the Morrison Settlement funds. $533 in legal fees were withheld and not removed from the Operating Account. JS 34.

II. CONCLUSIONS OF LAW

Respondent is charged with violating Rule 1.15(a) and Rule 1.17(A) of the District of Columbia Rules of Professional Conduct. Rule 1.15 (a) requires that a lawyer hold property of "clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." Rule 1.17(A) requires that such segregated funds should be deposited in accounts designated "trust" or "escrow" accounts. Respondent is also charged with violating Rule 1.15(b) which requires a lawyer who receives funds in which a third party has an interest to notify and deliver to the third person any property that person is entitled to receive. Respondent violated Rules 1.15(a), Rule 1.17(A) and Rule 1.15(b).

A. Respondent Violated Rules 1.15(a) and 1.17(A)

The allegations in this case concern the period March through October 1997. During that period, Respondent's firm maintained an escrow account as well as an operating account.

In the facts described above in connection with Counts I (Morton), II (Tucker), and V (Morrison), during the period March through October 1997, funds belonging to clients of Respondent were deposited by Respondent, or authorized to be deposited by Respondent, into the firm's Operating Account.

The facts regarding Count III (Proctor) are a bit different. There, Respondent only represented the client, Mr. Proctor, when another Capitol Hill Legal Services attorney left the firm and, apparently, the jurisdiction. Respondent represented Mr. Proctor

for the disbursement of funds received from a sale of property. In order to assist with the disbursement, Respondent moved the Proctor settlement funds from the firm's Escrow Account to the Operating Account and disbursed the funds from the Operating Account.

The facts relating to Count IV (Campbell) are also different. There, Respondent did not represent Ms. Campbell at all. She was represented by the firm, and her settlement money was deposited and disbursed from the Operating Account.

During all of these transactions the Operating Account contemporaneously held funds belonging to Respondent or his partners. During the same period, Respondent drew Operating Account checks to distribute funds to his clients, to his partner's clients, to himself and for his rent and other business expenses.

The Rule is clear, client funds are not to be commingled with operating funds. Rule 1.15(a). The Court of Appeals has also been clear.

> One of the most basic rules of fiduciary conduct is that the fiduciary must not commingle his own property with that held by him belonging to another. In particular, fiduciary funds must be kept separate and deposited in a special account.

In re Hessler, 549 A.2d 700 (D.C. 1988).

The Court in In re Goldberg, 721 A.2d 627, 628 (D.C. 1998), reiterated the seriousness of commingling. See In re Ross, 658 A2d 209 (D.C. 1995). The Court explained that the ban is designed to prevent misappropriation and the unintentional loss of a client's funds. See also In re Choroezej, 624 A.2d 434, 436 (D.C. 1992). Respondent testified that he intended to avoid commingling by distributing money to the clients and third party payees immediately. Tr. at 119-120. In all of the instances described above except one, Respondent did promptly pay all persons owed money from

a settlement.[2] There is no allegation of misappropriation here. Nevertheless, the Rules are mandatory. Rule 1.15(a) provides that the lawyer "shall" deposit client funds in a separate account, and Rule 1.17(A) states that segregated funds "shall" be deposited in one or more specially designated accounts and that those accounts "shall" be designated "trust" or "escrow" accounts. Good faith is not a defense to commingling. See In re Pels, 653 A.2d 388, 394, 397 (D.C. 1995).

The Committee finds that Respondent violated Rule 1.15(a) which prohibits commingling in each of the instances described in Counts I (Morton), II (Tucker), and V (Morrison). Each Count involves a client of Respondent's, and settlement money belonging to each of these clients was deposited in Respondent's Operating Account which contained money belonging to other clients of the firm as well as other partners in the firm. Moreover, the account was used to pay expenses of the firm as well as pay out money owed to other clients. Rule 1.17(A), which requires that lawyers deposit funds into specially designated accounts, was also violated as to Counts I, II and V because the client's money was never deposited in an escrow or trust account.

Rule 1.15(a) was also violated as to Mr. Proctor in Count III. The Rule applies to "property of clients." Although Mr. Proctor was not initially a client of Respondent's, he became a client when Respondent replaced Mr. Foster and helped disburse the settlement monies. Tr. at 129. Respondent caused the settlement monies to be moved from the Escrow Account to the Operating Account where they were commingled with the

[2] The case of Jonda-Morton, which triggered the complaint, is the exception. There, Ms. Morton and all of the third parties with an interest in the money except one were paid quickly. Respondent testified that he overlooked the fact he owed money to Neurodiagnostic Associates in connection with the Morton case. Tr. at 140-141. He did not pay Neurodiagnostic Associates until it was brought to his attention by Bar Counsel's initial letter. JS 9.

operating funds of the law firm. Because Respondent was responsible for moving the funds from the correctly designated Escrow Account into the Operating Account, the Committee believes he also violated Rule 1.17(A).

The Committee does not feel the facts in Count IV relating to Gwendolyn Campbell constitute a violation of either Rule insofar as Respondent is concerned. Rule 1.15(a) speaks to the responsibility of an individual lawyer. It says, "A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation." Similarly, Rule 1.17(A) speaks of funds "coming into the possession of a lawyer." According to the evidence presented with respect to Count IV, Ms. Campbell was never a client of Respondent.

Moreover, the Committee was not presented with evidence related to the structure of the law firm that would suggest that Respondent was a supervisor of the lawyer handling the Campell case. There was no evidence proffered as to the identity of the lawyer responsible for putting the Campbell money in the operating account. In the absence of such evidence, the Committee will not hold Respondent responsible for what may well be the actions of another lawyer in the firm. See Rule 5.1(c)(Responsibilities of a partner or supervisory lawyer).

B. Respondent Violated Rule 1.15(b)

Rule 1.15(b) provides that a lawyer receiving funds in which a third party has an interest has an obligation to notify the third party and deliver to that party any property to which the third party is entitled. Respondent and his client, Ms. Morton, signed an assignment and authorization with Neurodiagnostic Associates in June 1996. In June 1997, Respondent received settlement funds for the benefit of Ms. Morton. He distributed a

portion of the funds to Ms. Morton and three other payees who provided medical services to Ms. Morton. He failed to recall that there was also an outstanding bill from Neurodiagnostic Associates for care given to Ms. Morton. Respondent did not notify Neurodiagnostic Associates or pay the bill. Tr. 140-141. Ms. Morton contacted him and advised him he had not paid one of her doctors. Respondent testified that he told her to have her doctors contact him and they never did. Id. Only after he was contacted by Bar Counsel did Respondent pay Neurodiagnostic Associates.

In re Eaton, Bar Docket No. 310-95 (BPR June 3, 1997), is similar to the instant facts. In that case, a signed assignment and authorization in favor of the client's doctor had been misfiled. It was not paid until Bar Counsel made inquiry. Id. The Board directed Bar Counsel to informally admonish the attorney.

Here, Respondent inadvertently violated the requirement of Rule 1.15(b).

III. RECOMMENDED SANCTION

Bar Counsel recommended a public censure in this case and for the reasons set forth below, the Committee concurs. The Committee considers the following factors in determining the appropriate sanction: prior discipline, seriousness of misconduct, prejudice to the client, violation of other disciplinary rules, dishonest conduct, Respondent's attitude and mitigation. In re Jackson, 650 A.2d 675, 678 (D.C. 1994); In re Hill, 619 A.2d 936, 939 (D.C. 1993). In 1997 the Board analyzed the propriety of sanctions in cases involving commingling and considered the following issues:

1) whether the commingling was inadvertent or whether it was knowing;

2) whether the attorney was experienced in handling client funds;

3) whether the commingling was an isolated instance or protracted;

4) the degree of risk to client funds and whether there was any injury to the client;

5) whether there was a failure to keep adequate records of client funds or other serious violation;

6) whether commingling included a negligent or unintentional misappropriation;

7) whether commingling involved an intentional misappropriation;

8) whether Respondent cooperated fully with Bar Counsel;

9) whether the attorney has a prior disciplinary record;

10) whether the attorney demonstrated honesty and sense of public responsibility;

11) whether the attorney has taken corrective steps.

In re Osborne, Bar Docket No. 462-95, at 7 (BPR Dec. 24, 1997)(citations omitted), aff'd 713 A.2d 312 (D.C. 1998).

Considering these factors, the weight is on the side of a more lenient sanction. On one hand, the commingling was knowing, (there was a trust account that was unused because it was difficult to use) and protracted (it went on about six months). On the other hand, respondent was just establishing the law firm in a low income neighborhood. There was no misappropriation, negligent or intentional. There is also no suggestion that Respondent was being in any way dishonest. Accurate books were kept and client disbursements were made promptly except in the Morton case. The delay in that instance was only because Respondent overlooked the bill. The only client that had any difficulty because of Respondent's practice of using his Operating Account was Ms. Morton, and that was temporary until Respondent paid the bill. Respondent cooperated with Bar Counsel and is now properly using the trust account.

Nevertheless, commingling is a serious offense. In re Hessler, 549 A.2d at 701. In Hessler, the Court described a lawyer's obligation to hold a client's

property separately from a lawyer's own property as "one of the most basic rules of fiduciary conduct." Id. at 700.

Many of the commingling cases without misappropriation impose a sanction of public censure. In re Goldberg, 721 A.2d at 628 (D.C. 1998)(public censure for commingling for a brief period of time); In re Osborne, supra, (public censure for commingling and failure to supervise a non-lawyer staff member to assure compliance with ethical obligations); In re Ukwu, 712 A.2d 502 (D.C. 1998)(per curiam)(30-day suspension stayed with one-year conditional probation for commingling and failure to maintain records).

In the case of simple commingling, that is commingling without the added issues of misappropriation or prior discipline, the sanctions seem to vary primarily by the time the commingling lasted. Public censure was imposed in In re Osborne, supra, (commingling for six and a half months), In re Ingram, 584 A.2d 602 (D.C. 1991) (commingling for six months) and In re Gilchrist, 488 A.2d 1354 (D.C. 1985) (commingling for over three months). The lesser sanction of a Board reprimand was imposed in two cases involving very brief occasions of commingling. In re Jones, Bar Docket No. 486-94 (BPR June 18, 1997); In re Curtis, Bar Docket No. (BPR Oct. 11, 1996).

The sanction of informal admonition has only been used twice, first in an older case, In re Confidential, (W.E.B.), Bar Docket No. 372-81 (H.C. No. 1) aff'd (BPR June 23, 1983), and, more recently, by a hearing committee in In re Hannapel, Sklar and O'Duden Bar Dockets Nos. 72-95 et al. (H.C. No. 7, July 16, 1998. In re Confidential was decided in 1983. The Board has already said, "there is probably minimal

precedential value" to the case in light of the subsequent admonitions concerning the appropriate sanction for commingling in Hessler, supra, and Ingram, supra. In re Osborne, supra at 7 n. 4. The decision in Hannapel also seems of limited usefulness because the circumstances were unusual. The lawyers in that case were salaried employees of a non-profit organization who were not aware that the Rules applied to them.

The Committee does not feel that the companion violations of Rule 1.17(a) should increase the sanction. Similarly, the one incident of failure to notify and pay under Rule 1.15(b) should not enhance the severity of the sanction since the violation was the result of negligence and not deliberate conduct. In mitigation, the Committee considers the fact that Respondent was just beginning his law firm, which was located in a low-income community, and the firm now is properly using a trust account.

For the foregoing reasons, the Committee recommends that Respondent be publicly censured.

HEARING COMMITTEE NUMBER SEVEN

Nancy Crisman, Esquire, Chair

Ms. Ernestine Coghill-Howard

Elizabeth Sarah Gere, Esquire

June 26, 2000

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
	)	
ANTHONY GRAHAM, SR.,	)	Bar Docket No. 422-97
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Bar Counsel has filed a petition charging Respondent with violations of three provisions of the District of Columbia Rules of Professional Conduct (the "Rules"). The charged violations relate to Rule 1.15(a) (commingling funds by failing to hold client funds separately from the attorney's own funds), Rule 1.15(b) (having received funds in which a third party had an interest, failing promptly to notify that third party of the receipt of funds or deliver the funds to the third party) and Rule 1.17(a) (failure to segregate client funds and to deposit such funds in a specially designated account bearing the title "trust account" or "escrow account").

Respondent is a member of the Bar of the District of Columbia Court of Appeals (the "Court"), having been admitted on December 10, 1990. These charges arose from Respondent's representation of certain clients at Capitol Hill Legal Services, the firm in which Respondent is a partner. Respondent's actions, which form the basis for the charges took place during the period of March 1997 through October 1997. An evidentiary hearing was held on February 12, 1999, before Hearing Committee Number Seven (the "Committee"). This matter comes before the Board on Professional Responsibility (the "Board") on review of the Proposed Findings of Fact, Conclusions of Law and Recommendation as to Sanction of the Committee issued on June 26, 2000 (the "Committee Report"). The Committee Report is attached and the Proposed

Findings of Facts set forth therein are adopted by the Board. In the Committee Report, the Committee recommended that Respondent be publicly censured. Neither Bar Counsel nor Respondent filed exceptions to the Committee Report. The Board agrees with the Committee's recommended sanction.

CONCLUSIONS OF LAW

Bar Counsel has charged Respondent with violating Rules 1.15(a), 1.15(b) and 1.17(a) which provide, in relevant part, as follows:

> Rule 1.15 ("Safekeeping Property"):
>
> (a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution which [meets certain requirements] . . . Complete records of such account funds . . . shall be kept by the lawyer . . . .
>
> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person . . . [A] lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive . . . .
>
> Rule 1.17 ("Trust Account Overdraft Notification"):
>
> (a) Funds coming into the possession of a lawyer that are required by these rules to be segregated from the lawyer's own funds . . . shall be deposited in one or more specially designated accounts at a financial institution. The title of each such account shall contain the words trust account or "escrow account," as well as the lawyer's or the lawyer's law firm's identity.

The Committee found that Respondent violated each of the three Rules specified above. The Board agrees with this conclusion but disagrees with respect to the Committee's finding of a violation with respect to one specific count of the Specification of Charges brought by Bar Counsel (the "Specifications") as explained below.

A. Respondent Violated Rules 1.15(a) and 1.17(a)

The Committee found that Respondent violated Rule 1.15(a) and Rule 1.17(a) in each of the instances described in Count I (Jonda Morton-Smith, client), Count II (Sharon and Lawrence Tucker, clients), Count III (Lionel Proctor, client) and Count V (Carla Morrison, client) of the Specifications. The Committee found no violation of either rule in the instance described in Count IV (Gwendolyn Campbell, client) of the Specifications. The Board agrees with all these findings except with respect to Count V of the Specifications, where the Board finds that there was not sufficient evidence to find a violation of Rule 1.15(a) or Rule 1.17(a).

Counts I and III

Respondent has acknowledged violating the prohibition against commingling for the conduct underlying the charges in Counts I and III.[1] In those instances, Respondent either deposited, or authorized the deposit of, funds belonging to clients into his firm's operating account (the "Operating Account"), which Respondent knew contained general funds belonging to the law firm. In the Morton-Smith matter, the funds were deposited directly into the Operating Account; in the Proctor matter, they were transferred from the escrow account maintained by the Respondent's firm (the "Escrow Account") into the Operating Account before being disbursed

[1] In his brief, Respondent acknowledges, with respect to Count I, a violation of "Rule 1.15(c)," and, with respect to Count III, a "violation of the rule against commingling." Respondent's Proposed Findings of Fact, Conclusions of Law, and Recommendation As To Sanction, dated May 3, 1999, at 5 and 8. The Specifications charge violations, in each case, of Rule 1.15(a) rather than Rule 1.15(c).

from the Operating Account to Mr. Proctor. The Board agrees that these activities constitute violations of Rule 1.15(a) and Rule 1.17(a). In the Morton-Smith matter, the funds were never deposited into the required escrow or trust account; in the Proctor matter, Respondent was responsible for removing the funds from the Escrow Account and depositing them in the Operating Account before distributing them to the client.

Count II

In the case of Count II, Respondent argues that "the attorney's money and the client's money were never in the attorney's account at the same time," owing to the fact that the initial settlement check from the adverse party, which was payable to Respondent's clients, was returned for insufficient funds. Respondent's Proposed Findings of Fact, Conclusions of Law, and Recommendation As To Sanction, dated May 3, 1999 ("Respondent's Brief") at 6-7. Respondent had deposited the settlement check in the Operating Account and issued a check to Mrs. Tucker on the Operating Account, which cleared notwithstanding the fact that the settlement check was later returned unpaid. A replacement settlement check was ultimately issued to Respondent. Respondent argues that the check he issued to Mrs. Tucker was, in essence, an advance from Respondent of Mr. and Mrs. Tucker's share of the settlement, and that "when Respondent received the re-issued settlement check it was Respondent's money. Thus, as a matter of law there was no commingling . . . ." Id. at 7.

The Board does not agree. As Bar Counsel rightly notes, commingling occurred when Respondent initially deposited the Tuckers' settlement check in the Operating Account and the bank credited the Operating Account with those funds. By any reasonable measure, the funds which were credited to the account with respect to the settlement check were, at least in part, clients' funds. These funds became part of the balance of an account that also contained the

firm's funds. The fact that the settlement funds were later withdrawn by the bank when the settlement check was returned unpaid, and the fact that there were adequate other funds in the account to cover the check which Respondent had issued to the clients, is a contingency which does not excuse the initial commingling.

Indeed, it is the very fungibility of cash funds, upon which Respondent relies to make his argument, that supports the rule against commingling. Respondent argues that the funds he distributed to Mrs. Tucker from the Operating Account, which originally belonged to the firm, became by virtue of that distribution, his clients' funds. Correspondingly, he argues, the funds which ultimately came into the account from the settlement check, which were to have been his clients', became by virtue of the earlier distribution, his firm's property. This designation and re-designation of ownership of funds creates a risk of loss to the client which is prevented by the simple segregation of client funds from the lawyer's own funds. As the Court has stressed, "the purpose of the rule against commingling [is] not only to prevent the more serious offense of misappropriation, but also to avoid the possibility of unintentional loss of a client's funds due to circumstances beyond the control of the attorney." In re Ross, 658 A.2d 209, 211 (D.C. 1995) (citing In re Hessler, 549 A.2d 700, 702 (D.C. 1988)). The mere fact that such re-designation of ownership did not result in harm to the client, in a given instance, does not forgive it. The Board finds that Respondent's activities with respect to the Tuckers' funds constituted a violation of Rule 1.15(a).

Likewise, in the Tucker matter, Respondent made no attempt to safeguard the Tuckers' funds by placing them in an escrow or trust account, as required by Rule 1.17(a). The Board therefore also finds a violation of Rule 1.17(a) in this instance.

Count IV

The Committee found no violation of either rule on the part of Respondent with respect to the activities underlying Count IV, the Gwendolyn Campbell matter. In this instance, the salient fact is that Gwendolyn Campbell was, at all relevant times, the client of another attorney at Capitol Hill Legal Services. Respondent's activity with respect to Ms. Campbell was limited to his providing the second of two required signatures on an Operating Account check that was made payable to Ms. Campbell as a disbursement of settlement funds to her. Respondent testified that he had no knowledge of the facts and circumstances surrounding his partner's representation of Ms. Campbell, the settlement of her case, or the handling of the settlement funds. The Board does not find that Bar Counsel has proven any facts inconsistent with Respondent's testimony.

Bar Counsel argues that Respondent violated the rule against commingling with respect to Ms. Campbell, even though "[he] did not possess her entrusted funds," when "he allowed his legal fees and other funds to be deposited in the same account where he knew his firm had deposited Ms. Campbell's funds." Bar Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation As To Sanction, dated April 2, 1999[2] ("Bar Counsel's Brief") at 20. The Board disagrees with this assignment of responsibility. As the Committee points out in its Report, both Rule 1.15(a) and Rule 1.17(a) "speak[] to the responsibility of an individual lawyer." Committee Report at 11. Rule 1.15(a) pertains to "property of clients or third persons that is in the lawyer's possession in connection with a representation" and Rule 1.17(a) to "funds coming into the possession of a lawyer that are required by these rules to be segregated from the lawyer's own funds." No evidence has been presented that Respondent ever had possession over

the Campbell settlement funds, nor that such funds were connected to any representation of Campbell by Respondent. Bar Counsel expressly concedes that there was no possession by Respondent. Since possession is an element of both Rules, the Board finds no violation of either with respect to Count IV.[3]

Count V

In the matter underlying Count V, Respondent admits receiving a settlement check in the case in which he represented his client, Carla Morrison, but states that "he did not deposit the check into his operating account nor did he cause another to deposit the check into his operating account." Respondent's Brief at 10. Respondent testified that he received a settlement check upon settling Ms. Morrison's case, mailed Ms. Morrison the settlement check for her signature, and scheduled an appointment at his office for Ms. Morrison to exchange the endorsed settlement check for a disbursement check from Capitol Hill Legal Services. Respondent further testified that "because [Ms. Morrison] didn't show up on time, I had to leave, I signed the check, left word for one of my partners to issue her this and get the check from them and that was what happened. She came in, she have [sic] issued a check and the check that she had was received." Hearing Transcript at 111. On cross-examination, Respondent disclaimed any knowledge as to what happened to the settlement check after he mailed it to his client, including any knowledge as to whether he or any of his partners ever received back, or for that matter even saw, the endorsed settlement check which his client was to have returned to the firm. Id. at 138-39. Respondent did stipulate that the settlement check was deposited in the Operating Account. Joint

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[2] Mistakenly dated April 2, 1998 on the Certificate of Service.

[3] The Board also notes, with the Committee, that no evidence was presented showing that Respondent had supervisory responsibility over whoever in his firm represented Campbell and obtained possession of the Campbell settlement funds. Committee Report at 11.

Stipulation ¶ 33. It is not clear from the record that Respondent was responsible for the eventual deposit of the settlement check into the Operating Account before disbursement to the client of her share of the settlement proceeds. Therefore, the Board finds that Bar Counsel has failed to satisfy its burden of establishing violations of Rule 1.15(a) and Rule 1.17(a) with respect to Count V.

B. Respondent Violated Rule 1.15(b)

Bar Counsel has charged Respondent with a violation of Rule 1.15(b) only with respect to Count I, the Morton-Smith matter.

In that matter, Respondent and his client executed an assignment and authorization ("A&A") in June 1996 in favor of Neurodiagnostics Associates ("Neurodiagnostics"), one of Ms. Morton-Smith's medical providers. That A&A, together with a bill for medical services rendered to Ms. Morton-Smith, which Neurodiagnostics forwarded to Respondent in September 1996, put Respondent on actual notice that Neurodiagnostics had an interest in any funds that Ms. Morton-Smith might receive in settlement of her case. In May 1997, Respondent received a settlement check in connection with that case, and later that month made disbursements from the settlement funds to certain of Ms. Morton-Smith's medical providers, overlooking Neurodiagnostics. By Respondent's own testimony, he did not review Ms. Morton-Smith's case file in order to determine to whom he should issue checks, but relied on his notations on the outside jacket of the file. That situation continued even after Ms. Morton-Smith telephoned Respondent to complain that she had received a call from a medical provider or providers with respect to an unpaid bill. Respondent did not pay the Neurodiagnostics bill until late September, 1997 — more than a month after Bar Counsel informed him by letter that Ms. Morton-Smith had filed a complaint and that Bar Counsel was investigating the matter.

Joint Stipulation ¶ 10; BX2. By his own testimony, he only "went back through [his] files to see what [Ms. Morton-Smith] was talking about" after receiving the complaint from Bar Counsel. Hearing Transcript at 140.

Rule 1.15(b) requires that a lawyer "shall promptly notify" any third party with an interest in funds received by the lawyer that those funds have been received, and also that the lawyer "shall promptly deliver" to the third party any funds to which that party is entitled. Here, Respondent did neither with respect to Neurodiagnostics. The Court found a violation of Rule 1.15(b) in Ross, even though at least a portion of the delay between receipt of settlement funds and payment of a third party claim in that case was attributable to clerical error. See Ross, 658 A.2d at 209. While Respondent's neglect of the Neurodiagnostics bill may have been similarly attributable, at least for a time, to his faulty system for noting outstanding third party claims, such negligence cannot provide a defense.

Rule 1.15(b) is clear: a lawyer "shall" provide prompt notice and delivery. As the Court recognized in Ross, there is no bright line test for determining whether an action taken is "prompt." Id. at 211. However, the Board finds that the four-month delay in this case, where eventual payment was prompted only by Bar Counsel's intervention, falls short of any reasonable definition of "prompt." Respondent's brief does not specifically address the charged violation of Rule 1.15(b), but merely asserts that Respondent handled the Morton-Smith matter "competently and expeditiously" and that all of his actions were "honest and forthright." Respondent's Brief at 5. Without more, such assertions cannot mitigate the fact of the delay. Accordingly, we agree with the Committee that Respondent violated Rule 1.15(b) in his handling of the Morton-Smith matter.

SANCTION

Past cases involving commingling have resulted in a range of sanctions, from mere reprimand by the Board to disbarment. As the Court has recognized, "[t]he imposition of sanctions in bar discipline, as with criminal punishment, is not an exact science but may depend on the facts and circumstances of each particular proceeding." In re Fair, No. 99-BG-1518 at 17 n.24 (D.C. Sept. 13, 2001) (quoting In re Haupt, 422 A.2d 768, 771 (D.C. 1980)). In general, however, the Court recognizes seven factors that may be used to distinguish among cases in determining an appropriate sanction. Those factors include the following: (a) the seriousness of the conduct at issue; (b) the prejudice, if any, to the client which resulted from the conduct; (c) whether the conduct involved dishonesty and/or misrepresentation; (d) the presence or absence of violations of other provisions of the disciplinary rules; (e) whether the attorney has a previous disciplinary history; (f) whether or not the attorney acknowledged his or her wrongful conduct; and (g) circumstances in mitigation of the misconduct. See Report and Recommendation of the Board appended to the Court's opinions in In re Jackson, 650 A.2d 675, 678-79 (D.C. 1994) (per curiam), and In re Hill, 619 A.2d 936, 939 (D.C. 1993) (per curiam).

(a) Seriousness of the Misconduct

The Court has clearly stated that commingling, even alone, constitutes a serious breach of an attorney's ethical obligations:

> One of the most basic rules of fiduciary conduct is that the fiduciary must not commingle his own property with that held by him belonging to another. In particular, fiduciary funds must be kept separate and deposited in a special account.

In re Hessler, 549 A.2d 700 (D.C. 1988). In Hessler, the Court explained that the dangers incident to commingling include both misappropriation by the attorney (whether intentional or unintentional) and unintentional loss caused by "circumstances beyond the control of the

attorney." Id. at 702 (quoting Clark v. State Bar, 246 P.2d 1, 5 (1952)) (citation omitted). Client funds that have been placed in an attorney's account may, for example, be taken by creditors of the attorney, or may be subject to the bank's right of setoff. Id. Given these risks, the Hessler Court pointedly "emphasize[d] the ban against commingling to alert the bar that in future cases of even 'simple commingling,' a sanction greater than public censure may well be imposed." Id. at 703.

Considerations in determining the seriousness of an attorney's commingling include whether the commingling was (i) inadvertent or knowing, (ii) an isolated instance or protracted, (iii) with or without injury to the client. See Osborne, 713 A.2d 312, 313 n.2 (D.C. 1998) (per curiam). Here, the evidence has shown that the commingling was knowing and intentional. Respondent acknowledged that the Escrow Account was too difficult to use, so that by default he and his partners chose to deposit client funds into the Operating Account. Hearing Transcript at 116-18. It is not surprising, given Respondent's intentional reliance on the Operating Account, that the commingling in this case was also protracted, lasting for approximately six months.[4]

In cases in which there has been no misappropriation, as the Committee points out in its Report, the sanctions that have been imposed have varied depending on the duration of the commingling. Committee Report at 14. The Board adds in this regard that the respondent's intent with respect to the misconduct has likewise affected the sanction in these cases. For example, in the two cases cited in the record before us in which the violations were brief and unintentional, the sanction imposed was a Board reprimand. In In re Curtis, Bar Docket No. 366-95

[4] Although the record is not clear as to when Respondent terminated his improper use of the Operating Account, the record shows that Respondent deposited the Morton-Smith settlement check in the Operating Account in early May 1997 and that as late as mid-October 1997, the Operating Account was still being used in this manner, when the Respondent caused the Proctor funds to be transferred from the Escrow Account to the Operating Account.

(BPR Oct. 11, 1996), the Board issued a reprimand to an attorney whose violations were limited to the very first representations in her career, and "were the result of her erroneous belief that she had set up an appropriate separate account for client funds and her misunderstanding of the nature of unearned fees." Curtis, Board Report at 2-3. Similarly, in In re Jones, Bar Docket No. 486-94 (BPR June 18, 1997), the Board reprimanded an attorney who was found to have commingled client funds in a single instance, having noted that the attorney "does not normally practice personal injury litigation, [] was unaware of the special rules regarding client trust accounts, and [whose] violation was the result of 'at worst mere negligence.'" Jones, Board Report at 2.

Unlike the Curtis and Jones cases, Respondent knowingly and intentionally commingled client funds with law firm funds on an ongoing basis. In such cases, public censure has been the minimal sanction imposed. For example, in In re Osborne, 713 A.2d at 312, the Court ordered public censure together with the requirement that Osborne complete a course in professional responsibility. In that case, Osborne had been aware of the practices of his firm's bookkeeper, constituting commingling, for eighteen months without acting to correct them. The Court noted that the Board had "recommended a sanction of public censure instead of a Board reprimand because the commingling extended over a long period of time." Id. at 313. See also In re Ingram, 584 A.2d 602 (D.C. 1991) (per curiam) (public censure ordered when commingling lasted for approximately six months); In re Gilchrist, 488 A.2d 1354 (D.C. 1985) (public censure ordered when commingling lasted for over three months).

Another variable affecting the seriousness of the misconduct is the degree to which the attorney, despite commingling client funds with his own or his firm's funds, keeps careful records related to all such funds. As a practical matter, careful record-keeping may serve to

safeguard against unintentional misappropriation of client funds by the attorney. Here, the evidence on this question is mixed. Respondent for the most part kept accurate books and records and made prompt disbursements to his clients and to third parties having an interest in client funds, using financial software to keep close tabs on the funds in the Operating Account. However, the Respondent's record-keeping system was not adequate to fully protect the interest of Neurodiagnostics, which was not timely paid. Failure to keep account of payments due and payable from client funds aggravates the dangers of commingling those funds.

(b) Prejudice to the Client

As the Committee noted in its Report, "[t]he only client that had any difficulty because of Respondent's practice of using his Operating Account was Ms. Morton, and that was temporary until Respondent paid the bill." Committee Report at 13. Bar Counsel described the effect Respondent's delay had on Ms. Morton-Smith in greater detail: "In failing to notify or to pay Neurodiagnostics in May 1997, when he received the settlement funds, Respondent exposed his client to a collection action by Neurodiagnostics to collect its medical fee." Bar Counsel's Brief at 27-28. The Board would add that Ms. Morton-Smith was forced to turn to Bar Counsel for resolution of the Neurodiagnostics matter, resulting in her required participation in these proceedings, which constituted a time commitment that she could not have foreseen when she retained Respondent.

(c) Conduct Involving Dishonesty and/or Misrepresentation

Bar Counsel has not alleged that Respondent's conduct involved dishonesty and/or misrepresentation, nor did the Committee find any "suggestion" to the contrary. Bar Counsel's Brief at 28; Committee Report at 13. The Board agrees that Respondent was not acting in a dishonest manner or with any intent to harm or deceive his clients.

(d) Violations of Other Disciplinary Rules

Respondent has been found to have violated three provisions of the Rules: Rule 1.15(a), Rule 1.15(b) and Rule 1.17(a).

However, this case involves no allegation that Respondent misappropriated client or third party funds, either intentionally or negligently.[5] Misappropriation is the companion violation that, when present, inevitably results in disbarment or suspension. See, e.g., In re Anderson, 778 A.2d 330 (D.C. 2001) (six-month suspension for negligent misappropriation of client funds, with inadequate record-keeping); In re Addams, 579 A.2d 190 (D.C. 1990) (en banc) (disbarment for intentional misappropriation).

(e) Prior Disciplinary History

Respondent was admitted to practice in 1990, and prior to the current proceedings was not the subject of any disciplinary action.

(f) Respondent's Acknowledgement Of Misconduct

In his brief, Respondent acknowledges two instances of commingling, albeit characterizing those violations as merely "technical." While Respondent has not conceded each of Bar Counsel's allegations, the Board is mindful that, as the Court has stated, "respondents in disciplinary matters are entitled to a presumption of innocence and should be allowed to assert all possible defenses." Jackson, 650 A.2d at 679. Respondent has cooperated with the disciplinary process. His brief notes that he is "sensitive to his ethical obligations" and that "his firm is now using a trust account to hold client funds so that there will not be a recurrence of the problem."

[5] The Court has defined misappropriation as "any unauthorized use of client's funds entrusted to [the lawyer], 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." Anderson, 778 A.2d at 335 (quoting In re Harrison, 461 A.2d 1034, 1036 (D.C. 1983)). The burden is on Bar Counsel to prove the requisite level of intent. Fair, slip op. at 6.

Respondent's Brief at 12. The Board is satisfied that Respondent has recognized the import of these proceedings with respect to his fiduciary duties.

(g) Circumstances In Mitigation

As the Committee notes in its report, at the time of the violations that are the subject of these proceedings, Respondent "was just establishing the law firm in a low income neighborhood." Committee Report at 13. In his brief, Respondent elaborated on this point, noting that his firm "was a small new firm concentrating in CJA [Criminal Justice Act] work and just starting to do personal injury cases." Respondent's Brief at 12. The Committee also pointed to Respondent's subsequent proper use of a trust account as a mitigating factor. Committee Report at 15.

Analysis

The cases comparable to the instant case which involve knowing and protracted commingling without misappropriation fall generally into two classes: those in which public censure is ordered, and those in which a harsher sanction is imposed.

(a) Public Censure

The first class of comparable cases includes Osborne, Gilchrist, and Ingram. Bar Counsel relies primarily upon Osborne in recommending that Respondent be publicly censured. Reply of Bar Counsel to Respondent's Proposed Findings of Fact, Conclusions of Law and Recommendation As To Sanction at 5. In that case, the Court imposed a public censure and ordered completion of a course in professional ethics. Osborne, 713 A.2d at 313. Osborne, who conceded commingling, had been aware for approximately eighteen months that his firm's bookkeeper was depositing client funds as well as advanced fees into the firm's trust account, and was using checks drawn on the same account to pay the attorney's operating expenses. Id.

As in this matter, there was no misappropriation of client funds, excellent account records were kept, and the attorney, who cooperated with Bar Counsel, was making a contribution to his community, and had no prior disciplinary record.

Similarly, in In re Parsons, 678 A.2d 1022 (D.C. 1996) (per curiam), the Court publicly censured an attorney who commingled funds over a period of five days, with "no misappropriation . . . no withholding of funds, and no harm to the client." Parsons, Bar Docket No. 72-91 at 5 (BPR Feb. 1, 1996). Public censure was also imposed in Ingram, where the attorney commingled client funds in his personal bank account for six months, and then kept the funds in a file cabinet for several more months — conduct which the Court found was "exceedingly close to deserving the imposition of discipline beyond a public censure." Ingram, 584 A.2d at 602. Despite the risk to the client funds, the Court accepted the Board's recommendation as to sanction because the conduct at issue had occurred before the issuance of the Court's warnings in Hessler, and on the level of discipline imposed in similar cases. See also Gilchrist, 488 A.2d at 1354, in which the Court credited the Board's conclusion that Bar Counsel had failed to establish misappropriation, and therefore ordered public censure as being consistent with precedent; In re Artis, No. M-103-81 (D.C. Feb. 25, 1982), in which public censure was ordered for a commingling unaccompanied by misappropriation, even though the attorney failed to keep adequate records of client funds in his possession; and In re Teitelbaum, 686 A.2d 1037 (D.C. 1996) (per curiam), in which public censure was imposed based on commingling that did not result in injury to the client. Finally, in In re Millstein, 667 A.2d 1355 (D.C. 1995) (per curiam), the Court imposed public censure and ordered the completion of a course in professional ethics in a case of simple commingling, with no misappropriation or other prejudice

to the client. The Board in Millstein had recommended the ethics course in response to the aggravating effect of the attorney's ignorance of the Rules. Id. at 1356.

The foregoing cases, taken together, represent a baseline class of cases in which an attorney engages knowingly and for a certain time period in commingling, without lasting negative effect to the client. As the Board stated in its report in Parsons, "Where no harm to the client is shown, and there are no other aggravating factors, public reprimands and censures remain within the acceptable range of penalties." Parsons, Board Report at 3-4.

(b) Brief Suspension

The second set of comparable cases involves conduct substantially similar to that in the first set, with the difference being the presence of additional violations. These additional violations result in the imposition of heightened discipline — often a thirty-day suspension. For example, in Ross, the Court adopted the Board's recommended sanction of a thirty-day suspension for an attorney who had commingled client funds in his general operating account and had failed promptly to pay a third party medical provider. Ross, 658 A.2d at 209. The attorney received a settlement check in connection with a personal injury representation, deposited it in his operating account, disbursed the client's share to the client, and instructed his secretary, twice over several months, to prepare a check to the medical provider. Id. at 210. Eventually, the medical provider, who had been calling Ross's office with requests for payment during the intervening months, reached Ross himself by telephone. However, it was only following a complaint to Bar Counsel that the medical provider received payment, eleven months after Ross had received the settlement funds, and nearly three months after the provider's conversation with Ross himself. Id. The Court agreed with the Board that a brief suspension rather than censure was called for, given (i) the fact that Ross's misconduct had occurred after the Court issued its

warning about commingling in Hessler, and (ii) the additional violation of Rule 1.15(b), the failure to deliver funds promptly to a third party. Id. at 211; see also In re Ukwu, 712 A.2d 502 (D.C. 1998) (thirty-day suspension, suspended pending compliance with recommendations of the District of Columbia Lawyer Practice Assistance Committee, in case of commingling of client funds and failure to maintain proper financial records).

The Board agrees with the Committee that public censure is the appropriate sanction for Respondent. In light of the absence of any misappropriation, the critical question is whether all of the facts and circumstances incident to Respondent's misconduct place it in the baseline category of commingling cases, or push it into that category in which brief suspension is warranted. The Board finds that while this is a close question, on balance, Respondent's case is distinguishable from those that justified suspension.

The leading case in that category is Ross. Although Respondent, like Ross, was found to have violated Rule 1.15(b) in addition to Rule 1.15(a), the Board finds the underlying conduct in Ross to have been more egregious. Respondent acted more responsibly with respect to the delayed medical payment than did Ross: (a) upon receiving settlement funds, Respondent himself promptly issued checks paying Ms. Morton-Smith's medical bills and expenses (albeit overlooking the bill of Neurodiagnostics), whereas Ross apparently charged his secretary, who suffered from medical and emotional problems, with drafting a letter and preparing a check to his client's medical provider; (b) the overall time frame between receipt of settlement funds and payment of the medical provider was eleven months in the case of Ross, but only four months in the case of Respondent; and (c) most importantly, once Respondent received actual and specific notice of the unpaid Neurodiagnostics bill, with the letter from Bar Counsel, he delivered the payment to Neurodiagnostics within approximately one month's time. By contrast, Ross became

aware of the non-payment approximately five months after settlement, at which time he simply renewed his instructions to his secretary, who had failed to implement them in the first place. Ross, 658 A.2d at 210. Later, Ross was again put on actual and specific notice of the non-payment when a representative of the medical provider told him about it directly approximately seven months following the settlement. Nonetheless, he took no action, and the medical provider was not paid until three months later, following the filing of the complaint against Ross with Bar Counsel. Id. As the Court stated, referring to the conversation between Ross and the medical provider's representative, "[h]aving been given such notice, Mr. Ross could have and should have taken more aggressive steps to make sure that the check was sent as soon as possible." Id. at 211-12.

The Committee characterized Respondent's behavior with respect to the Neurodiagnostics bill as an "inadvertent" violation of Rule 1.15(b), based on Respondent's apparent belief that all of the medical providers had been paid. Committee Report at 12. Respondent testified that when Ms. Morton-Smith advised him that she was receiving calls from a medical provider or providers about an unpaid bill, he asked her to have that medical provider call him directly, and that no one did. Once he received notice by way of the letter from Bar Counsel, he acted within a reasonably short period of time. The Committee found that the Rule 1.15(b) violation "should not enhance the severity of the sanction" because it was based on negligence. Committeee Report at 15. It found Respondent's conduct to be more closely comparable to that in In re Eaton, Bar Docket No. 310-95 (BPR June 3, 1997), in which an assignment and authorization in favor of a medical provider was misfiled, resulting in a finding that the attorney violated Rule 1.15(b) through his negligence. In that case, an informal admonition was imposed. The Board agrees that Respondent's handling of the Neurodiagnostics

claim is closer to the conduct in Eaton than Ross, and declines to recommend a suspension based on the Rule 1.15(b) violation.

CONCLUSION

For the foregoing reasons, the Board agrees with the conclusion of the Committee that Respondent violated Rule 1.15(a), Rule 1.15(b) and Rule 1.17(a), and further agrees with the Committee's recommendation that the Court publicly censure Respondent.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Roger A. Klein

Dated: November 16, 2001

All the members of the Board concur in this report and recommendation except Ms. Ossolinski, who did not participate.