THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of:	:	
	:	
MICHAEL ALEXEI,	:	
	:	
Respondent.	:	Board Docket No. 20-BD-018
	:	Disc. Docket No. 2016-D375
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 999055)	:	

REPORT AND RECOMMENDATION OF AD HOC HEARING COMMITTEE

Respondent, Michael Alexei, is charged with violating Rules 1.1(a) and (b), 1.5(a), 1.15(a), (b), and (e), and 8.1(a) of the District of Columbia Rules of Professional Conduct (the "Rules"), arising from Respondent's representation of Maria Victoria Dijamco in an immigration case between 2014-2016. Disciplinary Counsel contends that Respondent committed all of the charged violations and should be disbarred as a sanction for his misconduct. Respondent contends that he did not commit any of the alleged Rule violations.

As set forth below, the Hearing Committee finds that Disciplinary Counsel has failed to prove any of the charged violations by clear and convincing evidence and recommends that the charged violations be dismissed.

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

I. PROCEDURAL HISTORY

On March 17, 2020, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"). Respondent filed an Answer on July 6, 2020.

A hearing was held on October 18, 2021.[1] Respondent was present and was represented by Kristin Paulding, Esquire. Disciplinary Counsel was represented by Caroll Donayre Somoza, Esquire. The following exhibits were received in evidence: DCX 1-30 and RX 1-149.[2] Tr. 9-10 (admitting both parties' exhibits and granting Disciplinary Counsel's June 22, 2021 motion to submit additional evidence). Disciplinary Counsel called the following witnesses: Respondent, Charles Anderson (its investigator) and Cora Tekach, Esquire (its expert). Respondent testified on his own behalf and did not call any additional witnesses.

Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had failed to prove any Rule violations. Tr. 239-240; *see* Board Rule 11.11. Therefore, the hearing did not proceed to the sanctions phase.

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on November 15, 2021, and Respondent

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[1] The hearing was originally scheduled begin on January 14, 2021, but was rescheduled five times – to begin on January 28, March 12, April 27, July 8, and, finally, October 18 – at the parties' request.

[2] "DCX" Refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to the transcript of the hearing held on October 18, 2021.

filed his Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on November 29, 2021. Disciplinary Counsel filed its Reply on December 6, 2021.

II. FACTUAL SUMMARY

When Respondent agreed to represent Ms. Dijamco, he offered two retainer agreement options: one option would cover filing disciplinary complaints against her former attorneys for no fee and filing a fee dispute complaint on a contingency fee basis, and the other option would cover a new green card application, humanitarian reinstatement, and appeal of a USCIS decision, for $5,000. Before she made a selection, and while both agreements were in force, Ms. Dijamco paid the initial deposit listed in the second retainer agreement ($2,500), which Respondent deposited into his firm's trust account. Respondent performed work on the immigration case over the next four days, at which point he withdrew the funds he had earned from the trust account, which left the balance below $2,500.

Ms. Dijamco subsequently decided to proceed with the second retainer agreement, and Respondent voided the first agreement. Respondent and Ms. Dijamco would later modify the second retainer agreement to add the preparation of two bar complaints against her former attorneys, in an effort to re-open her immigration case, and modify the filings Respondent would make in pursuit of her green card and work authorization. After Respondent prepared the forms contemplated by the modified second retainer agreement, but before he filed them, Ms. Dijamco made the second payment of $2,500. Respondent had earned that

amount through the performance of legal services, and he deposited the check into his personal bank account. USCIS ultimately denied Ms. Dijamco's green card application, citing deficiencies including the absence of a form seeking waiver of grounds for inadmissibility. Ms. Dijamco's former attorneys had filed that form but were unsuccessful with that legal strategy, and Respondent chose to pursue a different strategy. Ms. Dijamco subsequently hired new counsel and filed a disciplinary complaint against Respondent in an effort to reopen her immigration case again.

III. FINDINGS OF FACT

The following Findings of Fact are based on the testimony and documentary evidence admitted at the hearing, and these Findings of Fact are established by clear and convincing evidence. *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence [is] more than a preponderance of the evidence, [it is] 'evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the fact sought to be established'" (quoting *In re Dortch*, 860 A.2d 346, 358 (D.C. 2004))).

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on February 7, 2011, and assigned Bar number 999055. Tr. 26 (Respondent); DCX 1.

2. Respondent immigrated to the United States in 2001 and graduated from George Washington University Law School's LLM program in 2006 (he had become an attorney in Moldova in 1989). Respondent was admitted to the D.C. Bar

in 2011 and, at the time of the hearing, was a solo practitioner practicing immigration law. Tr. 25-27, 109-110 (Respondent); RX 37.

3. Respondent testified on his own behalf. The Hearing Committee finds Respondent's testimony to be credible.[3]

4. Respondent takes notes of his interviews with clients and maintains them in the client file. Tr. 29.

5. Ms. Dijamco and Respondent held their first meeting in March 2014, which meeting was set up by phone at an unknown date prior. Tr. 33.

6. On March 27, 2014, Respondent met with Ms. Dijamco at Respondent's house to discuss Respondent's representation of Ms. Dijamco in her immigration case. Tr. 114. Respondent agreed to research new immigration law over the next 30 days at no charge in order to possibly choose a new legal strategy for Ms. Dijamco to adjust her visa status. Respondent made a few contemporaneous notes for himself about this meeting and a possible preliminary strategy with possible fees. Respondent's notes include a notation about "(1) Research for 30 days Deadline 4-25-2014 (no legal fee)." Tr. 33-35, 75 (Respondent); DCX 6 at 34; DCX 13 at 529.

7. On April 19, 2014, Respondent presented Ms. Dijamco with two retainer agreements. Respondent told the client to take a week to decide how she

[3] Detailed credibility findings for Respondent are set forth in para. 53, *infra*.

wanted to proceed in her case (meaning which retainer agreement she wanted to choose). Tr. 56-57 (Respondent).

8. The scope of the representation in the first retainer agreement included (1) preparing a letter to the client's former attorneys and filing a bar complaint against them for no fee and (2) preparing a fee dispute resolution complaint against the former attorneys for a one-third contingency fee. Tr. 58 (Respondent); DCX 6 at 33. The first retainer agreement included a hand-written note at the bottom, stating "This Agreement" is part of the "Main Agreement" signed on 04-19-2014." DCX 13 at 530 (underline in original). The only other agreement signed on April 19, 2014, was the second retainer agreement described in para. 9, *infra*, and no evidence was presented to support that the second retainer agreement was not the "Main Agreement" referred to in this note.

9. The second retainer agreement stated that the scope of the representation would be to file the following documents: (1) I-485 with attached forms and evidence including "Supplement A" under INA 245(i) for a legal fee of $1,500;[4] (2) *Nunc Pro Tunc* humanitarian reinstatement of I-130 Request[5] for a legal

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[4] I-485, Application to Register Permanent Residence or Adjust Status, is used by a person in the United States to apply for lawful permanent resident status. INA 245(i) is a section of immigration law that provides certain undocumented immigrants an opportunity to adjust to lawful permanent resident status and receive a green card in the United States. *I-485, Application to Register Permanent Residence or Adjust Status*, U.S. CITIZEN AND IMMIGRATION SERVICES, www.uscis.gov/I-485.

[5] Humanitarian reinstatement is a discretionary form of relief available to the principal beneficiary of an approved Form I-130 (petition for alien relative) that USCIS approved before the petitioner's death. *Humanitarian Reinstatement,* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/green-card/green-card-eligibility/humanitarian-reinstatement.

fee of $750.00; and (3) I-290B[6] Motion including the "law brief" for a legal fee of $2,750. DCX 5 at 21; Tr. 59-60 (Respondent). Respondent set the total legal fee at $5,000, with the initial payment of $2,500 and a second payment of $2,500 upon the filing of forms with USCIS. DCX 5 at 21. The second agreement was later modified on July 5, 2014. *See* para. 25, *infra*; Tr. 81-83, 163-64 (Respondent); DCX 13, 533-34.

10. The first and second retainer agreements did not disclose or ask Ms. Dijamco to agree that Respondent would not deposit and maintain the advanced legal fees in his trust account. Tr. 62 (Respondent).

11. On April 19, 2014, Ms. Dijamco paid Respondent $2,500 by check. Tr. 63 (Respondent); DCX 13 at 535; DCX 27 at 766.

12. On Saturday, April 19, 2014, at 7:40 p.m., Respondent deposited, via ATM, the $2,500 in his law firm's trust account ending in #1837 at Capital One Bank. The cancelled check shows the deposit date of April 19, 2014. Capital One processed the check on Monday, April 21, 2014. Tr. 64 (Respondent); DCX 27 at 765. The Capital One statement reflects the processing date as the deposit date. DCX 27 at 796.

13. Respondent explained "I deposit this check in the trust account because at that moment when [Ms. Dijamco] signed the contract, we got a . . . client/attorney relationship and the work on her case started. I didn't earn at that time any money

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[6] Notice of appeal or motion to a USCIS decision. *I-290B, Notice of Appeal or Motion,* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, www.uscis.gov/i-290b.

yet because I did the research for free, 30 days, on legal matter." Tr. 65; *see also* Tr. 69, 73-74, 155 (Respondent).

14. Respondent began work after he was engaged on April 19, 2014. Respondent did six to eight hours of work between April 19, 2014, and April 24, 2014, drafting forms, doing research and working on a brief involving INA 245(i) *nunc pro tunc*. Tr. 67, 69-71, 134, 155-57, 234 (Respondent). In response to a question from Disciplinary Counsel that Respondent "took $489 from Ms. Dijamco's money without earning it," Respondent stated that that statement was not correct "[b]ecause I start work immediately from April 19, April 19 on her case." Tr. 69-70. The brief, which was ultimately filed on January 28, 2015, was submitted as one of Respondent's exhibits, RX 42 (at 92-98).

15. Respondent's rate in 2014, when charging an hourly rate, was between $250 and $350 per hour. Tr. 132 (Respondent). Although Respondent was not charging by hourly rate, an approximation using Respondent's hourly rate would have been that he earned between $1,500 and $2,800 by April 24, 2014.

16. On April 24, 2014, four days after the deposit of Ms. Dijamco's first payment, Respondent wrote himself a check for $1,900, which drew down the balance in the account to $2,010.98 – $489.02 below the $2,500 that Respondent initially held in trust on behalf of Ms. Dijamco. The bank processed this check on April 25, 2014. Tr. 66-67 (Respondent); DCX 27 at 742, 796. Because Respondent had earned more than $489.02 by April 24, 2014, *see* para. 15, *supra*, Disciplinary

Counsel failed to establish that the balance in Respondent's trust account fell below the amount he was required to hold on behalf of Ms. Dijamco.

17. On April 26, 2014, Respondent and Ms. Dijamco met in person. Ms. Dijamco decided to proceed with the second retainer agreement. The first retainer agreement was voided by crossing out the entire page and writing "void" on the document in red. Tr. 57-58 (Respondent); DCX 13 at 530.

18. Between April 19, 2014 and April 26, 2014, before Ms. Dijamco had selected how to proceed, both the first (fee dispute contingency) and second (immigration relief fee-based) retainer agreements were valid and in existence. Therefore, the Respondent could do legal work on the immigration matter during that time period for a fee as provided in the second retainer agreement and was not operating under the $0 contingency agreement.

19. At the April 26, 2014 meeting, Ms. Dijamco elected to proceed by filing a complaint for ineffective assistance of counsel in Illinois against her former attorneys and to file an I-485 form, *nunc pro tunc* for humanitarian reinstatement and an I-290 appeal. Tr. 59, 77 (Respondent); DCX 13 at 532. At the meeting, Respondent also had Ms. Dijamco write a document in her handwriting, with her signature, and her sister attesting, that stated that she was aware she had the right seek a second opinion and waived it, directing Respondent to prepare immigration papers. Tr. 237-38 (Respondent); DCX 13 at 532.

20. During the course of Respondent's representation of Ms. Dijamco, he reviewed the history of Ms. Dijamco's case and knew that it would be a very difficult

case. He learned that Ms. Dijamco entered the United States in 1996 using a fake name and a fake passport. He did not want to repeat the work that her previous lawyer did. Tr. 115-19, 128, 232-37 (Respondent); RX 2.

21. Respondent studied the fourteen-year history of Ms. Dijamco's case and learned that her prior attorney did the following (RX 4):

a. In January 2000, an I-485 (Green Card Application) and additional forms were filed. The attorney did not file an I-601 Application for Waiver of Grounds of Inadmissibility at that time, but filed it separately in August 2005. Tr. 211-12 (Tekach); RX 5.

b. In March 2005, Ms. Dijamco was interviewed by a USCIS officer. RX 7.

c. In July 2005, the USCIS officer asked Ms. Dijamco to send in an I-601 waiver form, and her lawyer prepared the form and sent it in. RX 8-9.

d. In March 2006, Ms. Dijamco's waiver was denied, and in May 2006 she noted her appeal. RX 11-12.

e. In August 2008, the appeal was denied because Ms. Dijamco's mother, her qualifying relative, had died in 2007. RX 14.

f. In 2008, Ms. Dijamco wanted a work authorization and asked her lawyers to file a humanitarian reinstatement request. It was filed and denied in 2009. RX 15-16.

g. In January 2010, the law changed, and Ms. Dijamco's lawyer felt that they had grounds to reopen her original green card application. They

refiled a second I-485 (Green Card Application) but did not file an I-601 waiver form. Ms. Dijamco got a new work authorization while this matter was pending. RX 17-19, 23.

h. In January 2011, Ms. Dijamco was interviewed by a USCIS officer, and in March 2011, her green card application was once again denied, and her work authorization was revoked. RX 24, 26-27.

22. Beginning in March 2014, Ms. Dijamco and Respondent discussed different strategies to get her green card. Ms. Dijamco also wanted a work authorization. Tr. 53-54, 130, 232-34 (Respondent).

23. On May 21, 2014, a month after Ms. Dijamco paid Respondent the first installment of $2,500, the balance in the trust account had fallen to $738.98 – $1,761.02 below the amount that Respondent initially held in trust on behalf of Ms. Dijamco. DCX 27 at 798. The record shows that Respondent had performed work that earned fees prior to this date but does not show exactly how much Respondent he had earned by that point. *See* para. 15, *supra*. Therefore, Disciplinary Counsel failed to establish that the balance in Respondent's trust account fell below the amount he was required to hold on behalf of Ms. Dijamco.

24. On May 29, 2014, Respondent presented to Ms. Dijamco for her signature the disciplinary complaints he drafted against her former attorneys. DCX 13 at 183-86.

25. On July 5, 2014, Respondent presented to Ms. Dijamco an addendum to the previous second retainer agreement of April 19, 2014. *See* DCX 13 at 533-

34. The addendum was added with asterisks at the bottom of the retainer agreement and continued onto a second page. The asterisks at the bottom of the retainer agreement clarify that the legal fee of $5,000 included previous consultations and preparing a bar complaint, amongst other unreadable language. The second page is dated July 5, 2014, and contains signatures from Respondent and Ms. Dijamco. This addendum stated that "Client agrees to compensate the attorney for additional work," which was listed in the addendum as: (1) $1,000 to prepare and file two bar complaints against her former attorneys and review the record of her immigration proceedings; (2) $850 to prepare and file a new I-864 affidavit of support with additional evidence; and (3) $900 to prepare a *nunc pro tunc* adjustment of status request cover letter to USCIS with detailed legal arguments. DCX 13 at 534. The addendum's third task replaced the language of the third task in the initial agreement signed on April 19, 2014, which discussed the *nunc pro tunc* humanitarian reinstatement of I-130 request. The addendum also noted that the first April 19, 2014 retainer agreement, which was a contingency fee agreement and included a "$00" fee, was voided. Tr. 82-83, 163-64 (Respondent); DCX 13 at 533-34; *see* DCX 13 at 530.

26. The second retainer agreement also includes handwritten notes on the top of the document that states: "Parts (1) and (2) are completed and client paid $2,250 + $250 (I-864, Friend) = $2,500." DCX 13 at 533. There is no indication on the document as to when those notes were written and no testimony provided about this topic.

27. Respondent sent the disciplinary complaints against Ms. Dijamco's former attorneys to those attorneys sometime in June 2014. Tr. 79-80 (Respondent).

28. Respondent's November 30, 2016, response to Disciplinary Counsel included a footnote, which stated that Respondent drafted a 61-page complaint against Ms. Dijamco's former lawyers at "$00" legal fees under the "condition that Client will file a fee dispute resolution complaint against her former attorneys." DCX 6 at 29, n.1. The footnote also stated that Ms. Dijamco later declined to file the fee dispute resolution complaint and that it took Respondent three days to prepare and file the bar complaint. *Id.* The footnote does not address when Respondent prepared the bar complaint, and Respondent was not asked for testimony on that question. In fact, the "$00" fee for the bar complaint was part of the first retainer agreement, which was a contingency fee agreement that was voided. *See* para. 25, *supra*. Because that first retainer agreement was voided, the "$00" fee was not relevant. At the same time, the second retainer agreement, which provided for fee-based services, was also in effect. The July 5, 2014 Addendum to the second retainer agreement included a $1,000 fee for preparing and filing two bar complaints, which covered the previously completed work. During the hearing, Respondent explained that the $1,000 fee reflected the fee for his previous work for preparing the bar complaints, which he had sent to those attorneys sometime in June 2014. Tr. 83-84, 86 (Respondent); DCX 13 at 530, 533-34. The Hearing Committee finds credible Respondent's testimony that he did not lie regarding the charge for the 61-page complaint and therefore did not knowingly make a false statement of fact in his

November 30, 2016 response to Disciplinary Counsel related to the 61-page complaint. The exhibits referenced above support Respondent's testimony.

29. On September 8, 2014, Respondent submitted Ms. Dijamco's disciplinary complaint to the Attorney Registration and Disciplinary Commission of Illinois. Tr. 80-81 (Respondent); DCX 13 at 496. Respondent and Ms. Dijamco used the strategy of filing an attorney disciplinary complaint against Ms. Dijamco's former attorneys pursuant to the immigration case of *Matter of Lozada*,[7] which was one method of re-opening a denied immigration case. Tr. 79-81.

30. On January 21, 2015, Ms. Dijamco paid the second $2,500 payment. Tr. 90-91 (Respondent); DCX 22 at 601. On January 21, 2015, Ms. Dijamco signed several DHS forms that Respondent had prepared. RX 43-48.

31. On January 25, 2015, the Respondent deposited the second $2,500 payment into his personal account at PNC Bank. PNC Bank processed the check on January 26, 2015. Tr. 91-92 (Respondent); DCX 22 at 600-01, 617.

32. On January 28, 2015, Respondent filed the document titled *Nunc Pro Tunc* Adjustment under INA Sec. 245(i) based on Ineffective Assistance of Counsel (Matter of Lozada), including Forms I-485 and I-485 Supplement A, for adjustment of status on behalf of Ms. Dijamco, which included the DHS forms and argument amongst the 61 pages of exhibits. Tr. 89-90 (Respondent); DCX 13 at 145-178.

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[7] *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) (providing that removal proceedings may be reopened due to ineffective assistance of counsel but requiring, *inter alia*, that the subject of removal proceedings file a disciplinary complaint against former counsel or explain why such a complaint was not filed).

33. Respondent testified that he "earned money, I take as I go." Tr. 72 (Respondent). The Hearing Committee finds that testimony to mean that client payments made for work which had been completed by the time the payment was made were already earned and thus deposited in Respondent's personal account.

34. There was no testimony elicited during the hearing describing each task detailed on the second retainer agreement and the July 5, 2014 Addendum, or when each task was completed. The Hearing Committee reviewed those documents, and the other exhibits cited *supra*, and finds that by the time that Respondent deposited the final $2,500 payment on January 25, 2015, he had completed the work: (from second retainer agreement) (1) I-485 with attached forms and evidence including "Supplement A" under INA 245(i) for a legal fee of $1,500; (2) *Nunc Pro Tunc* humanitarian reinstatement of I-130 Request for a legal fee of $750; (from July 5, 2014 Addendum) (3) $1,000 to prepare and file two bar complaints against her former attorneys and review the record of her immigration proceedings; (4) $850 to prepare and file a new I-864 affidavit of support with additional evidence; and (5) $900 to prepare a *nunc pro tunc* adjustment of status request cover letter to USCIS with detailed legal arguments. *See* DCX 13 at 533-34. The work totaled $5,000. Thus, the Hearing Committee finds that Respondent had earned the $5,000 total payment for the work he completed..

35. The Hearing Committee finds that the testimony of Cora D. Tekach, Expert Witness for Disciplinary Counsel, does not support the allegation that Respondent did not complete the second and third tasks of the July 5, 2014

Addendum ($850 to prepare and file a new I-864 affidavit of support with additional evidence; and $900 to prepare a *nunc pro tunc* adjustment of status request cover letter to USCIS with detailed legal arguments). First, Ms. Tekach was asked by Disciplinary Counsel to provide an opinion about the reasonable standard of care. Ms. Tekach's report did not discuss whether Respondent completed certain legal work at a particular time. Second, Ms. Tekach's testimony cited by Disciplinary Counsel, Tr. 201 (Tekach), was in response to a question about whether Respondent's conduct complied with a reasonable standard of care. Ms. Tekach was not asked whether Respondent completed certain legal work at a particular time. Third, Respondent completed those two items of work. *See* para. 34, *supra*.

36. In light of the above, the Hearing Committee finds that on January 25, 2015, when the Respondent deposited the second $2,500 payment into his personal account at PNC Bank, those funds had been earned. The subsequent draw down of Respondent's personal account at PNC Bank is not relevant. *See* Tr. 93 (Respondent); DCX 22 at 617-18.

37. With regard to financial records, in response to Disciplinary Counsel questions, Respondent described generally that his financial records will include a copy of checks, and that he relies on bank statements, his memory and his practice of work. Respondent also described generally that he relies on notes (although he does not "do notes everywhere") and those notes can be in a folder or in the computer, or in his memory. Tr. at 93-95 (Respondent). Respondent was not asked

specifically, and he did not testify, about whether or how he kept financial records for the Ms. Dijamco matter. *Id*.[8]

38. Respondent testified that he responded to Disciplinary Counsel's subpoena for his complete client file with the complete file. Tr. 97 (Respondent). The file included the retainer agreements with Ms. Dijamco, notes of possible strategies and possible fees, and copies of checks and receipts, amongst other items. DCX 13. The Hearing Committee finds that, contrary to Disciplinary Counsel assertion, this evidence demonstrates that Respondent did provide documents demonstrating how he handled payments.

39. Respondent testified generally about how he kept time records and that he kept time records by using the date function of Word documents he works on and making written notations in his client's digital file. Tr. 29-30 (Respondent). Respondent was not asked specifically to show in his file the location of his timekeeping information, and was also not asked how he used the date function or digital files to reflect time. The Hearing Committee finds an absence of evidence concerning whether timekeeping records were kept in a certain manner.

40. On September 26, 2015, USCIS issued a decision denying Ms. Dijamco's green card application. The decision cited reasons why the application was denied. DX 5 at 23-27.

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[8] Respondent was not charged with failing to keep complete records of entrusted funds under Rule 1.15(a).

41. USCIS noted that it never received a properly filed request for reinstatement of the I-130 petition. DCX 5 at 24; RX 52 at 117; Tr. 186-87 (Tekach).

42. The Hearing Committee finds that Ms. Tekach's testimony that "the retainer agreement said that a humanitarian reinstatement would be filed but that was not done," Tr. 186-87 (Tekach), was incorrect, in that the July 5, 2014 addendum removed the humanitarian reinstatement provision in the initial retainer agreement. *See* para. 25, *supra*. Ms. Tekach's Report included the same error. She corrected her testimony on cross-examination by Respondent's counsel. Tr. 203-06.

43. Respondent did not file an I-601 Application for Waiver of Grounds of Inadmissibility. DCX 5 at 24; Tr. 103.

44. Respondent testified that that he was not going to repeat work that Ms. Dijamco's former attorneys had completed and which had proven unsuccessful, including filing the I-601 waiver form. Respondent's strategy was to file a green card application asking for a *Nunc Pro Tunc* Adjustment under INA 245(i) and to file a legal brief supporting an argument that an I-601 waiver was not necessary. Tr. 127-130 (Respondent), 186, 194-96 (Tekach). Respondent testified that he did not receive a request for information from the immigration hearing office for an I-601 waiver form. Tr. 128-29. Ms. Tekach testified that the I-601 waiver form should have been filed by Respondent in Ms. Dijamco's case because she had a "fraud problem" in this case. Tr. 190-91 (Tekach). Ms. Tekach also agreed with the statement that it was unreasonable for Respondent to expect to receive a request for an I-601 waiver when his strategy was that it was not necessary because he was filing

a green card application asking for a *Nunc Pro Tunc* Adjustment under INA 245(i). Tr. 192-93 (Tekach).

45. Ms. Tekach testified upon questions from Respondent's counsel that, in fact, it is typical not to file the I-601 waiver form at the same time the green card application is filed. Tr. 212 (Tekach).

46. Ms. Tekach, in her report, stated that "it was not an effective strategy to file a new I-485 without Form I-601." DCX 28 at 818-19. Ms. Tekach also testified that she recognized that Ms. Dijamco's former attorneys had filed the I-601 waiver form and that course of action had been unsuccessful. Tr. 215 (Tekach).

47. Ms. Tekach did not provide information in her report or testimony as to why repeating the failed strategy of filing the Form I-601 would have been successful this time.

48. The Hearing Committee finds that Ms. Tekach's report and testimony did not correctly summarize the work that Respondent provided to Ms. Dijamco pursuant to the agreements. The Hearing Committee also finds that Ms. Tekach's report and testimony failed to explain why Respondent's strategy to not repeat a failed course of action fell below the standard of care of a reasonable immigration lawyer.

49. On October 21, 2016, Ms. Dijamco sent an email to Respondent stating, "I wanted to thank you for all of your help with my appeal, as you know I have chosen other representation in Chicago that will hopefully help with the application process. I also wanted to let you know that you may receive a claim/grievance letter

from my new attorney. Please understand this is not personal, it is just something that is necessary in order to re-open my case. I hope you understand, and I sincerely thank you again for all of your help." RX 53.

50. On October 31, 2016, Ms. Dijamco filed a bar complaint against Respondent.

51. In a submission to Disciplinary Counsel on January 13, 2020, titled "Respondent's [Draft] Written Pleading to Proposed Draft of Specification of Charges," Respondent stated that "[t]he initial payment was subject to Respondent's personal account according to the second agreement top clause . . . ; however, Maria did not ask me to whom she may direct her check so she just took my office title from my business card and Respondent did not have a choice but deposit it into the clients' trust account. . . ." DCX 30 at 830, 837 (brackets in original), 839. Respondent also wrote that "the work was completed already" and that "Respondent will never accept the second payment unless the work is completed." DCX 30 at 839. He asserted that "[t]echnically it was earned, technically" and explained that he deposited the check in his trust account not because they were unearned fees, but "because we didn't have a legal attorney/client relationship until then." Tr. 75 (Respondent). As explained above, however, Respondent testified credibly that he had not earned any fees before he received the first $2,500 payment. *See* paras. 13-14, *supra*.

52. Ms. Dijamco did not testify at the hearing.

53. The Hearing Committee finds that the Respondent's testimony was credible. This finding is based on a number of factors. The Hearing Committee finds that Respondent was forthcoming in his answers to Disciplinary Counsel and his own counsel, and that his overall demeanor was believable and sincere. Although Respondent's testimony was not always as clear as it could have been, in listening and reviewing the transcript of the full testimony, the Hearing Committee concludes that Respondent was providing sufficient answers to the questions asked. While some of Respondent's testimony was circular, that was due to the manner of Disciplinary Counsel's questions. In particular, Respondent explained a number of times how to properly read the written agreements between himself and Ms. Dijamco, and also consistently disputed Disciplinary Counsel's assumptions concerning how the agreements should be read. Subsequent questions that relied on assumptions which had been denied and corrected by Respondent naturally elicited what could be read as repetitive or confusing testimony. A very important factor supporting the Hearing Committee's finding of credibility was that the written documents, including the two agreements, supported Respondent's testimony. As detailed above, the agreements had cross-outs, handwritten additions and an addendum, and one retainer agreement had been later voided. The Hearing Committee examined these documents in detail and finds that they matched the work that had been performed by Respondent, the fees charged and Respondent's explanation of how to read the agreements. *See* paras. 8-9, 17-19, 25-26, 28, 34, *supra*. In addition, expert witness Ms. Tekach read the agreements incorrectly, and

therefore her testimony about the agreements did not support a contrary finding. *See* para. 42, *supra*.[9]

IV. CONCLUSIONS OF LAW

Disciplinary Counsel contends that Respondent failed to provide competent representation to Ms. Dijamco, charged her an unreasonable fee, intentionally misappropriated unearned fees, failed to deposit entrusted funds in a trust account, and lied to Disciplinary Counsel during its investigation, in violation of Rules 1.1(a) and (b), 1.5(a), 1.15(a), (b), and (e), and 8.1(a). Disciplinary Counsel seeks Respondent's disbarment, which is the presumptive sanction for reckless or intentional misappropriation. Respondent contends that Disciplinary Counsel failed to prove by clear and convincing evidence that his representation fell below the applicable standard of care, that he failed to earn all of the fees he collected before he took them as his own property, and that he knowingly made a false statement to Disciplinary Counsel. Accordingly, Respondent argues that he violated no Rules and should receive no sanction.

A. Disciplinary Counsel Did Not Prove that Respondent Violated Rules 1.1(a) (Lack of Competence) and 1.1(b) (Lack of Skill and Care).

Rule 1.1(a) requires a lawyer to "provide competent representation to a client." The Court has determined that competent representation requires the "legal

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[9] Pursuant to *In re Krame*, 284 A.3d 745, 754-55 (D.C. 2022), the Hearing Committee has based its credibility findings on substantial evidence including Respondent's demeanor, consistency of testimony, documents in evidence and lack of contradictory evidence.

knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *See In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (explaining that a lawyer who has the requisite skill and knowledge, but who does not apply it for particular client, violates obligations under Rule 1.1(a)). Rule 1.1(b) mandates that "a lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." The comments to Rule 1.1 state that competent representation includes "adequate preparation, and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Rule 1.1, cmt. [5]. Rule 1.1 "applies only to failures that constitute a 'serious deficiency' in the attorney's representation of a client." *In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014) (quoting *In re Evans*, 902 A.2d 56, 69 (D.C. 2006)).

Relying on its expert witness, Disciplinary Counsel contends that Respondent's failure to include an I-601 waiver form on behalf of Ms. Dijamco demonstrated a lack of competence, skill, and care that ultimately prejudiced the client. Respondent counters that it was not necessary to file a I-601 waiver form and that his legal strategy represented Ms. Dijamco's best chance of success in her goal to obtain a green card and work authorization.

The Hearing Committee finds that there was not clear and convincing evidence that Respondent failed to provide competent representation. The standard is not, and Disciplinary Counsel has no support for an argument, that the Respondent's legal strategy was not the best, or that it was unsuccessful. As

presented in the Findings of Fact, the Hearing Committee finds that Respondent engaged with his client, learned the history of the case, researched options, prepared legal briefs, created a strategy based on the history of the case, and executed on that strategy. The Hearing Committee did not find the report or testimony presented by Disciplinary Counsel's expert witness to be clear or convincing as to the issue of competence. The expert's testimony made clear that she was not fully knowledgeable about the case file, or what work Respondent agreed to do and did. The expert also did not provide any information as to why the course of conduct that she proffered was the only competent course of conduct, or that it would have been successful given that that exact course of conduct had failed in the past.

Therefore, the Hearing Committee finds that Disciplinary Counsel did not prove that Respondent violated Rules 1.1(a) and (b) (Lack of Competence, Skill, and Care).

B. Disciplinary Counsel Did Not Prove that Respondent Violated Rule 1.5(a) (Unreasonable Fee).

Rule 1.5(a) provides that:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> > (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> > (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> > (3) The fee customarily charged in the locality for similar legal services;
> > (4) The amount involved and the results obtained;

> (5) The limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) Whether the fee is fixed or contingent.

The Court has held that "Rule 1.5(a) can be violated by the act of charging an unreasonable fee without regard to whether the fee is collected." *In re Cleaver-Bascombe*, 892 A.2d 396, 403 (D.C. 2006) (internal quotation marks and citation omitted). "The prototypical circumstance of charging an unreasonable fee is undoubtedly one in which an attorney did the work that he or she claimed to have done, but charged the client too much for doing it." *Id.* However, "[i]t cannot be reasonable to demand payment for work that an attorney has not in fact done." *Id.*

Disciplinary Counsel contends that Respondent provided no benefit to Ms. Dijamco, collected the full fee for work he failed to complete, and failed to return the unearned portion, thus rendering the fee inherently unreasonable. Respondent contends that Disciplinary Counsel failed to prove that the $5,000 fee was unreasonable given the substantial work he performed over the course of two and a half years, adding that he completed all of the work contemplated by the fee agreement and addendum and that Ms. Dijamco was satisfied with his efforts.

The Hearing Committee thoroughly reviewed the written agreements between Respondent and Ms. Dijamco, the notes written on those agreements and the notes written separately, the voided items, the voluminous client file with all legal submissions and the testimony. As set forth in the extensive Findings of Fact

describing how the first and second retainer agreements matched up with the legal work, the Hearing Committee finds that Respondent did complete the work agreed to in those agreements, contrary to Disciplinary Counsel's assertion. Both Disciplinary Counsel's Proposed Findings of Fact and Ms. Tekach's testimony about what work was agreed to and whether it was completed were contradicted by the written agreements and the work itself. That evidence was corroborated by Respondent's testimony, which the Hearing Committee finds credible.

With regard to the flat fee charged by Respondent for those services, there was no testimony that those fees were unreasonable for the volume or complexity of the work completed.

Finally, the Hearing Committee does not find a violation of Rules 1.1(a) and (b); therefore, the Hearing Committee disagrees that the fee is unreasonable because the work was not competent. The fact that Respondent's strategy was unsuccessful, as was the strategy of the client's former counsel, is not the measure of whether the fee was unreasonable.

Therefore, the Hearing Committee finds that Disciplinary Counsel did not prove that Respondent Violated Rule 1.5(a) (Unreasonable Fee).

C. Disciplinary Counsel Did Not Prove that Respondent Violated Rule 1.15(a) (Reckless or Intentional Misappropriation).

Rule 1.15(a) prohibits misappropriation of entrusted funds. "Misappropriation is 'any unauthorized use of [a] 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 [the lawyer] derives any personal gain or

benefit therefrom.'" *In re Nave*, 197 A.3d 511, 514 (D.C. 2018) (per curiam) (quoting *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (alterations in original)).

"The three elements of misappropriation are (1) that client funds were entrusted to the attorney; (2) that the attorney used those funds for the attorney's own purposes; and (3) that such use was unauthorized." *In re Harris-Lindsey*, 232 A.3d 613, 620 (D.C. 2020) (citing *In re Travers*, 764 A.2d 242, 250 (D.C. 2000)). Funds are "entrusted" when the lawyer is "imbued with authority to prevent their unauthorized use." *Id.* at 624 (applying the holding prospectively).

Misappropriation is essentially a *per se* offense and does not require proof of improper intent. *See Anderson*, 778 A.2d at 335. Thus, an attorney commits "unauthorized use" when either "the client did not consent to the attorney's use of the funds" or "the funds or assets were accessed without required prior approval by a court." *Harris-Lindsey*, 232 A.3d at 624 (applying the holding regarding court approval prospectively). Thus, "when the balance in [a] [r]espondent's . . . account dip[s] below the amount owed" to the respondent's client or clients, misappropriation has occurred. *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Pels*, 653 A.2d 388, 394 (D.C. 1995)). This is the case even when the attorney has sufficient cash in hand in other accounts to cover the shortage. *See Pels*, 653 A.2d at 394.

Once it proves that a misappropriation occurred, Disciplinary Counsel must then establish whether the misappropriation was intentional, reckless, or negligent. *See Anderson*, 778 A.2d at 336. Intentional misappropriation most obviously occurs

where an attorney takes a client's funds for the attorney's personal use. *See id.* at 339 (intentional misappropriation occurs where an attorney handles entrusted funds in a way "that reveals . . . an intent to treat the funds as the attorney's own"). "Reckless misappropriation reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds, and its hallmarks include: the indiscriminate commingling of entrusted and personal funds; a complete failure to track settlement proceeds; the total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition; the indiscriminate movement of monies between accounts; and finally the disregard of inquiries concerning the status of funds." *In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013) (internal quotation marks and citation omitted); *see also Anderson*, 778 A.2d at 339 ("[R]ecklessness is a state of mind in which a person does not care about the consequences of his or her action." (internal quotation marks and citations omitted)). Negligent misappropriation is characterized by "a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded." *In re Abbey*, 169 A.3d 865, 872 (D.C. 2017) (citations omitted).

Disciplinary Counsel contends that Respondent misappropriated unearned fees by "immediately" withdrawing Ms. Dijamco's first installment payment from his trust account and depositing the second payment directly into his personal account, then spending them on personal expenses, before he had earned those fees. Respondent counters that he had performed sufficient work to earn the portion he

took from the first installment payment and that he had earned the full fee before he deposited the second installment payment.

As set forth above in the Findings of Fact, the Hearing Committee finds that Respondent earned the fees he took at the time of each payment. *See* paras. 14-16, 34, 36, *supra*. While the exhibits in this case are not straightforward, the Hearing Committee has done its best to present the sequence of events in chronological order. By doing so, the Hearing Committee was able to determine that Respondent did complete portions of work before taking payment for that work. Therefore, there is no factual basis on which to find that Respondent either negligently or intentionally misappropriated fees.

D. Disciplinary Counsel Did Not Prove that Respondent Violated Rule 1.15(b) and (e) (Failure to Deposit Entrusted Funds in Approved Depository).

Rule 1.15(e) provides that "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client . . . until earned or incurred unless the client gives informed consent to a different arrangement."[10] Rule 1.15(b) provides that such funds "shall be deposited with an 'approved depository' as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. . . ." The Court has

[10] The Court in *In re Mance*, citing the Rule 1.0 definition of informed consent, stated "[i]nformed consent [is] . . . the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonable available alternatives to the proposed course of conduct." 980 A.2d 1196, 1206 (D.C. 2009) (quoting D.C. Rules of Professional Conduct – Terminology (2009)). "Where there is no discussion regarding the fee arrangement besides merely stating the overall fee, and no mention of the escrow account option, a client cannot be said to have a sufficient basis to give informed consent to waive the requirements of a rule designed to protect the client's interests." *Id.* at 1207.

held that "when an attorney receives payment of a flat fee at the outset of a representation, the payment is an 'advance[ ] of unearned fees'" and must be held as property of the client pursuant to Rule 1.15(e) until the fees are earned. *In re Mance*, 980 A.2d 1196, 1202 (D.C. 2009).

As explained in the previous subsection, the parties disagree as to whether Respondent had earned Ms. Dijamco's second installment payment before he deposited it in his personal account, treating it as his own. If the fee was yet unearned, Respondent was required to deposit the entrusted funds in his trust account. If the fee was fully earned, it became Respondent's property upon receipt, and placing it in his trust account may have risked commingling of personal funds and entrusted funds. There is no dispute that Respondent did not obtain Ms. Dijamco's informed consent to treat otherwise entrusted funds as his own property upon receipt without having earned them.

As discussed above, in the Findings of Fact, the Hearing Committee finds that Respondent earned the fees he took at the time of each payment. Findings of Fact paragraphs 35-37 detail the work completed and when payment was made. Because the second payment was already earned, Respondent did not violate Rule 1.15(b) and (e) when he deposited the payment in his personal account. Therefore, there is no factual basis on which to find that the second payment constituted entrusted funds or that he failed to deposit them in an approved depository.

E. Disciplinary Counsel Did Not Prove that Respondent Violated Rule 8.1(a) (False Statement).

Rule 8.1(a) provides that "a lawyer . . . in connection with a disciplinary matter, shall not . . . knowingly make a false statement of fact." The Terminology section of the Rules defines "knowingly" as "actual knowledge of the fact in question" which "may be inferred from the circumstances." Rule 1.0(f). Note that Comment [1] to Rule 8.1 provides that "it is a separate professional offense for a lawyer knowingly to make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct." Moreover, the "[l]ack of materiality does not excuse a knowingly false statement of fact." Rule 8.1, cmt. [1].

Disciplinary Counsel contends that Respondent made knowingly false statements. The first statement was when Respondent told Disciplinary Counsel in 2016 that he did not charge Ms. Dijamco for drafting the disciplinary complaint against her former attorneys. The second statement was when Respondent stated in a response to a draft of the Specification of Charges, shortly before it was filed, that he had earned the fees before depositing Ms. Dijamco's check but was forced to deposit it in his trust account because she had addressed the check to Respondent's office.

The Hearing Committee concludes that there is not clear and convincing evidence that Respondent violated Rule 8.1(a). Regarding the first statement, as detailed above in paragraphs 25-29, Respondent presented the disciplinary complaints to Ms. Dijamco in May 2014 and sent them to her former attorneys the following month. At that time, there was no agreement in effect that entitled him to

charge a fee for that work. Rather, the July 5, 2014 addendum later provided for a $1,000 fee for work already completed. Thus, when he drafted the complaints, he did so at no charge. Disciplinary Counsel failed to prove that Respondent's failure to provide a more complete explanation in a footnote of a two-page letter to Disciplinary Counsel was a knowingly false statement.

Regarding the second statement, as detailed above in paragraphs 13-15, the Hearing Committee finds that Respondent began working on the case on April 19, 2014 and thus had not earned any part of his fee before Ms. Dijamco made her first $2,500 payment. Respondent's contrary statement in his draft response to Disciplinary Counsel conflicts with that finding. When pressed to explain the inconsistency during the hearing, Respondent stated that the statements were not inconsistent in part because the fee was "technically" earned. *See* para. 51, *supra*. What Respondent meant by "technically" was left unclear as the word can be understood in different ways in this context. In any event, however, Disciplinary Counsel bears the burden of proving that Respondent knew his statement was false when he made it, and the record is not developed on that point.[11] Left with only Respondent's confusing explanation in the context of otherwise credible testimony,

[11] That may be because the final Specification of Charges made no reference to this statement, and Respondent was not aware that he would be asked to address it during the hearing. If the basis for the charge was not revealed until Respondent provided contrary testimony, Disciplinary Counsel had the option under Board Rule 7.21 to request a continuance to add an additional charge and provide Respondent with an opportunity to respond.

the Hearing Committee is unable to conclude by clear and convincing evidence that Respondent provided a knowingly false statement to Disciplinary Counsel.

V. CONCLUSION

For the foregoing reasons, the Committee finds that Disciplinary Counsel has failed to prove any of the charged violations by clear and convincing evidence. The Hearing Committee recommends that the charged violations be dismissed.

AD HOC HEARING COMMITTEE

Miriam Smolen, Esquire, Chair

Rabbi Marc Lee Raphael, Public Member

Eric L. Hirschhorn, Esquire, Attorney Member