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

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| In the Matter of: | : | |
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| BILLY L. PONDS, | : | Board Docket No. 17-BD-015 |
| | : | |
| Respondent. | : | Disciplinary Docket Nos. 2011-D377, 2013-D146, and 2014-D049 |
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| A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 379883) | : | |

## AMENDED REPORT AND RECOMMENDATION[1]

This Report and Recommendation addresses the first two counts of the eight count Specification of Charges filed by Disciplinary Counsel in the above-captioned matter. For the reasons set forth below, the Ad Hoc Committee ("Committee") finds that Disciplinary Counsel has established by clear and convincing evidence that Respondent recklessly misappropriated client funds and violated some of the other Rules charged in each Count. It also finds that there are no exceptional circumstances that might overcome the presumptive sanction of disbarment under *In re Addams*, 579 A.2d 190 (D.C. 1990). Accordingly, the Committee recommends that Respondent be disbarred.

### Procedural History

This case has a complex and lengthy procedural history, the details of which are set forth in the footnote.[2] The short version is that the Committee, with the consent of the parties and leave

[1] In its initial Report and Recommendation, the Committee relied on certain exhibits which had not been admitted into evidence. This Amended Report and Recommendations corrects that oversight and an incorrect record reference in footnote 52, page 59.

[2] On February 22, 2017, Disciplinary Counsel filed an eight court Specification of Charges charging Respondent with violations of the Rules of Professional Conduct ("Rules") in connection

of the Chair of the Board on Professional Responsibility,[3] heard the first two Counts of the Amended Specification of Charges ("Specification") before holding hearings on the other six Counts. The first two Counts alleged intentional or reckless misappropriation and, given that the presumptive sanction for that misconduct was disbarment, an adverse finding on those claims might make hearings on the other six counts -- which would be extensive -- unnecessary.

The Committee held hearings on Counts 1 and 2 on November 28, 29, 30 and December 20, 2017. Disciplinary Counsel was represented by Dolores Dorsainvil Nicolas and Caroll

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with his representation of eight different clients. The first two counts alleged that Respondent had engaged in intentional or reckless misappropriation in connection with the representation of two different clients and violated seven different Rules. The other counts charged a total of 66 rule violations in connection with his representation of six other clients. The allegations spanned a period of fifteen years.

At the prehearing conference, the Committee Chair suggested that Disciplinary Counsel might review the Specification of Charges in light of what the Chair viewed as some potential oversights. On August 14, 2017, Disciplinary Counsel filed an Amended Specification of Charges, which added violations of, *inter alia,* the Virginia Rules of Professional Conduct. The Amended Specification of Charges was referred to a Contact Member for review. Respondent filed his Answer and Affirmative Defenses in Response to Amended Specification of Charges on August 14, 2017.

On August 21, 2017, Disciplinary Counsel requested leave to file a Second Amended Specification of Charges, which would have added a ninth count. That amendment, which was opposed by Respondent, was referred to the same Contact Member. On October 11, 2017, the Contact Member granted Disciplinary Counsel's motion to file its Amended Specification of Charge and its request to correct minor matters in that Specification. The Contact Member denied Disciplinary Counsel's motion to file the Second Amended Specification of Charges.

On September 29, 2017, while Disciplinary Counsel's request to file a Second Amended Specification was pending, Disciplinary Counsel filed a motion for leave to amend the Specification of Charges a third time to include a misappropriation charge in Count 3. Respondent opposed that motion. On October 4, 2017, the Committee Chair denied Disciplinary Counsel's request to file a Third Amended Specification.

[3] On October 12, 2017, after consulting with the parties, the Chair of the Committee filed a request with the Chair of the Board of Professional Responsibility requesting permission to separate the consideration of the first two counts. *See Request to Separate the Hearing on the Counts of the Specification of Charges Alleging Misappropriation from the Hearing on the Other Counts*. On October 30, 2017, the Board Chair granted the request.

Donayre, Assistant Disciplinary Counsels. Respondent was represented by Barry Coburn and Kimberly Jandrain of the law firm of Coburn & Greenbaum.

On December 4, 2017, the Committee requested the parties to brief a series of questions concerning the Court of Appeals decision in *In re Mance*, 980 A.2d 1196 (D.C. 2009) ("*Mance*"). They filed their responses on December 19th. At the conclusion of the December 20th hearing, the Committee reached a preliminary nonbinding determination that Disciplinary Counsel had established at least one intentional or reckless misappropriation. The Committee held a hearing on mitigation and aggravation on February 20, 2018.[4]

Disciplinary Counsel introduced the testimony of six witnesses: Mr. & Mrs. Young, the complainants in Count 1; Ms. Betty Briggs and Ms. Iesha Nicole Armstrong,[5] the complainants in Count 2; Mr. Charles Anderson, a forensic investigator with the Office of Disciplinary Counsel; and Mr. Michael Christopher Maschke, Chief Executive Officer of Sensei Enterprises, a forensic digital computer company. Respondent introduced the testimony of five witnesses: Mr. Ponds, Ms. Michelle Anapole, his wife and assistant, Ferris Bonds, Esq., the Virginia attorney who served as local counsel in connection with Ms. Armstrong's matter, Ms. Bridzette Lane and Bishop Adrian Taylor, who were witnesses in the sanction portion of the hearing. He also submitted in mitigation the Declarations of Norman Reimer, Esq., Executive Director of the National Association of Criminal Defense Lawyers, and A.J. Kramer, Esq., the Federal Public Defender for

[4] Jeffrey Freund, one of the attorney members of the Committee, was unable to attend the February 20th hearing. Pursuant to Rule 7.12 of the Board on Professional Responsibility and with the consent of the parities, he reviewed the transcript of the hearing.

[5] Ms. Armstrong's testimony was introduced through a videotaped deposition that was conducted at the Chesapeake Detention Center in Baltimore, where Ms. Armstrong was incarcerated.

the District of Columbia. Collectively, the parties tendered a total of 130 exhibits. The 81 exhibits entered into evidence, in whole or in part, are listed below.[6]

**Evidentiary Standard**

Disciplinary Counsel bears the burden of establishing by clear and convincing evidence that Respondent violated the Rules of Professional Conduct. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) ("*Anderson I*"); *see also In re Anderson*, 979 A.2d 1206, 1213 (D.C. 2009) (applying clear and convincing evidence standard to charge of misappropriation of funds) ("*Anderson II*"). As the Court has explained, "[t]his more stringent standard expresses a preference for the attorney's interests by allocating more of the risk of error to [Disciplinary] Counsel, who bears the burden of proof." *In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011) (citation and internal quotations omitted). Clear and convincing is more than a preponderance of evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (citation omitted). On the basis of the record as a whole, the Hearing Committee makes the following findings of fact and

[6] Disciplinary Counsel's exhibits, D.C. Exh. 1-5, 10, 12, 14, 19, 27-31, 35-36, 46-47, 51, 54-55, 56B, 56C, 57-58, 62 (pages 150-151), 65 (pages 10, 69), 74-76; Respondent's exhibits, R. Exh. 12, 14-19, 31, 44-47, 51-63, 65-85, 87, 91-93; J. Exhs. B, 33A-GG, 56, & 56A. The Committee finds that D.C. Exh. 12 and R. Exh. 20 were admitted into evidence, even though they were not included in the parties' lists of admitted exhibits. *See* Tr. 642:13-16. After the Hearing Committee issued its Report and Recommendation on August 14, 2018, it came to its attention that its Report relied on the following Exhibits which had not been admitted into evidence: R. Exhs. 7-9, 21, & 49 and D.C. Exhs. 37-45. R. Exhs. 21 & 49 are copies of documents admitted in the criminal proceeding in which Mr. Young was involved. The Committee takes official notice of them. In so far as is relevant, R. Exhs. 7 & 8 are the same as D.C. Exhs. 10-64 & 10-65, and thus there is no reason to question their authenticity or reliability. R. Exh. 9 is consistent with the record in the case and D.C. Exhs. 37-45 are copies of Respondent's correspondence to Bar Counsel (now Disciplinary Counsel). There is no question as to their authenticity. The Hearing Committee *sua sponte* admits R. Exhs. 7-9, 21, & 49 and D.C. Exhs. 37-45 into evidence.

conclusions of law set forth below, each of which is supported by clear and convincing evidence. *See* Board Rule 11.6.

**Findings of Fact**

1. Respondent is a graduate of the University of South Carolina and the Howard University Law School. (Tr. 594). He was admitted to practice in the District of Columbia on June 25. 1984. (D.C. Ex. 1;[7] Tr. 595). He is a sole practitioner and, until approximately two years ago, was primarily engaged in criminal defense work. (Tr. 517, 597). From 1996 to 2004, he served as an Adjunct Professor of Law at Georgetown University Law School, where he taught a course on trial practice and advocacy. (Tr. 597).

2. Respondent is assisted by his wife, Michelle Anapole, who handles the administrative aspects of the practice. (Tr. 416-22). She has a B.A. in Law and Society from American University. (Tr. 414).

3. Ms. Anapole is the first point of contact for many clients, assists in the preparation of retainer agreements, accepts payments, and handles various financial aspects of Respondent's practice. (Tr. 427-29). When Respondent is not in the office, she will discuss various aspects of the retainer agreement with clients and, when asked, will assist clients to understand the agreement. (Tr. 420-24).

4. She does not discuss fee arrangements, (Tr. 602), nor does she explain to clients the benefits of placing their funds in an escrow or IOLTA account, or the risks associated with allowing Respondent to treat pre-paid fees as his own. She was not familiar with Rule 1.16(d). (Tr. 476-80).

[7] Disciplinary Counsel's Exhibits will be cited as D.C. Exh. Respondent's Exhibits will be cited as R. Exh. The Joint Exhibits will be cited as J. Exh.

**The Retainer Agreement**

5. Since Respondent's retainer agreement ("Agreement") plays a major role in both Counts, we will discuss it first and address the facts concerning the Agreement relevant to each of the Counts in the discussion of the respective Count.

6. Respondent uses a template Agreement, which he modifies for the particular client and matter involved. (Tr. 425; 500-01; 505). He dictates the scope of the representation in his Agreements and Ms. Anapole includes it when she prepares the Agreement for signature. (Tr. 420-21; 505).

7. The Agreement gives clients the option of retaining Respondent on an hourly basis or paying a nonrefundable fixed fee. (D.C. Exh. 5 at 6).[8] Respondent's hourly fees at the time of these cases were $600 for his time, $150 for investigative services, and $175 for paralegal services. (*Id.*). Funds paid pursuant to an hourly fee arrangement are deposited in his escrow account. (Tr. 610). Clients who elect the hourly fee arrangement are required to post a retainer and to re-stock the retainer if it falls below a certain amount. (Tr. 671).

8. With respect to the fixed fee, the Agreement provides:

> Client agrees that all legal fees paid to Attorney for representation described in this document are the exclusive property of the Attorney, and Client expressly waives any claim of property interest [sic] in these monies. **Furthermore, consistent with the above-noted term, Client hereby waives** [sic] **to the Ponds Law Firm placing all or part of the legal fee paid, including but not limited to, the initial retainer payment, into this law firm's escrow account and consents to The Ponds Law Firm placing all or part of the legal fee paid, including**

[8] Disciplinary Counsel numbered the pages of its exhibits with both the exhibit number and the page number, *i.e.* page 6 of Exhibit 5 is numbered 5-6. Because the Committee finds that this numbering system makes citation to multiple pages of an exhibit confusing, we will cite the page number only when citing to a specific page of any exhibit, *e.g.* pages 5 and 6 of Exhibit 5 will be cited as D.C. Exh. 5 at 6-7, rather than D.C. Exh. 5 at 5-6 - 5-7.

> **but not limited to, the retainer payment** [sic]. (D.C. Exh. 5). (Emphasis and truncated final sentence in original).

The fixed fee does not cover costs and expenses associated with the representation. (*Id.* at 7).

9. The Agreement also provides "Client understands that representation of Client on any matter other than that described in the immediate preceding sentence[9] is not included in this Agreement and that a separate Retainer Agreement shall be required for representation of Client in any other matter not specifically made a part of this Agreement." (*Id.* at 9).

10. Respondent would prefer that clients elect the hourly rate option, but 99.9% of his clients opt for a fixed fee. (Tr. 546). He thought that the two options had benefits and limitations both for clients and for him. He could potentially earn more if clients elected the hourly rate option, but that left the total cost uncertain. The fixed fee provided clients with an assurance as to the cost of the representation. (Tr. 606). "[T]hey would never know if they would be in a position to be able to pay the whole bill, and they were aware of the consequences if the bill was not paid or they were not able to replenish the account, that I would withdraw" (Tr. 672). The fixed fee also provided him some protection in the event a court denied his request to withdraw when a client failed to pay a fee installment. (Tr. 529-31).

11. The Agreement states that "as a result of setting the flat fee [sic] as well as the flat fee charged for legal representation, Respondent does not have to maintain a record of hours expended working on the client's case." It notes that Respondent's law firm was small and that, by taking on the client's case, Respondent might be precluded from taking other clients. (D.C. Exh. 5 at 6).

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[9] The "preceding sentence" in each Agreement is a sentence describing the scope of the representation.

12. The Agreement gives Respondent the right to terminate the Agreement for any reason (*Id.* at 9), including if "periodic payments described in Section 1 … are not made in the full amounts and at the time agreed upon for receipt." (*Id*. at 8). There is no provision that requires Respondent to refund any portion of the fees paid, even if Respondent terminates the Agreement because the client fails to make a subsequent payment. (Tr. 711). [10]

13. There is no mention in the Agreement of the protections afforded the client by placing funds in escrow. It simply provides that the client is waiving having the funds placed in escrow. It does not explain the benefits to the client of an escrow account. (D.C. Exh. 5 at 7). The Agreement does not require Respondent to take reasonable steps to assure that his termination would not materially adversely affect the client.[11] (Tr. 711-17).

14. Respondent sets his fees, in part, with a view to the prospect that he may be conflicted from representing others involved in the same case. (Tr. 528-29; 722-23).

15. Respondent was aware of the *Mance* decision. (Tr. 548, 706). He believes the Agreement complies with that decision and the other requirements of the District of Columbia Rules of Professional Conduct. (Tr. 548). He was not aware of the Ethics Committee Opinion issued in response to *Mance.* (Tr. 815).

16. Respondent reviews the Agreement with all his clients. He testified that he "went through all of the aspects of the Agreement, … [with a] particular focus on … non-refundability…." "[O]nce [the fee] was paid, [it] became the property of the law firm and … they would waive all interest in it." (Tr. 610). He wants to assure that

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[10] Although not reflected in the Agreement, Respondent testified that he would refund the fee if he decided to terminate the representation or was unable to represent the client in the matter for which he was retained. (Tr. 717-18).

[11] *See* D.C. Rule 1.16(b) & (d).

> the client understands that … the fee that is going to be paid and subsequent payments will be nonrefundable because it's a flat fee versus an hourly rate. And that language becomes very important to let the client know in various plain English as possible, so they can understand it, that it is nonrefundable and they waive all rights in the property. And that …they waive … it being placed in an escrow account. You want them to know upfront exactly what the financial parameters are and the various ramifications of that. (Tr. 604-05).

17. Respondent testified that when he discusses with clients the option to pay him on an hourly basis, he explains his obligation to place entrusted funds in an escrow account, and the requirement to earn fees before withdrawing funds from an escrow account in that context. (Tr. 610). He did not testify that he discussed with his clients the obligation to refund any fees that were unearned or the risks of allowing him to treat the payments as his own. (Tr. 707-10).

18. He admitted that these topics were not addressed in the Agreement. (Tr. 711-13). He was of the view that the flat fee was his and he had no obligation to refund it. (Tr. 601, 672; 713). Absent extenuating circumstances, such as his inability to perform because of illness or where the client terminates his services before he undertakes any work, any fees paid are his. (*See, e.g.,* Tr. 671-72; 714-19).

## Count 1

### A. Mr. Young is stopped and relieved of cocaine

19. On March 5, 2011, Mr. Joseph Young was stopped by the Prince Georges County Police and relieved of approximately 500 kilograms of cocaine. (Tr. 71). He was not arrested, however. (Tr. 72-73). Mr. Young thought that he was not arrested because it was a "bad" stop. (Tr. 515-16).

20. Mr. Young is a high school graduate who attended the University of the District of Columbia for a time studying to be an accountant. He has held a variety of relatively low-skilled jobs since graduating. (Tr. 150-52). Prior to the March 5th stop, he had been convicted of three

criminal offenses, including one for domestic abuse and assault. (Tr. 139-41). He was represented by public defenders in each of those cases. (Tr. 153). He is currently employed as a trash collector. (Tr. 70-71).

21. Because he was concerned that he might be prosecuted, Mr. Young contacted Respondent to discuss representing him in the event the stop resulted in a criminal proceeding. (Tr. 71-72). Respondent had been recommended by a friend of a friend. (Tr. 71; 552).

22. The initial meeting between Mr. Young and Respondent was on March 7, 2011. During that meeting, Mr. Young told Respondent that he had no prior involvement with illegal drugs or the person who provided him with the confiscated drugs. (Tr. 128; 518, 520). That was not true. (Tr. 725-26; 811-12). *See also* R. Exh. 20 at 00047-48 [12] (Proffer of Evidence) (Mr. Young admitted in his plea agreement with the government that he was involved in a multiparty conspiracy involving $1,000,000 in illegal drugs.) Respondent maintains, correctly, that Mr. Young withheld material information from him. (Tr. 726).

23. Respondent thought Mr. Young's belief that he was not immediately arrested because there was a problem with the stop was naïve. Based on his experience, Respondent believed that Mr. Young was not arrested because the stop and confiscation of the cocaine were part of a larger drug investigation, which if true, would have involved wiretaps and cellphone location data. Respondent thought that law enforcement wanted to complete its investigation before any charges were brought. Respondent testified that arresting a relatively low-level offender, such as Mr. Young, could impair law enforcement's ability to pursue the major players.

[12] Future references to Respondent's exhibits will omit the three zeros and cite only to the applicable page number.

Respondent expected that, at some point, Mr. Young would be charged in connection with a broad criminal conspiracy. (Tr. 517-19).

**B. The Terms of the Agreement**

24. Mr. Young retained Respondent on March 8. 2011. (D.C. Exh. 5 at 5). Under the terms of the Agreement, Respondent agreed to represent Mr. Young: "in connection with any state or federal charges filed against Client, including but not limited to, possession with intent to distribute, a controlled substance, distribution, conspiracy regarding the seizure on March 5, 2011 of five hundred (500) grams of a controlled substance."

25. If Mr. Young was not charged or if Respondent succeeded in having any charges dropped, the fee was $20,000, payable in three installments; $5,000 at the initial meeting, $5,000 by March 14, 2011, and $10,000 by March 29, 2011. If a trial date was set in state or federal court, the fee increased by an additional $10,000. (*Id.*).

26. Mr. Young testified that, if charged, he would seek a plea agreement as he was "caught red-handed." (Tr. 77; 161). However, he did not discuss that prospect with Respondent. (Tr. 157, 161-62). Respondent was of a similar view as to Mr. Young's chances, unless they could successfully challenge the constitutionality of the stop and seizure. He noted that Mr. Young had been caught with the cocaine in his pants. (Tr. 546).

27. Respondent drafted the terms of the Agreement intending to limit the scope of his commitment to a case involving one or two defendants. (Tr. 523-26). He testified he told Mr. Young that the Agreement only covered a prosecution limited "to what happened on March the 5th between you and the other man . . . . " (Tr. 545). Respondent testified that he explained to Mr. Young the differences in representing a client in a relatively simply criminal case and a case involving large numbers of defendants. (Tr. 527-29). A multiparty criminal proceeding involves

hundreds of hours of preparation reviewing the tapes of wiretaps from all the defendants and checking cell phone location data. (Tr. 524-25). Respondent testified that he advised Mr. Young that he thought the case would be a multiparty case and that, by agreeing to represent Mr. Young, he would be conflicted from representing any of the other defendants. (Tr. 549). Respondent testified that he was asked by one or two of the coconspirators to represent them. (Tr. 549-50).

28. Mr. Young had no recollection of Respondent's discussing the terms of the Agreement in depth with him. (Tr. 81-83). Mr. Young "skimmed through" the Agreement, and "didn't really read it, there's a lot of jargon in there I don't understand." (Tr. 79; 117-25). He did not recall Respondent explaining that he would treat the funds as his or his obligation to place the funds in an escrow account, the benefits of an escrow account or the alternatives to an escrow account that would protect the money paid. Mr. Young did not know what an escrow or IOLTA account was. (Tr. 79-85).[13] Mr. Young thought he had paid Respondent to represent him and that Respondent was obligated to provide services in order to earn the fee. (Tr. 81-83).

29. Mr. Young signed the retainer accepting Respondent's fixed fee proposal, initialing each page. (D.C. Exh. 5 at 4-11). He gave his wife a copy of the Agreement for her to review after he had signed it. (Tr. 155). She did not read it until after Mr. Young was arrested. (Tr. 188-89). She was under the impression that, having agreed to represent Mr. Young, Respondent would represent him in any trial resulting from the March 5th stop. (Tr. 164-65).

30. At the relevant time and at the time of the hearing, Mrs. Young was a loan officer with Navy Federal Credit Union. (Tr. 163). She is a high school graduate and took some college courses. (Tr. 179–80).

[13] He also testified that Respondent did not tell him that the fee was nonrefundable. (Tr. 82). Given Respondent's and Ms. Anapole's testimony concerning the centrality of nonrefundable flat fees to Respondent's practice, the Committee finds that statement is not credible.

31. On March 8, 2011, Mr. Young and his wife gave Respondent a check for $5,000. (D.C. Exh. 10 at 10). They paid the second installment of $5,000 in parts: $1,000 in cash on March 10, 2011 (D.C. Exh. 5 at 13; R. Exh. 7); $1,500 by check on March 11 (D.C. Exh. 5 at 15; R. Exh. 9); $1,500 by check on March 15 (D.C. Exh. 5 at 14; R. Exh. 8); and $1,000 in cash on March 19, 2011. (R. Exh. 9).[14]

32. They missed the March 29th date for paying the additional $10,000, but paid it on April 4, 2011, at which time they entered into an Addendum Retainer in which Respondent waived his right to terminate the representation. (D.C. Exh. 5. at 12).

### C. Respondent's Handling of the Young's Funds

33. Respondent deposited three of the six payments made by Mr. & Mrs. Young in his escrow account. The initial $5,000 was deposited on March 9, 2011, an additional payment of $1,500 was deposited on March 16, 2011, and the $10,000 payment was deposited on April 4, 2011. (J. Exh. 56 at lines 50, 55, 70).[15] The payments of March 10th, March 15th, and March 19th were not deposited in Respondent's escrow account. (*Id.* at lines 50-71).[16]

34. After depositing Mr. Young's $5,000 check, the balance in Respondent's escrow account was $5,195.74. On March 16, 2011, nine days later, the balance was a negative $89.26, even after Respondent deposited Mr. Young's $1,500. (*Id.* at lines 55 & 56). The balance did not

[14] The record is not clear whether this was paid by check or in cash. But the note on the receipt indicates that it replaced a payment by check. (R. Exh. 9). Since there is no copy of a check from Mr. or Mrs. Young in the bank records, the Committee assumes it was paid in cash.

[15] J. Exh. 56 is a spreadsheet listing the various deposits and withdrawals from Respondent's escrow account. References to various lines is to a transaction reported on the spreadsheet.

[16] No other deposits listed in Joint Exhibit 56 are attributed to the Youngs and none of the cash deposits into Respondent's escrow account in and around this time period correspond both by date and amount of the Youngs' payments. (J. Exh. 56 at 2, lines 50-70). There is a cash deposit of $1,000 on March 24, 2011, but not attributed to anyone. It was also 14 days after the Youngs' paid Respondent.

equal or exceed $10,000 -- the amount paid by the Youngs by March 19 -- until April 4, 2011, when the $10,000 check was deposited. At that point, the balance in the account was $10,060.74, (*id.* at line 70), less than the $20,000 paid by Mr. & Mrs. Young as of that date. The balance in the escrow account remained less than $20,000 until December 1, 2011, when approximately $203,000 of client funds were deposited. (J. Exh. 56 at line 117). During this time, the amount of work Respondent undertook for Mr. Young was limited, as explained below.

**D. Respondent's Representation of Mr. Young**

35. Respondent and Mr. Young met at least six or seven times from March 7, 2011, when Mr. Young first contacted Respondent, to August 9, 2011, the date when Mr. Young was arrested. (Tr. 90; 533). Respondent and Mr. Young disagreed as to the length of these meetings. Mr. Young stated that most of these meetings were short: 15 to 20 minutes, in the nature of "check-ins." At times when he delivered funds to Respondent, he meet with Ms. Anapole, not Respondent. (Tr. 90).

36. Respondent testified that these meetings were longer -- in the order of 60 to 90 minutes. (Tr. 549). During their initial meeting, Respondent discussed with Mr. Young (i) the underlying facts of the March 5th stop and his concerns that it was part of a larger investigation (Tr. 527–29); (ii) whether the stop was unconstitutional, (Tr. 543), (iii) the difficulties that Mr. Young might encounter in getting released on a bond after he was arrested, (Tr. 533-34; 542-43); and (iv) the sentencing guidelines. (Tr. 535).

37. Respondent also testified that he explained to Mr. Young the differences between a trial involving one or two defendants and one involving a large number of conspirators. (Tr. 517-29). As he explained at the hearing, the latter typically involves extensive Title III wiretaps involving conversations among the multiple defendants and extensive cellphone data the

government uses to track the location of individuals allegedly involved in the conspiracy. Preparing for a trial in those circumstances requires hundreds of hours reviewing the tapes and cell phone data. (Tr. 590–92).

38. Respondent advised Mr. Young to keep out of trouble, not to have any further dealings with the person who provided the cocaine, to get a job, and to obtain character letters. (D.C. Exh. 12; Tr. 93; 157; 531, 542-43). Mr. Young got a job and obtained character letters. (R. Exh. 12; D.C. Exh. 12 at 4, D.C. Exh. 10 at 44, 48-55). However, he contacted the person who supplied him with the cocaine by phone, contrary to Respondent's advice. (R. Exh. 12 at 3).

39. According to Respondent's notes, he met with Mr. Young on March 8th & 24th, 2011 and spoke to him by telephone on March 30th. In the March 24th meeting, Respondent reiterated the importance of obtaining the character letters. (R. Exh. 14). The discussion on March 30th stressed the importance of Mr. Young making the final $10,000 payment. (*Id.*).

40. Respondent testified that he met with Mr. Young on other occasions, but the only one he described with any specificity in his testimony was when he visited Mr. Young in jail on August 11 or 12. (Tr. 728). Except for the brief notes produced as Respondent's Exhibits 13 and 14, Respondent had no other notes of his meetings or telephone conversations with Mr. Young nor did he have any time records reflecting meetings or other work on the matter. (Tr. 729).

41. In addition to meeting with Mr. Young, Respondent reviewed Mr. Young's criminal history to evaluate the possibility of vacating a prior conviction in Virginia Beach, including the availability of a "Coram nobis" motion. (Tr. 534; 539-41). Vacating that conviction would enhance Mr. Young's chances of being released on bond if he were arrested. Respondent concluded that he could not bring such a motion. (Tr. 541). Respondent had no time records to support the time he devoted to these efforts.

42. On August 9, 2011, Mr. Young was arrested and detained in the D.C. Jail pursuant to a twenty-nine count Indictment charging 17 individuals with conspiracy to distribute various quantities of controlled substances. (R. Exh. 18; Tr. 95). The Indictment specifically referenced the March 5, 2011 stop. (R. Exh. 18 at 30).

43. Mrs. Young tried to reach Respondent that day, but was not successful. (Tr. 95-96; 165-66). Respondent was not in town that day or was otherwise unavailable. (Tr. 164; 632). Mr. Young was represented by a Court appointed attorney at his first court appearance. (Tr. 101).

44. Respondent returned Mrs. Young's call on August 10th, and told her he would see Mr. Young the next day. (Tr. 632). In that meeting, he advised Mr. Young that he would require an additional $30,000. (Tr. 166-67). Respondent testified that "I explained to [Mr. Young] that what turned out to be was exactly what I had predicted was going to happen, and that the indictment was . . . . a twenty-nine count indictment covering a significant period of time." (Tr. 632-33).

45. Mr. Young advised Respondent to talk to his wife. (Tr. 97). She initially advised Respondent that they would try to raise the funds, but ultimately told him that they could not. (Tr. 166-67; 634-35).

46. The record does not establish when Respondent told either Mr. or Mrs. Young that he would not represent Mr. Young, but he never entered an appearance in the criminal case. He was concerned that, if he entered his appearance, he might have been required to represent Mr. Young throughout the entire trial of the twenty-nine count Indictment. (Tr. 529-31).

47. Mr. Young was represented by a court-appointed attorney in the subsequent proceedings. (Tr. 101; R. Exh. 44 at 856; R. Exh. 49 at 937). He pled guilty to a criminal

Information and was sentenced to sixty months in prison. (R. Exh. 21 at 58, docket entry 218).[17] He served 3 1/2 years. (Tr. 101-02). The Proffer of Evidence submitted with the Information referenced the March 5, 2011 stop. (R. Exh. 20 at 47).

**E. Mrs. Young Requests a Refund**

48. Before she filed her complaint with Bar Counsel on September 7, 2011, Mrs. Young called Respondent's law firm on several occasions requesting a refund of the fee, so that she could find another attorney. (Tr. 168, 172). Respondent did not respond to her telephone calls and did not have any further contact with either Mr. or Mrs. Young. (D.C. Exh. 5 at 2; Tr. 172).

49. Respondent did not return the fee, or any part of it, because he had started work on Mr. Young's behalf and would have been conflicted out of taking any related case. He testified that Mr. Young "understood [that] even if he wasn't charged, that the fee would be kept. He agreed to these terms. And I explained to him in great detail in terms of the risk of doing that when the fees were nonrefundable versus those being paid by the hour." (Tr. 722-23).

50. In September 2011, Mr. & Mrs. Young filed a request for arbitration with the D.C. Bar Arbitration Board (ACAB). (D.C. Exh. 10 at 56-115). They sought a full refund of the $20,000 paid. Respondent filed papers in response to the arbitration request, but did not appear at the hearing. He requested a continuance on the grounds that he had the flu and was too ill to attend. (D.C. Exh. 19 at 16-17). The request was denied. (*Id.* at 19).

[17] The transcript indicates that Mr. Young was sentenced to six months, and was released in 3 1/2 years because he participated a drug treatment program. (Tr. 101-02). Those numbers are inconsistent. The docket sheet in the case states that he was sentenced to sixty months. (R. Exh. 21 at 58, docket entry 218).

51. On December 19, 2012, the Arbitration Board awarded Mr. & Mrs. Young the full $20,000 requested, plus a $50 filing fee and interest at 6% per annum from April 4, 2011. Respondent was ordered to make the payment by January 31, 2013. (D.C. Exh. 19 at 7).

52. Respondent challenged the award in Superior Court on the grounds, *inter alia*, that the refusal to postpone the arbitration hearing based on his illness was arbitrary. (D.C. Exh. 19 at 18-19).[18] That challenge was denied, *inter alia,* on the grounds it was late. (*Id.* at 29-35).[19] Respondent has not paid any portion of the award. (Tr. 734).

53. On September 7, 2011, Mrs. Young filed a complaint with Bar Counsel (now Disciplinary Counsel) on behalf of her husband. (D.C. Exh. 5 at 1).

**Count 2**

54. This Count contains two severable sets of allegations: (a) that Respondent failed to maintain complete records, as required under Rule 1.15(a), and engaged in conduct involving dishonesty, deceit or misrepresentation in that he used his escrow account to hide funds from the IRS, and (b) that Respondent violated several of the Rules, including Rule 1.15(e) (misappropriation), in connection with his representation of Ms. Iesha Armstrong. The Committee will address them in reverse order.

**A. Representation of Ms. Armstrong**

**i. Ms. Briggs & Ms. Armstrong Retain Respondent**

55. At some point in late March or early April 2012, Ms. Iesha Armstrong called Respondent from the federal penitentiary in Danbury, CT, to see whether he would represent her

[18] Respondent has had and continues to have a series of medical problems that affected his ability to practice. (Tr. 645-47).

[19] In a lengthy footnote at the end of the unpublished opinion, the Court, "without making any finding", questioned the merits of the claim. (D.C. Exh. 19 at 33-34).

in connection with a request to terminate her Virginia probation early. At the time, she was incarcerated for a crime unrelated to the probation. (J. Exh. B at 6-7; Tr. 285).

56. Ms. Armstrong wanted to terminate the probation so she might quality for a halfway house or other program. (J. Exh. B at 6). Her mother, Ms. Betty Briggs, was being treated for cancer (D.C. Exh. 62 at 151) and wanted her daughter's assistance. (D.C. Exh. 57 at 5).

57. Respondent had represented Ms. Armstrong in the matter for which she was then incarcerated. He had been recommended by a friend of Ms. Armstrong. (J. Exh. B. at 7-8; Tr. 286). Both Ms. Armstrong and her mother were satisfied with Respondent's work in the earlier matter. (Tr. 287-88; J. Exh. B at 8; R. Exh. 91).

58. Respondent agreed to handle the probation matter, but told Ms. Armstrong to have Ms. Briggs pay him promptly. (J. Exh. B at 8; D.C. Exh. 57 at 1; Tr. 303). Respondent quoted Ms. Briggs a flat fee of $4,500. (Tr. 287).

59. In late March or early April 2012, Ms. Briggs gave Respondent a check dated March 30, 2012 for $4,500. (J. Exh. 33U at 260; Tr. 289-90). On April 5, 2012, Ms. Briggs signed Respondent's Retainer Agreement, initialing each page. (D.C. Exh. 57 at 7-14; Tr. 290).

60. Respondent deposited Ms. Briggs' $4,500 check on April 4, 2012. The balance in his escrow account after that deposit was $8,009.52. (J. Exh, 56 at line 173). The balance in his escrow account fell to $3,782.23 -- less than the amount Ms. Briggs paid -- the next day, April 5th, and to $3,183.23 on April 10th. (*Id.* at lines 177-78). The balance did not exceed $4,500 until April 17th, and exceeded it then only because Respondent deposited $10,000 received from another client. (*Id.* at line 179).

61. On April 18th, Respondent withdrew a total of $9,500, resulting a balance of $3,683,33, less than the amount of Ms. Briggs' payment. (*Id.* at lines 180-81). Over the next few

days, the balance dropped and was $1,983.23 on May 1st. (*Id.* at line 183). Between then and November 3, 2012, when Respondent sent Ms. Armstrong a draft of the "Motion to Terminate Probation Unsuccessfully," the balance was less than $4,500 on multiple days. (J Exh. 56 at 5-6).

**ii. Ms. Briggs' Retainer Agreement**

62. The Agreement was the fundamentally the same as the Agreement Mr. Young signed, except that the scope of the representation was described as the probation matter. (R. Exh. 51 at 939).

63. The Agreement stated that Ms. Briggs was retaining "The Ponds Law Firm and Virginia Local Counsel . . . ." (R. Exh. 51 at 939). It provided that Respondent would represent Ms. Armstrong "in connection with her probation violation matters arising from her prior case(s) before the Circuit Court for Arlington County. Virginia. *Commonwealth of Virginia v. Iesha Armstrong,* case numbers CR9900 1815-00.[sic] CR99001816-00 CR 99001817-00 and CR99001818-00." (D.C. Exh. 57 at 7).

64. Respondent testified that he explained the Agreement to Ms. Briggs and advised her that the fee was nonrefundable. (Tr. 605-10). Ms. Briggs testified that he just told her to read it, (Tr. 290-96) although she later admitted that Respondent and Ms. Anapole had explained that the fee was nonrefundable. (Tr. 292; 330, 338).[20] She understood "nonrefundable" to mean that Respondent would do the work requested and keep the funds, as he had in the prior case he handled for Ms. Armstrong. (*Id.*). Ms. Briggs stated: "Once he represented my daughter, then that was it." (Tr. 292-93; 330). She did not remember Respondent telling her would treat the funds as his own and would have no obligation to refund any portion of it under any circumstance. (Tr. 294-95).

[20] In his Response, Respondent argues for the first time that at least part of the fee was an engagement fee. (Response at 11, ¶ 55).

65. Ms. Briggs did not recall Respondent discussing his obligation to place the fee in escrow, that he could not withdraw funds from escrow until earned, the risks of a nonrefundable fee, or the risks of treating the funds as his own. (Tr. 292-94).

66. Respondent explained to Ms. Briggs that he would have to retain a Virginia lawyer to work with him, as he was not a member of the Virginia Bar. (Tr. 670). Neither Ms. Briggs nor Ms. Armstrong remembered being so advised. (Tr, 291; J. Exh. B at 10).[21]

67. Respondent testified that, if he had done no work, he would have refunded the fee. (Tr. 718-19; 722-23).

**iii. <u>Representation of Ms. Armstrong</u>**

68. Respondent's communications with Ms. Briggs and Ms. Armstrong were limited. Ms. Briggs wrote him in November 2012 asking about the status of the case and noting that Ms. Anapole had put her off when she called. (D.C. Exh. 57 at 4; Tr. 295-96; 303-04; J. Exh. B at 15) Respondent never replied. (Tr. 304).

69. Ms. Armstrong's first communication with Respondent after he was retained was on May 25, 2012 -- some eight weeks after Ms. Briggs signed the Agreement -- when he sent Ms. Armstrong an email advising that he would call her at the prison on May 30th. (R. Exh. 52). Because she was incarcerated, any telephonic communications required that she coordinate with her prison counselor to arrange for the time of the call so that she could take it in his office. (J. Exh. B at 15-24).

70. Respondent did not call her on May 30th as proposed. (J. Exh. B at 19). Respondent scheduled several other telephone calls. None of them occurred; the record is not clear

[21] Although the Committee credits Respondent's testimony on this point, resolution of the conflict is not material to the decision. The Agreement provided that Ms. Briggs was retaining Respondent and an unnamed Virginia attorney. *See* ¶ 63, *supra.*

whether Respondent did not place the calls to Ms. Armstrong's counselor or whether the counselor was not available. (*See, e.g.*, R. Exh. 53, 55-57, 67-69).

71. On March 5, 2013, Ms. Armstrong advised Respondent that her counselor was not willing to arrange a call with him because of Respondent's failures to make previously scheduled calls. (R. Exh. 71; J. Exh. B at 30-32). Because she could not reach Respondent by telephone, her principal means of communicating with him was by email. (J. Exh. B at 15).

72. On September 27, 2012, Respondent sent Ms. Armstrong an email advising that Ms. Anapole had spoken to Ms. Briggs and requested certain documents in support of her motion for relief. He stated that once he received the documents "your motion will be ready to be filed with the court." (R. Exh. 58).

73. At some point around August 2012, Respondent requested that Ms. Briggs obtain notarized statements from her doctor and others concerning her health situation as well as a notarized statement from her as to her health. (Tr. 298; J. Exh. B at 25). She obtained at least some of this material. (D.C. Exh. 62 at 151).

74. Respondent also requested that Ms. Armstrong send him a hand-written letter. (R. Exh. 60). She wrote the letter, (J. Exh. B at 27; R. Exh. 59), and sent it to 3220 N Street, NW, #344, Washington, D.C., the address Respondent had given her. (J. Exh. B at 66).

75. However, Respondent had moved and did not advise either Ms. Briggs or Ms. Armstrong. (J. Exh.B at 25-26; Tr. 343-44). They learned that he had moved when Ms. Briggs ran into a mail carrier at the N Street address and was told that he had moved. (Tr. 343-44). Respondent never received the letter.[22]

[22] Response at 13, Finding of Fact 65.

76. On November 3, 2012, eight months after being retained and paid, Respondent sent Ms. Armstrong a draft of a "Defendant's Motion to Terminate Probation Unsuccessfully." (D.C. Exh. 62 at 74).

77. On April 19, 2013, a year after Respondent was retained, Ferris Bond, Esq., a member of the Virginia Bar whom Respondent hired to serve as local counsel (Tr. 848), filed a Notice of Hearing for May 2, 2013 in the Circuit Court of Arlington County, Virginia, with respect to Ms. Armstrong's "Motion to Terminate Probation Unsuccessfully." (R. Exhs. 74 & 75). The Motion was the same in all material respects as the Motion Respondent drafted. Ms. Armstrong's letter was not attached to the Motion. Respondent did not sign the Motion. (R. Exh. 75 at 976).

78. On June 19, 2013, Respondent sent Ms. Briggs an email advising that the Motion had been filed with the Court but that "the Court will not place this motion on the docket until Iesha has completed her sentence." He requested that Ms. Briggs call him so that he "could explain the reason for the Court's decision to hold [the] …motion in abeyance." (R. Exh. 80).[23]

79. On June 27th, Respondent sent Ms. Briggs another email "in reference to the phone calls to my office from you." He explained that the Court "decided to hold Iesha's Motion … in abeyance solely because she failed to appear in court in 2008 and the Court issued a bench warrant." (R. Exh. 81).[24]

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[23] Respondent apparently re-sent the same email on June 20, 2013. (R. Exh. 81).

[24] The bench warrant had been issued in another matter when Ms. Armstrong failed to appear in court in connection with that matter. Mr. Bond testified that the court would not docket the Motion to Termination Probation Unsuccessfully until Ms. Armstrong appeared in court to answer the warrant. Since Virginia was aware that she was in federal custody, the clerk of court knew that she could not appear. (Tr. 855).

80. Mr. Bond also wrote to Ms. Armstrong to explain what had happened. (Tr. 854-55). He testified that "it was pretty clear to me she didn't understand what was going on", *i.e.* she did not understand why Ms. Armstrong's Motion was not docketed. (Tr. 859).[25]

**iv. Ms. Briggs requests a refund**

81. On January 24, 2014, Ms. Briggs requested that Respondent refund the fee. She had checked the Circuit Court docket sheet for Ms. Armstrong's case, and there was no record that the motion to terminate Ms. Armstrong's probation had been filed. (R. Exh. 85; Tr. 306-09).

82. Respondent refused to return the fee on the grounds that he had performed the services he had agreed to in the Agreement. (R. Exh. 84).

**B. Respondent's Escrow Account and Financial Recordkeeping**

**i. The Escrow Account**

83. During the period for which bank records were produced -- from August 2010 to November 2012 -- Respondent's financial recordkeeping was not thorough or comprehensive. Ms. Anapole testified that she kept track of client payments by filing copies of receipts she issued for payments with the Agreement for each matter. (Tr. 481-83). No ledger was maintained. (Tr. 481-82).[26]

84. Respondent maintained two bank accounts at BB&T, an operating account and an escrow account. He also had accounts in his own name at Fidelity Investment and J.P. Morgan. (Tr. 370, 376; J. Exh.33; J. Exh. 56 at 3-4). Respondent used the operating account to pay the

[25] In December 2014, Ms. Armstrong obtained relief from probation with the assistance of another lawyer. (J. Exh. B at 44). The record is silent whether Ms. Armstrong had completed her sentence or whether other factors played a role in obtaining that relief.

[26] There is nothing in the record explaining how Respondent kept track of when he might withdraw funds from the escrow account in a matter where a client decided to pay Respondent on an hourly basis and the escrow account contained an advance on his monthly billing for work done on an hourly rate basis.

ongoing expenses of the firm, such as couriers, duplicating costs, etc. (Tr. 696). Ms. Anatole has signature privileges with respect to the operating account only. (Tr. 437).

85. The escrow account was not an IOLTA account. (J. Exh. 33A-33GG; Tr. 375). Respondent was the only person with signature authority for the escrow account. (Tr. 437). Respondent used the escrow account to hold payments for client transcripts, court fees and similar costs associated with client matters. (Tr. 433; 506-11). Except for these types of payments, any funds received by Respondent might be placed in either account. (Tr. 506-11).

86. In some cases, the escrow account was also used as a kind of clearing house. Respondent testified that: "I don't consider the funds my funds until the check is cleared. … I deposit the funds in the escrow account and the general practice is, once the funds have cleared, then they are transferred out of that account. And oftentimes what we'll do is put the client's funds in the escrow account until we've begun to do some actual work on the case, which generally begins the next day." (Tr. 721).

87. Respondent frequently made deposits and withdrew funds from the escrow account without indicating the source of the funds or the client matter, if any, for the funds withdrawn. (J. Exh. 56; D.C. Exh. 56B-56C).[27] From August 2010 to November 2012, Respondent made a total of 30 cash deposits. Some of these were a couple of hundred dollars, one was $10,000, and several others were in the thousands. (D.C. Exh. 56B). There is no record of the source of these deposits.

[27] After some dispute about the accuracy of the closing balances in Disciplinary Counsel's proffered exhibits, the parties submitted joint exhibits concerning that account. (J. Exh. 33A-GG, 56 & 56A). Exhibits 33A-GG consists of the BB&T bank records of Respondent's escrow account transactions from July 2010 through March 29, 2013. Exhibit 56 is a spreadsheet for Respondent's escrow account and Exhibit 56A is a spreadsheet of the various overdrafts of that account. Mr. Charles Anderson, a forensic investigator for Disciplinary Counsel, prepared the two exhibits. (Tr. 376). Exhibits 56B-56D are solely Disciplinary Counsel's.

(J. Exh. 56; D.C. Exh. 56B). Few of the records contain information whether the cash deposits or personal transactions related to a client matter. (J. Exh. 56).

88. There were 11 withdrawals from the escrow account totaling $72,500 which were deposited in Respondent's personal accounts with Fidelity Investments or J.P Morgan. (D.C. Exh. 56C).

89. Respondent's escrow account was overdrawn between January 12 and 18, 2011, on March 16, 2011, between April 21 and 27, 2011, and on February 10, 2012. The amount of the overdrafts ranged from $22.74 to $242.41. (J. Exh. 56A). Respondent covered the January 2011 overdrafts with funds from his operating account, (J. Exh. 56 at line 43); the source of the funds to cover other overdrafts is not clear. (J. Exh. 56 at lines 57, 80, 161).

90. On April 5, 2016, Disciplinary Counsel wrote to Respondent requesting, *inter alia*, information concerning thirteen overdrafts on his escrow account from January 12, 2011 through February 10, 2012, a copy of a specific client retainer agreement, and that he identify the client matters associated with thirty cash deposits. It also issued a subpoena for Respondent's trust account records from December 1, 2010 through February 29, 2012. (D.C. Exh. 36 at 1-4). After requesting and obtaining several extensions of time, (*see* D.C. Exhs. 37-45), Respondent filed his response of June 21, 2016. He maintained that several of the alleged overdrafts were not overdrafts or were due to the actions of others and identified three of thirty of the cash deposits. He refused to comply with the subpoena because it referenced the wrong docket number. (D.C. Exh. 46).

91. On June 22, 2016, Disciplinary Counsel again wrote to Respondent requesting his complete records with respect to the second count of the Specification and issuing a corrected subpoena for his escrow account records. On July 6, 2016, Disciplinary Counsel subpoenaed BB&T's records of Respondent's escrow account. (D.C. Exh. 47).

92. On July 18, 2016, Respondent replied to the June 22nd letter. He reiterated the points made in his response to Disciplinary Counsel's April 5th letter, refused to comply with the subpoena on the grounds that (a) Disciplinary Counsel had taken a mirror image of his computer and thus had access to all his records, (b) the request covered matters that were several years old and he no longer had the records,[28] and (c) his clients agreed that any fees paid were his on payment and waived any requirement that he place their funds in an escrow account. (D.C. Exh. 51 at 4, 6-7; Tr. 739, 741-42).

93. Disciplinary Counsel maintains that Respondent never provided the requested information. (Tr. 892). Disciplinary Counsel's forensic witness testified that his company had taken a mirror image of Respondent's computer, and had undertaken some word searches. However, the information was provided to Respondent's counsel (Tr. 893), but not to Disciplinary Counsel. (Tr. 887).[29]

**ii. Respondent's Financial Situation**

94. Respondent owes a substantial amount of money to the IRS. Since 1998, the IRS has filed assessments totaling $477,377:

- $159,709 for tax years 1994 through 1996, (D.C. Exh. 55 at 1-3),
- $46,510 for tax years 1993, 1997, and 1998 (D.C. Exh. 55 at 1, 4-5),
- $197,105.37 for tax years 1998, 1999, and 2000. (D.C. Exh. 54 at 2; D.C. Exh. 55 at 1, 6-7), and
- $74,053.66 for tax years 2001, 2002, and 2003. (D.C. Exh. 55 at 1, 8).

[28] The request covered matters arising in 2011. (D.C. Exh. 46).

[29] The Committee excluded additional testimony concerning this issue on the grounds that it was immaterial to the issues under consideration. Respondent had not been charged with failure to cooperate with Disciplinary Counsel and Disciplinary Counsel had financial data from Respondent's bank. (Tr. 900).

95. In June 2003, the IRS filed a federal tax lien against Respondent with the Circuit Court for Prince George's County for his failure to pay $396,485.43. (D.C. Exh. 54; D.C. Exh. 55 at 1-2; Tr. 394-96).

96. Except for the tax lien, there is no evidence that the IRS is pursuing the assessments or seeking to enforce any liens. Respondent testified that he has "a group of people working on it" and that he intends to resolve the debt. (Tr. 744). He did not explain how he intends to resolve the debt nor did he explain what was being done to address it.

97. Respondent owns four parcels of land in the District of Columbia, including three in Georgetown. There are unsettled federal tax liens on all of them. (D.C. Exh. 55).

**Aggravation & Mitigation**

98. Respondent was suspended from practice for 30 days in 2005 for a conflict of interest in connection with a Maryland matter, *In re Billy Ponds,* 888 A.2d 234, 245 (D.C. 2005), and was publicly censured for disclosing confidential information in a motion to withdraw as defense counsel. *In re Billy Ponds,* 876 A.2d 636, 637 (D.C. 2005)

99. In 2017, the Court of Appeals affirmed an ACAB award of $27,500 against Respondent in, *Billy Ponds v. Jonathan Bourdon, et. al.,* Nos. 16-CV-915 & 16 CV-1040 (D.C. 2017), an unrelated matter. Respondent has not paid that judgment because he is planning to sue his former clients and seek an offset. (Tr. 1053). Respondent maintains that the clients in that matter were happy with his services, until the Supreme Court denied certiorari. (*Id.*).

100. Ms. Bridzette Lane, a client, testified in support of Respondent. She retained him in April 2011 to represent her in a wrongful death claim against the Metropolitan Police Department for the death of her 19-year-old son. (Tr. 1001-02). A former client of Respondent referred her to him. Ms. Lane was very satisfied with Respondent's representation. She stated that Respondent discussed the continent fee retainer agreement with her. She found Respondent

responsive, explaining his strategy and keeping her informed of developments in the litigation. (Tr. 1004-06).

101. The Police Department offered to settle the litigation, which Respondent discussed with her. She found it unacceptable, and Respondent did not pressure her to accept it. (Tr. 1006-07). She thought that Respondent did not put his financial interests ahead of hers. They lost the case at trial, and Respondent is handling the appeal. (Tr. 1008).

102. In addition to representing her in the litigation, Respondent assisted Ms. Lane in establishing a foundation in honor of her son to assist other mothers of troubled youth. He also assisted in raising funds for the foundation. (Tr. 1008-10). Bishop Adrian Taylor, the pastor of her church, corroborated Ms. Lane's testimony. He assisted Ms. Lane in connection with the litigation. (Tr. 1018-23). He found Respondent "very caring and very consideration of her situation …[and] kind." (Tr. 1019-20).

103. Respondent also introduced a Declaration from Norman Reimer, Esq., Executive Director of the National Association of Criminal Defense Lawyers, noting the importance of solo criminal defense lawyers to the criminal justice system. Mr. Reimer stated that solo practitioners provide the working-poor and middle-class who have been accused of a crime with the option of selecting their own counsel rather than relying on public defenders or attorneys appointed pursuant to the Criminal Justice Act. Solo practitioners are also essential, he asserted, to the representation of those who do not qualify as indigent. (R. Exh. 93 at 1-2). Mr. Reimer attached to his Declaration an extensive monograph describing the financial eligibility guidelines for assigned counsel.

104. Mr. Reimer's Declaration was supported by the Declaration of A.J. Kramer, the Federal Public Defender for the District of Columbia. He asserted that, as a consequence of budgetary challenges faced by the Public Defender Service, solo practitioners representing

criminal defendants were essential to implementing criminal defendants' right to counsel, as required by *Gideon v. Wainwright,* 371 U.S. 335 (1963). (R. Exh. 92).

**Conclusions of Law**

**Count 1**

1. Count 1 charges Respondent with violating six D.C. Rules of Professional Conduct: (i) Rule 1.3(b)(1) by failing to seek the lawful objectives of his client, (ii) Rule 1.5(a) by charging an unreasonable fee, (iii) Rules 1.15(a) & (e) by engaging in reckless or intentional misappropriation, (iv) Rule 1.15(e) by not treating unearned fees as entrusted funds or obtaining client consent to another arrangement, (v) Rule 1.16(d) by failing to protect his client's interest upon termination of his representation, and (vi) Rule 8.4(d) by conduct prejudicial to the administration of justice. We discuss each claim in turn.

**A. Rule 1.3(b)(1) -- Intentionally Failing to seek the lawful objective of his client**

2. Rule 1.3(b)(1) provides that a "lawyer shall not intentionally … fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules." A violation of Rule 1.3(b)(1) requires proof of intentional neglect, which is established where the evidence shows that the respondent was (1) "demonstrably aware of [the] neglect," or (2) "the neglect was so pervasive that [the respondent] must have been aware of it." *In re Reback,* 487 A.2d 235, 240 (D.C. 1985), *adopted in relevant part, In re Reback II,* 513 A.2d 226, 228 (D.C. 1986); *see In re Ukwu,* 926 A.2d 1106, 1116 (D.C. 2007). The knowing abandonment of a client constitutes intentional neglect. *See In re Lewis,* 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report).

3. Disciplinary Counsel asserts that Respondent violated the Rule when he withdrew from Mr. Young's representation precipitously once the Youngs could not or would not pay the additional $30,000 Respondent demanded. (D.C. Brief at 37-38). Respondent argues that he did

not violate the Rule because (a) he met with Mr. Young several times and provided valuable advice, and (b) his Agreement limited his obligations to defending Mr. Young with respect to charges that arose solely out of Mr. Young's November 5, 2011 stop. He maintains that the "indictment, information and proffer of evidence all confirm that the underlying facts and allegations in the criminal case go beyond the single transaction on March 5, 2011." (Response at 37).

4. That Respondent provided Mr. Young with some advice shortly after the March 5th stop does not answer this charge. Mr. Young anticipated that Respondent would represent him in any criminal proceeding arising out of the March 5th stop. It is his failure to represent Mr. Young once he was arrested without receiving an additional $30,000 payment that forms the basis of this charge.

5. Respondent's argument that his Agreement did not require him to represent Mr. Young in a multi-party multi-count proceeding is more responsive, but no more meritorious: his Agreement was not so limited. It provided that Respondent would represent Mr. Young "in connection with *any state or federal charges* filed against Client, including but not limited to, possession with intent to distribute, a controlled substance, distribution, conspiracy *regarding the seizure on March 5, 2011* of five hundred (500) grams of a controlled substance." (Emphasis added) (FF 16).[30] The retainer did not exclude the obligation to represent Mr. Young should he be indicted as part of a multiparty indictment -- which is something Respondent expected would be the case. The Agreement stated that Respondent would represent Mr. Young for *any* state or federal charges stemming from the March 5th confiscation of 500 grams of a controlled

[30] The Committee's Findings of Fact will be cited as (FF --).

substance.[31] The only exception was that Mr. Young would be required to pay an additional $10,000 if a trial date was set. (FF 25). At the time Respondent withdrew, no trial date had been set.

6. Under District of Columbia law, contracts are interpreted "under the 'objective' law of contracts, meaning that the written language of the contract 'govern[s] the rights and liabilities of the parties, regardless of the intent of the parties at the time they entered into the contract . . . .'" absent circumstances not present here.[32] *Sahrapour v. LesRon LLC,* 119 A.3d 704, 708 (D.C. 2015); *Dyer v. Bilaal,* 983 A.2d 349, 354-55 (D.C. 2009); *Tillery v. D.C. Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006).

7. Respondent's argument relies, however, on his intent when he drafted the Agreement rather than the language of the Agreement. But the District of Columbia permits consideration of the intent of the parties only if the agreement is unclear or ambiguous. The Committee does not believe the Agreement is unclear or ambiguous. It expressly states that upon receiving $20,000, Respondent would represent Mr. Young at least until a trial date was set. (FF 24-25). Nothing in the Agreement gave him the right to withdraw prior to that time, regardless of his intentions when he drafted the Agreement.

8. While District of Columbia's rules concerning the interpretation of a contract would suffice to reject Respondent's reading of the Agreement, the Committee's conclusion is reinforced by the special rules governing the interpretation of retainer agreements. Retainer agreements "are a subject of special interest and concern to the courts [and] are not to be enforced upon the same

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[31] Both the Indictment and the Proffer of Evidence referenced the March 5, 2011 arrest. (FF 42, 47).

[32] Those circumstances include fraud, duress, mutual mistake, and where the contract is "not susceptible of a clear and definite understanding, …." *Id.* (citations omitted).

basis as ordinary commercial contracts." *Spilker v. Hankin,* 188 F.2d 35, 39 (D.C. 1951). Rather, they are "governed by the standard of good faith and reasonableness." *Haynes v. Kuder,* 591 A.2d 1286, 1291 (D.C. 1991) (citation omitted). They "are scrutinized with particular care, and an attorney who has drafted a retainer agreement ordinarily has *the burden of showing* that the contract was fair, reasonable, and *fully known and understood by the client*." *Revson v. Cinque & Cinque, P.C.,* 221 F.3d 59, 67 (2d. Cir. 2000) (citations omitted and emphasis added).

9. The reason for applying special rules in interpreting retainer agreements was explained by the Virginia Supreme Court in *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958, 962-63 (1977):

> [I]t is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each. *Krippner v. Matz*, 205 Minn. 497, 506, 287 N.W. 19, 24 (1939).

*Accord, Connelly v. Swick & Shapiro,* 749 A.2d 1264, 1267 (D.C. 2000) ("compensation paid to attorneys for legal services is largely a question of fundamental fairness. The goal is to compensate attorneys reasonably for professional services rendered in a manner where the client's obligation is understood in advance, and accepted as an objectively fair undertaking."); Restatement (Third) of the Law Governing Lawyers, § 18(2) (2000) ("a tribunal should construe a contract between client and lawyer as a reasonable person in the *circumstances of the client* would have construed it.") (emphasis added); *see also,* Virginia Legal Ethics Opinion 1667, July 8, 1996, at http://leo.mcguirewoods.com (last visited July 19, 2018).

10. These principles reinforce the Committee's conclusion that Respondent did not have the right, under the terms of his Agreement, to withdraw when he did. Mr. Young was under the impression that Respondent would represent him at least until a trial date was set. Indeed, he

did not anticipate that he would need counsel for a trial, as he intended to plead guilty.[33] (FF 26). Nothing in the Agreement put Mr. Young on notice that Respondent would require an addition $30,000 to enter an appearance. To the contrary, the Agreement provided that Respondent would require an additional $10,000 only when and if a trial date was set.

11. Indeed, by retaining the $20,000 already paid by the Youngs, Respondent's refusal to enter an appearance destroyed whatever fairness-- the basis on which retainer agreements are to be evaluated -- might have attached to the Agreement. Accordingly, the Committee concludes that, whether viewed under the District of Columbia law and specifically under the more stringent rules applicable to retainer agreements, Respondent was obligated to represent Mr. Young at least until a trial date was set.[34] In refusing to do so, Respondent failed to fulfill his obligation to Mr. Young under the Agreement. By walking away from representing Mr. Young once he was arrested, Respondent abandoned his client and failed to seek Mr. Young's lawful objectives. *In re Frison,* 89 A.3d 516, 516-17 (D.C. 2014) (per curiam); *In re Samad,* 51 A.3d 486, 491-92 (D.C.

[33] The Committee recognizes that he did not express that intention to Respondent and that, in any event, there may be quite a distance between an unexpressed desire to plead guilty to a narcotics crime arising out of a single transaction and the ability to obtain a favorable plea offer in the context of a narcotics conspiracy case. Nevertheless, Mr. Young's intention informs his understanding of the Agreement's effect on his circumstances.

[34] Even if Respondent is correct and he was not obligated to represent Mr. Young in a trial of a complex 17 party conspiracy case, Respondent was obligated to represent Mr. Young until a trial date was set. By not even discussing with Mr. Young whether he was willing to plead guilty to the charges against him, thereby potentially avoiding a long and complex trial, Respondent intentionally walked away from that obligation. Since Mr. Young pled guilty to an Information and did not go to trial, Respondent might have avoided the multiparty trial that concerned him had he discussed Mr. Young's objectives before withdrawing. In so doing, he might also have fulfilled his obligation to Mr. Young.

2012) (per curiam) Disciplinary Counsel has established by clear and convincing evidence that Respondent violated Rule 1.3(b)(1).[35]

**B. Rule 1.5 -- Charging an unreasonable fee**

12. Rule 1.5 requires, *inter alia*, that a "lawyer's fee shall be reasonable" and sets forth eight criteria to be considered in evaluating whether a fee is reasonable. Among them are (i) the time and labor required, (ii) the novelty and difficulty of the question, (iii) the likelihood that acceptance of the representation will preclude other employment, (iv) the customary fees charged in the community, (v) the amount involved and the result obtained, etc. Disciplinary Counsel asserts that Respondent violated this Rule by charging a nonrefundable fee, something it argues *Mance* precludes. (D.C. Brief at 35). In all events, Disciplinary Counsel maintains that Respondent did not "provide any meaningful service for Mr. Young" that might justify his $20,000 fee. (D.C. Brief at 36-37; Reply at 10-11).

13. Respondent does not dispute that, under *Mance,* an attorney may not "keep a fee without having earned it." (Response at 34). However, he argues that, since Mr. Young retained him before Mr. Young was charged, the fee was in the nature of an engagement fee, which the Court approved in *Mance*. (*Id*. at 35). He further argues that, by representing Mr. Young, he was precluded under the conflict of interest rules from representing any of the other defendants and, in fact, he was asked by others to represent them. (*Id.*). Finally, he disputes the claim that his work

[35] It is arguable that Respondent also violated Rule 8.4(d) when he refused to represent Mr. Young and refused to refund his fee. *See In re Evans,* --- A.3d ---, No. 16-BG-1146, 2018 WL 3215173, at *2 (D.C. June 28, 2018) (Rule 8.4(d) violation where respondent withdrew from a client representation, did not refund fee, and a replacement attorney had to be appointed.). However, while Disciplinary Counsel alleged a Rule 8.4(d) violation, it did not make that argument during the hearing nor has it made that argument in its Post-Hearing Brief. *See* D.C. Brief at 43-44. Accordingly, the Committee concludes that it has waived it.

was minimal. (*Id.* at 36). Thus, he asserts that Disciplinary Counsel has not established by clear and convincing evidence that the $20,000 fee was unreasonable.

14. We will address Respondent's engagement fee claim first, his argument that his work justified the fee second, and then his claim that the fee was warranted because he was precluded from representing others. Finally, we will discuss Disciplinary Counsel's assertion that *Mance* absolutely bans nonrefundable fees, other than reasonable engagement fees.

**i. An "Engagement Fee"**

15. The Committee finds that the claim a portion of the fee was an "engagement fee" is untenable. Although Respondent asserted in his Post-Hearing Brief that the fee was at least in part an engagement fee, he testified to the contrary at the hearing: "These were flat fee nonrefundables. They were not advanced fees or availability fees of any type." (Tr. 702).

16. Moreover, the Agreement does not provide that the $20,000 is an engagement fee. In *Mance,* the Court defined an engagement retainer as "'a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required."' *Mance* at 1202.[36] The Agreement does not purport to establish such an arrangement. It provides that Respondent will represent Mr. Young if he were charged with a crime as a result of the March 5, 2011 stop. (FF 24).

17. Mr. Young did not understand it to be an Agreement under which Respondent would be available to represent Mr. Young in a future matter. He believed that the fee was for specific services to be rendered in connection with a specific set of circumstances that had already occurred, not simply for assuring that Respondent would be available if a matter might arise. (FF

[36] For a discussion of engagement fees. *See also* Restatement (Third) of the Law Governing Lawyers, § 34, Comment e (2000); *Ryan v. Butera, Beausang, Cohen & Brennan,* 193 F.3d 210, 216 (3d Cir. 1999); *In re Gray's Run Tech., Inc.*, 217 B.R. 48, 52-53 (Bankr. M.D. Pa. 1997).

28). *See Connelly v. Swick & Shapiro, supra* (client needs to understand the terms of the retainer agreement in advance); Restatement (Third) of the Law Governing Lawyers, *supra* (tribunal should construe a contract between client and lawyer as a reasonable person in the *circumstances of the* client would have construed it).

**ii. Respondent Earned the Fee**

18. Respondent's claim that his work justified the $20,000 fee does not wash. The Agreement stated that his hourly fee was $600. (FF 7). Based on that rate, Respondent would have had to spend more than 33 hours to justify that fee. The seven items listed in his Response at page 36[37] could not have taken 33 hours.

19. Nor is there anything in the record that would support a finding that he devoted enough additional time to justify the fee. Respondent maintains that he met with Mr. Young six or seven times and spent an hour or an hour and a half each time and visited Mr. Young in jail. (FF 34-35). Respondent kept no record of his time, but assuming we accept that testimony -- which we find dubious in light of the limited content of his notes of his meetings with Mr. Young -- it only comes to about 10 hours. That still leaves him some 20+/- hours short.[38]

20. Unfortunately, Disciplinary Counsel did not introduce any evidence in support of that claim. There is no evidence in the record as to the amount of time that those tasks might

[37] Those items are: "(i) discussing the underlying facts relating to the stop and explaining Mr. Ponds' concerns and the possibility of a larger investigation; (ii) discussions regarding Title III wiretaps and the use of cell phone data to track the location of individuals allegedly connected to a conspiracy; (iii) discussions about whether the stop was unconstitutional; (iv) discussing the difficulties that Mr. Young may encounter in getting released on a bond after he was arrested; (v) discussing Mr. Young's prior criminal history; (vi) preliminary discussions regarding the sentencing guidelines; (vii) discussions and research relating to the possibility of vacating a prior conviction in Virginia Beach, including the availability of a "*Coram nobis*" motion."

[38] The Committee is not suggesting that a flat fee is unreasonable whenever the amount of time devoted to the matter is less than the flat fee. The reasonableness of the fee in those circumstances will depend on the facts and circumstances of the individual case.

require, nor what a seasoned criminal defense lawyer might charge for them. As a result, Disciplinary Counsel has not provided the Committee with a solid basis to find a violation of Rule 1.5. Nonetheless, the Committee believes that it should not ignore as Committee members what at least its lawyer members know as lawyers: that $20,000 for Respondent's actual work is unreasonable. *Cf. In re Nwadike,* Board Order, Bar Docket No. 371-00 at 28 (BPR July 30, 2004) (Expert testimony is not required for finding a Rule 1.1(b) violation where the violation is obvious.).

### iii. The $20,000 Was Designed to Compensate Respondent for Lost Opportunities

21. The standard in Rule 1.5 for determining the reasonableness of a fee is not limited to the amount of time an attorney devotes to a matter. It includes the lost opportunity costs for the attorney. Respondent testified that he told Mr. Young that, by taking his case, he would be precluded from representing others if Mr. Young was charged as part of a large multiparty conspiracy. And Respondent testified that he was contacted by some of the other defendants in the indictment charging Mr. Young and was required to turn them down because of the conflict of interest rules. (FF 27). Disciplinary Counsel did not rebut that testimony. Nor did it introduce any evidence of what might be a reasonable fee for Respondent's lost opportunity costs, save perhaps the ACAB order.

22. The Committee finds that order of limited utility. There is no record explaining the basis of the ACAB's decision. And, the burden of proof in ACAB proceedings -- preponderance of the evidence[39] -- is less rigorous that the clear and convincing standard applicable here.

[39] District of Columbia Bar, Attorney Client Arbitration Board, Fee Arbitration Service, Rules Of Procedure § 19(f) (Dec. 14, 2010).

Accepting the ACAB decision as controlling would reduce Disciplinary Counsel's burden to a preponderance of the evidence. That is not Disciplinary Counsel's burden under Rule XI.

23. The Committee recognizes that $20,000 is a lot of money to compensate Respondent for the few hours of work he undertook and the lost opportunity cost. However, in the absence of evidence to establish that the fee was not reasonable compensation for Respondent's work and lost opportunities, the Committee is constrained to conclude that Disciplinary Counsel has failed to establish by clear and convincing evidence that Respondent's fee was unreasonable.

**iv. Does *Mance* Preclude a Nonrefundable Fee**

24. Disciplinary Counsel's maintains that *Mance* interpreted Rule 1.5 as precluding a nonrefundable fee, other than a reasonable engagement fee. (D.C. Brief at 3-4). While *Mance* raises questions whether nonrefundable fees are permissible, the Committee does not think the decision goes so far as to make it unlawful *per se*, which is what Disciplinary Counsel is arguing. Among other things, the Colorado Court in *In re Sather, supra,* on which the Court of Appeals relied in *Mance*, specifically prohibited any agreement providing for a nonrefundable fee. *Sather, supra,* 3 P.3d at 413.[40] The Court of Appeals did not follow Colorado's lead and did not expressly ban nonrefundable fees. It thus left open whether nonrefundable fees might be acceptable in circumstances other than engagement fees.[41]

[40] Because it believed that there was substantial uncertainty among Colorado lawyers as to nonrefundable and flat fees, the Colorado court referred the matter to the Colorado Bar Association for a rulemaking to address the issues. *In re Sather, supra* at 414.

[41] The Committee also believes that holding unlawful any nonrefundable fee, other than engagement fees, could call into question retainer agreements under which a lawyer agrees to represent clients with respect to all of a certain category of matters (*e.g.* general advice regarding organizational governance matters) under a flat monthly or quarterly fee not tied specifically to the amount of work to be performed. *See generally, Ryan v. Butera, Beausang, Cohen & Brennan,* 193 F.3d at 216, 218-19 (discussing the difference between the various types of retainer agreements). In the absence of clearer guidance from the Court or the relevant Bar committees,

25. *Mance* requires fees to be earned; labeling a fee "nonrefundable" does not turn a reasonable fee into an unreasonable one because of the label. The question is whether the client knowingly agreed to the fee, whether the attorney performed the work contemplated in the Agreement, and whether the fee was objectively reasonable for the task involved, taking into consideration the applicable factors set forth in Rule 1.5(a). Indeed, the Committee believes that, had Respondent negotiated a plea deal for Mr. Young and represented him through sentencing, the $20,000 fee (or even the additional $10,000 fee provided for in the Agreement if the plea had occurred after a trial date had been set) would not necessarily violate Rule 1.5, even if he managed to achieve that result in substantially less than 33 hours.

26. Thus, the question here is whether the $20,000 fee was unreasonable, regardless of whether it was called a nonrefundable or a flat fee. Disciplinary Counsel has not met its burden of establishing by clear and convincing evidence that the $20,000 fee was unreasonable.

### C. Rule 1.16(d) -- Failure to Return Unearned Fees or Take Reasonable Steps to Protect Mr. Young's Interests

27. Rule 1.16(d) requires lawyers to "take timely steps to the extent reasonably practicable to protect a client's interest" when the attorney-client relationship is terminated. The steps listed in the Rule include the "refunding of any advance payment of fee[s] or expense[s] that [have] not been earned or incurred." Disciplinary Counsel argues that Respondent violated the rule when he did not return any of Mr. Young's fee after he refused to represent Mr. Young without an additional $30,000. (D.C. Brief at 38-39). Respondent answers that he was not required to return any portion of the fee because it was intended to compensate him for the time he devoted to

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we are unwilling to accept Disciplinary Counsel's position that all nonrefundable fees, other than minimal engagement fees, are *per se* unlawful, particularly where the fee agreements are negotiated at arms length between lawyers and sophisticated clients.

Mr. Young and the lost opportunities to represent other defendants named in the Indictment. (Response at 34-35).

28. Since the Committee has found that Disciplinary Counsel has not established that Respondent's fee was unreasonable, it would follow logically that Respondent had no obligation to refund the fee, or any portion of it. But "[t]he life of the law has not been logic,"[42] and the failure of Disciplinary Counsel to bear its burden of establishing an unreasonable fee by clear and convincing evidence does not necessarily also establish that Respondent had no obligation to assist Mr. Young when the representation terminated. He was under a contractual obligation to defend Mr. Young at least until a trial date was set. He failed to live-up to that obligation.

29. Rule 1.16(d) does not allow attorneys to drop clients like a hot potato. It requires that they take reasonable steps to minimize any harm to the client as a result of a termination of the relationship. That is true even if the client terminates the relationship. *See In re Russell,* 424 A.2d 1087, 1088-89 (D.C. 1980); *In re Edwards*, 990 A.2d 501, 526-28 (D.C. 2010), *cert. denied*, 563 U.S. 1022 (2011). Thus, Respondent was required to take reasonable steps to assist Mr. Young. He took none. Had he refunded at least a portion of the unearned fee, Mr. Young might have been able to retain other counsel rather than having to rely on a public defender. That is why Mrs. Young requested the refund. (FF 48). While Disciplinary Counsel may not have proven that the fee was unreasonable, the Committee finds that it has established by clear and convincing evidence that Respondent violated Rule 1.16(d) when he walked away from Mr. Young without providing him any assistance and failed to refund any of the fee, effectively precluding him from obtaining new private counsel.

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[42] O.W. Holmes, The Common Law 1 (1881).

## D. Rules 1.15(a) & (e) - Reckless or Intentional Misappropriation of Unearned Fees

### i. Informed Consent

30. 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. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts" maintained in accordance with Rule 1.15(b).[43] Rule 1.15(a) also requires lawyers to maintain complete records of property held in trust and to keep those records for five years after the termination of the representation.

31. Rule 1.15(e) requires that "advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to [Rule 1.15(a)] until earned or incurred unless the client gives informed consent to a different arrangement." It also requires that unearned fees be returned to the client.

32. How these rules applied to flat or fixed fees was uncertain until the Court of Appeals decision in *Mance*. There the Court held that, except for engagement retainers, "a flat fee is an advance of unearned fees because it is money paid up-front for legal services that are yet to be performed . . . . ." (*Id.* at 1202). Rule 1.15(e), the Court held, required that flat fees, other than engagement fees, be placed in the attorney's trust or escrow account until earned. (*Id.* at 1203). The only exception to this requirement is where the lawyer obtains the client's *informed consent* to treat the flat or fixed fee as his own. (*Id.* at 1204) (emphasis added).

33. The Court, citing the Rule 1.0 definition of informed consent, stated "[i]nformed consent [is] . . . the [A]greement by a person to a proposed course of conduct after the lawyer has

[43] Rule 1.15(b) requires attorneys to place client funds in an IOLTA account, subject to certain exceptions not relevant here. Disciplinary Counsel did not charge a Rule 1.15(b) violation in Count 1.

communicated adequate information and explanation about the material risks of and reasonable available alternatives to the proposed course of conduct." (*Id.* at 1206). Citing *In re Sather,* 3 P.3d 403, 413 (Col. 2000), the Court held an:

> attorney must expressly communicate to the client verbally and in writing that the attorney will treat the advance fee as the attorney's property upon receipt; that *the client must understand the attorney can keep the fee only by providing a benefit or providing a service for which the client has contracted*; that the fee [A]greement must spell out the terms of the benefit to be conferred upon the client; and *that the client must be aware of the attorney's obligation to refund any amount of advance funds to the extent that they are unreasonable or unearned if the representation is terminated by the client. In re Sather, 3 P.3d at 413.* We agree, and add that the client should be informed that, unless there is Agreement otherwise, *the attorney must, under Rule 1.15(d)*[44]*, hold the flat fee in escrow until it is earned by the lawyer's provision of legal services*
> *Mance, supra* at 1206-07 (emphasis added).

The Court further held that: "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 (emphasis added).

34. These requirements were explained in an Ethics Committee Opinion released in June 2010, shortly after the decision in *Mance* was issued. Ethics Committee Opinion 355, https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion355.cfm (last visited July 19, 2018), provides that the "bare mention of "the escrow account option" will *usually be insufficient unless accompanied by some explanation of the features that distinguish a trust account from an operating account*: i.e., that trust funds are generally protected from a lawyer's creditors and that trust funds cannot be spent until earned and thus are more readily available for refund to the client." (emphasis added). It held that the "lawyer must explain that, in contrast to a trust account, funds

[44] Rule 1.15(d) was recodified as Rule 1.15(e) in the 2006 revision of the Rules.

in an operating account are "lawyer's property upon receipt," *with the caveat that they can be retained only by providing the agreed upon services*." (footnotes omitted). The Committee went on to note that "'the client must be aware of the attorney's obligation to refund any amount of advance funds to the extent that they are unreasonable or unearned if the representation is terminated by the client.' . . . .".

35. Disciplinary Counsel proved by clear and convincing evidence that Respondent's Agreement fails that test. It covers only portions of the disclosure requirement. It stated that the fee would become Respondent's property upon payment. But, rather than providing that Respondent would refund any unearned portion, the Agreement provided that the funds were Respondent's and Mr. Young had no claim to them regardless of Respondent's efforts, if any. (FF 8-9).

36. Further, instead of advising the client that Respondent was obligated to place the funds in an escrow account unless they agreed to an alternative arrangement, the Agreement provided that the client "waives to the Ponds Law Firm placing all or part of the legal fee paid …into this law firm's escrow account." (FF 5). There is no explanation of what protections an escrow account provides or the risks to the client occasioned by placing the fee into Respondent's operating account. Read as a whole, the Agreement avoids telling clients the very things the Court and the Ethics Opinion identified as essential to obtaining informed consent.

37. Disciplinary Counsel proved by clear and convincing evidence that Respondent failed to convey the required information to either Mr. or Mrs. Young orally. Mr. Young did not understand material portions of the Agreement: "there's a lot of jargon in there I don't understand." He did not know what an escrow or an IOLTA account was. Respondent did not discuss any of the other topics the Court required for informed consent. (FF 28). Respondent testified that he

advised clients of these criteria in connection with his discussion of hourly fees, but did not testify that he also explained the obligation in connection with fixed fees. (FF 17).

38. Respondent also did not explain the limitations on when he could withdraw them if he placed them in escrow. He relied principally, if not solely, on the language of the Agreement to discharge the requirement to explain his escrow obligations. (Response at 31). However, *Mance* requires that information be explained both orally and in writing. *Mance* at 1206. And, as noted above, the Agreement made only a passing mention of an escrow account, without any explanation of its benefits.

39. Respondent argues that his testimony is more creditable than Mr. Young's because Mr. Young was testifying in a stressful situation about events that occurred six years before his testimony, whereas Respondent testified as to his practice in entering into retainer agreements with all his clients. (Response at 28). The Committee disagrees. It finds Mr. Young's testimony more credible. As Disciplinary Counsel notes, his testimony was consistent with his complaint, which was filed shortly after the events. Thus, his memory and that of his wife were not affected, as Respondent argues, by the passage of time.

40. The Committee also finds unpersuasive Respondent's efforts to characterize Mr. Young as a knowledgeable purchaser of legal services. (Response at 5). He is a high school graduate with a minimal amount of college who has held a several jobs that do not require sophisticated thinking. He currently works as a garbage collector. (FF 20). While Mr. Young did have a lawyer in connection with his Virginia criminal and other cases, the lawyers were public defenders. (FF 20). As a result, Mr. Young did not gain the knowledge that might have assisted him in understanding the Agreement. Indeed, *Mance* states that it is the *lawyer's obligation* to

assure that *the client understands* what rights the client is waiving when he consents to waiving the escrow requirements. *Mance* at 1207 (emphasis added).

41. Respondent's inference that Mrs. Young was sufficiently sophisticated to understand the Agreement is similarly misplaced. First, Mr. Young was the client, not Mrs. Young. It is the client who must give informed consent. Second, Mr. Young signed the Agreement before Mrs. Young had the opportunity to review it. She did not review it until Respondent advised that he wanted $30,000 more to undertake the work she thought he had already agreed to provide. In all events, her testimony was that she thought Respondent would represent Mr. Young in the case against her husband. (FF 29).

42. Finally, Respondent's own testimony supports Mr. Young's version of events. During the hearing, Respondent repeatedly stated that his fee discussions with clients focused on the nonrefundability of the fee. As he noted, he wanted clients "to know upfront exactly what the financial parameters" were. His testimony consistently reiterated that he told his clients that once they paid the fee, the money was his. (FF 16). He did not testify that he advised his clients that he was required to provide a benefit to earn the fee, that he was obligated to refund unearned fees, or that he was required to place in the fee in escrow.

43. Since Respondent believed when he was retained (and at the hearing) that he was entitled to charge a nonrefundable fee, there would have been no reason for him to have had a discussion with Mr. or Mrs. Young – or any client who elected a flat fee arrangement – about the pros and cons of escrow accounts. The reality was that Respondent did not believe he had an obligation to place these fees in such an account because they belonged to him when paid virtually no matter what transpired. (FF 92). Under those circumstances, a discussion about these options would have been meaningless.

44. Without giving Mr. Young a meaningful option to insist that the flat fee be placed in escrow and withdrawn as earned, Mr. Young cannot be said to have given informed consent. Informed consent requires that the client understand his or her options and the benefits and risks of each. *Mance* at 1207. Respondent did not provide Mr. Young with that information. His disclosure of his escrow obligations were only a "bare mention of an escrow agreement," something the Ethics Committee opinion stated was inadequate. Accordingly, the Committee concludes that Disciplinary Counsel has established by clear and convincing evidence that Respondent did not obtain informed consent to treat the fees paid by Mr. & Mrs. Young as his property nor did he obtain informed consent to retain the full amount of the payments without regard to the amount of work he performed.

45. Without have obtained informed consent, Respondent was required to place the $20,000 in an escrow account and withdraw only such funds as he actually earned. He did neither. As such, Disciplinary Counsel has established by clear and convincing evidence that Respondent violated Rules 1.15(a) and 1.15(e).

**ii. <u>Misappropriation</u>**

46. Misappropriation occurs whenever '"the balance in [an attorney's] trust account falls below the amount due to the client [or third party]."' *In re Ahaghotu,* 75 A.3d 251, 256 (D.C. 2013) (citation omitted). *See also In re Choroszej,* 624 A.2d 434, 436 (D.C. 1992) (misappropriation is any "unauthorized use by an attorney of a client's funds entrusted to him or her, whether or not temporary or for personal gain or benefit") (citation omitted). Proof of intent is not required. *Id.; see also, In re Cloud,* 939 A.2d 653, 659-60 (D.C. 2007).

47. Here, the balance in Respondent's escrow account dropped below the amount Mr. & Mrs. Young had paid shortly after Respondent deposited the funds in his account. Respondent deposited the initial payment of $5000 on March 9th, and withdrew $4,550 in the next few days -

- reducing the balance to $645.74. By March 16th, the balance in the account was overdrawn by $89.72. (FF 34). Respondent did some work for Mr. Young, but as the Committee has concluded, those tasks were not sufficient to justify the funds he withdrew when he withdrew them. Further, Respondent's recordkeeping did not permit Disciplinary Counsel, and does not permit the Committee, to determine what he might have earned when he took the funds. Accordingly, Disciplinary Counsel has established misappropriation by clear and convincing evidence.

48. The question remains whether the misappropriation was intentional, reckless or negligent. We conclude that it was at least reckless. Recklessness is defined in the context of misappropriation cases as "a pattern or course of conduct demonstrating an unacceptable disregard for the welfare of entrusted funds." *Cloud,* 939 A.2d at 660. 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; …" *In re Ahaghotu,* 73 A.2d 251, 256 (D.C. 2013) (internal quotation marks omitted); *In re Abbey,* 169 A.3d 865, 872 (D.C. 2017). Respondent's handling of client funds is characterized by several of these factors. He failed to keep track of client funds, indiscriminately deposited those funds in both his operating and escrow accounts, and was generally cavalier about his recordkeeping obligations. He simply treated virtually all the funds as his.

49. Respondent maintains that, if he misappropriated client funds, it was negligent, as he reasonably believed that he had informed consent. In support he relies on *In re Hewett,* 11 A.3d 279 (D.C. 2011); *In re Fair,* 780 A.2d 1106 (D.C. 2001) and *In re Travers,* 764 A.2d 242 (D.C. 2000). (Response at 33). None of these cases get him across the finish line. In *In re Hewett*, the Court found that the misappropriation was intentional, but did not disbar the respondent because

he took the funds to advance his client's interests; *i.e.* to assure that his client remained eligible for Medicaid. 11 A.3d at 289-90. The respondent *In re Fair* took fees that were earned but before obtaining Court approval "in the context of an ambiguous probate culture and engaged in conduct which within the very next year was legislatively sanctioned…" 780 A.2d at 1113 (footnote omitted). The Court found that it was not uncommon for attorneys to take their fee before approval and that typically there was no sanction. (*Id.* at 1112). No similar extenuating circumstances exist here.

50. *In re Travers* is marginally closer to this case. There, the respondent took his fee before he obtained the required Court approval. However, he believed that he was not subject to the probate code requirement for approval of fees because he was not representing "the estate." The Hearing Committee concluded that the misappropriation was negligent because it found that the respondent "sincerely 'believed' [the requirement to obtain prior Court approval] did not apply to him." *Travers,* 764 A.2d at 249. The Court adopted the Hearing Committee's findings without discussion.

51. The Committee cannot make a comparable finding here. When *Mance* was released, there was substantial discussion within the Bar concerning its holding. The Bar held CLEs to discuss *Mance,* Bar Counsel wrote a column in "The Washington Lawyer" explaining the decision,[45] and the Ethics Committee issued an opinion setting forth the steps it viewed as necessary to obtain informed consent. The Court itself explained in detail what was required to obtain informed consent. *Mance* at 1206-07.

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[45] Dolores Dorsainvil, *Bar Counsel: You Can't Get Around Mance*, Washington Lawyer (July/August 2011) http://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/july-august-2011-bar-counsel.cfm; (Last visited July 19, 2018); *see also* Tyler Moore, Flat Fee *Fundamentals*: An Introduction to the Ethical Issues Surrounding the Flat Fee after *In re Mance*, 23 Geo. J. Legal Ethics 701 (2010) (last visited July 30, 2018).

52. Respondent was aware of *Mance,* but his Agreement does not reflect its teachings. The Agreement touches on some of the disclosures the Court required, but they are framed in ways that reduce the ability of clients to understand what they are agreeing to -- such as waiving the right to have funds placed in escrow, without an explanation of what that means. Similarly, his testimony gave the unmistakable impression that his discussions with his clients related primarily to making it sure that they understood that he would treat the advanced fees as his own. And his submissions to Disciplinary Counsel are consistent with that view, asserting that he was not required to place fees in an escrow account. (*See* D.C. Exh. 51 at 6-7 (arguing that his clients had waived the escrow requirement and consented to his treating any fee payment as his)). This is hardly surprising in light of Respondent's belief that the fee belonged to him when paid. Further, Respondent's testimony indicated that he was not aware of the Ethics Committee Opinion and its advice is not reflected in the Agreement.

53. Thus, rather than providing clients with the disclosures *Mance* requires, Respondent's Agreement was designed to assure that clients would consent to his taking the fees as his on payment. Respondent's failure to inform himself adequately of the requirements for informed consent was not negligence; it was at least reckless, if not an intentional refusal to follow the requirements. The terms of the Agreement simply do not reflect a good faith misunderstanding of *Mance*.

54. As the Court has recognized in other contexts, the continuing failure to address a problem over time can transform negligent conduct into intentional. *In re Smith,* 70 A.3d 1213, 1217 (D.C. 2013); *In re Cloud,* 939 A.2d at 660; *In re Utley*,698 A.2d 446. 449-50 (D.C. 1997). Respondent's use of the Agreement in these two cases was not unique. He used a template Agreement, which he modified for each client relationship. (FF 6). However, the Committee does

not need to reach the decision whether his use of the Agreement constituted an intentional misappropriation of client funds; it is sufficient that we find it recklessness -- a disregard for Respondent's obligation to stay attuned to his ethical responsibilities. In sum, we conclude that Disciplinary Counsel has demonstrated by clear and convincing evidence that Respondent recklessly misappropriated Mr. Young's fee.

### E. Rule 8.4(d) -- Conduct That Seriously Interferes with the Administration of Justice

55. Rule 8.4(d) prohibits an attorney from engaging in conduct that seriously interferes with the administration of justice.

> To establish a violation of Rule 8.4(d), Bar Counsel must show (1) that the attorney acted improperly in that the attorney either "'[took] improper action or fail[ed] to take action when ... he or she should [have] act [ed]'; (2) that the conduct involved 'bear[s] directly upon the judicial process (i.e., the "administration of justice") with respect to an identifiable case or tribunal'; and (3) that the conduct 'taint[ed] the judicial process in more than a *de minimis* way,' meaning that it 'at least potentially impact[ed] upon the process to a serious and adverse degree.'

*In re White,* 11 A.3d 1226, 1230 (D.C. 2011) (emphasis in original and internal citations omitted), *cert. denied*, 563 U.S. 1022 (2011). The Comments to the Rule make clear that it encompasses a broad range of misconduct and should "be interpreted flexibly …[to] include[] any improper behavior of an analogous nature to these examples" set forth in Comment [2].[46]

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[46] Comment [2] lists the following as conduct as constituting interference with the administration of justice:

> failure to cooperate with Disciplinary Counsel; failure to respond to Disciplinary Counsel's inquiries or subpoenas; failure to abide by Agreements made with Disciplinary Counsel; failure to appear in court for a scheduled hearing; failure to obey court orders; failure to turn over the assets of a conservatorship to the court or to the successor conservator; failure to keep the Bar advised of respondent's changes of address, after being warned to do so; and tendering a check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client. Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples.

56. Disciplinary Counsel argues that Respondent violated the rule by thumbing his nose at the arbitration process and not refunding Mr. Young's fee after the ACAB issued its order. It also implies that Respondent violated Rule 8.4(d) by pursuing his appeal. (D.C. Brief at 44)

57. The Committee is reluctant to find a violation of Rule 8.4(d) on the grounds that Respondent appealed the ACAB decision. It recognizes that the arbitration process is intended to be quick, efficient and informal. *In re Martin*, 67 A.3d 1032, 1047 (D.C. 2013). However, D.C. Code § 16-4423(a)(3) specifically authorizes appeals on the grounds that the arbitrator refused to postpone a hearing upon a sufficient showing to support the continuance. While it appears that Respondent would have lost had the Court reached the merits, (FF 52 n.18). Disciplinary Counsel has not shown that Respondent's claim that the denial of his continuance was an abuse of the panel's discretion was frivolous.

58. Similarly, the Committee does not believe that Respondent's failure to refund the fee after the ACAB award violates Rule 8.4(d). Although D.C. Bar R. XIII obligates attorneys "to arbitrate fee disputes, and those proceedings are final and binding on the parties, a violation of Rule 8.4(d) requires more than a refusal to pay an arbitral award. …While arbitral proceedings perform a judicial function, a Rule 8.4(d) violation requires that the misconduct bear directly on the integrity of the proceedings themselves, not the enforcement of the decision." *In re Carter,* 11 A.3d 1219, 1224 (D.C. 2011).

59. Disciplinary Counsel has not shown how Respondent's failure to pay the arbitral award "bears directly [on the integrity of the]" arbitration proceeding. As the Court held in *In re Carter,* conduct that violates Rule 8.4(d) must occur prior to or during the course of the judicial proceeding. Here, as there, the judicial proceedings had been completed at the time that Respondent's misconduct took place. *Id*.

60. The cases cited by Disciplinary Counsel do not require a different result. They involved conduct that directly interfered with the judicial process. *See In re White,* 11 A.3d at 1232 (conflict of interest violation that jeopardized the fairness of the proceeding); *In re Martin,* 67 A.3d at 1052 (lawyer's effort to force a client not to file a disciplinary complaint); *In re Hopkins*¸677 A.2d 55, 61-62 (D.C. 1996) (the failure to take steps promptly to protect an estate requiring the appointment of an auditor for the estate). The only case the Committee has found concerning the failure to pay an order was *In re Travers, supra.* There the Court held the failure to return an illegal fee, when ordered by a court, violated the predecessor to Rule 8.4(d) as it delayed the closing of the estate. Respondent's failure to pay the ACAB award does not involve any of these or similar factors. It did not delay any proceeding or burden the Courts, except to hear his appeal. *See In re Hallmark,* 831 A.2d 366, 376 (D.C. 2003) (requiring more egregious conduct than burden on court's administrative process). Thus, the Committee finds that Disciplinary Counsel has not proven by clear and convincing evidence that Respondent violated Rule 8.4(d).[47]

## Count 2

### A. Choice of Law

61. This Count includes two sets of claims; one involving Respondent's representation of Ms. Iesha Armstrong in connection with a matter in the Circuit Court for Arlington County, Virginia, and one involving claims as to the adequacy of Respondent's recordkeeping, whether he

[47] The Committee does not believe the recent decision, *In re Evans,* -- A.3d --- No. 16-BG-1146, 2018 WL 3215173, at *5 (D.C. June 28, 2018), requires a different result. There the Court upheld a Board determination that the failure to repay promptly an unearned fee violated Rule 8.4(d). However, in that case, the failure to repay occurred while his client's case was pending before the Court, requiring the appointment of counsel. Here, there was no direct effect on any pending matters.

commingled, and whether he engaged in conduct involving fraud, dishonesty or misrepresentation. Disciplinary Counsel has alleged violations of both Virginia and District of Columbia Rules of Professional Conduct with respect to these matters. Thus, our first step is to decide which Rules of Professional Conduct apply.

62. Rule 8.5 of the District of Columbia Rules of Professional Conduct provides that:

> a. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs….
>
> b. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:
>
> 1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise ….

Disciplinary Counsel argues that the District of Columbia rules should apply to both sets of charges since Respondent did not enter an appearance in the Virginia court and the misconduct alleged in Count 2 did not take place in Virginia, but in connection with Respondent's billing and financial practices, which occurred in the District. (D.C. Brief at 27). Respondent does not address the question of which disciplinary rules apply. For the reasons set forth below, the Committee concludes that the Virginia Rules apply to Respondent's representation of Ms. Armstrong, and the District of Columba Rules apply to the remaining charges.

63. Under Rule 8.5(b)(1), attorney conduct in connection with matters pending before a non-District tribunal is subject to the ethical rules of the tribunal. Applying that rule to Respondent's representation of Ms. Armstrong, the Virginia Rules would apply as the case was pending in a Virginia court. Disciplinary Counsel argues, however, that the District's rules should govern since Respondent did not enter an appearance and that most of the alleged misconduct took place in the District of Columbia. But Rule 8.5(b)(1) does not resolve the choice of law question

on whether the attorney appeared in a tribunal outside the District or whether the majority of the work was performed in the foreign tribunal. It focuses on where the matter is pending and provides that the disciplinary rules of that tribunal apply in connection "with *a matter* pending before a tribunal." (emphasis added).

64. The comments to the Rule make that clear. Comment [4] explains that the Rule "provides that … a lawyer's conduct relating to a *matter pending before a tribunal* the lawyer shall be subject *only* to the rules of professional conduct of that tribunal." (emphasis added). As the Comment [3] explains, the Rule is intended to assure that an attorney is "subject to only one set of rules of professional conduct, and [that] the determination of which set of rules applies to particular conduct [is] as straightforward as possible …" The interpretation of the Rule urged by Disciplinary Counsel does not accord with those objectives. Instead of making the determination of the applicable Rules simple, it makes the decision complex, requiring that each phase of an attorney's work be evaluated based on the applicable rules where it was performed or perhaps a weighing of the quantum of work performed in each jurisdiction. The Committee does not believe that is how the Rule should be read. The charges relating to Ms. Armstrong allege violations that are connected to Respondent's efforts to assist her in obtaining relief from a Virginia probation. The motion for that relief was filed in a Virginia Circuit Court. The Committee concludes that the ethical rules of the Virginia Rules of Professional Conduct control with respect to those claims.[48]

65. In urging that the District's Rules should apply, Disciplinary Counsel relies primarily on *In re Pelkey*¸962 A.2d 268 (D.C. 2008). There the Court applied the District's Rules

[48] The Committee recognizes that, since the Motion was never docketed, the matter was technically not "pending" before a Virginia court, and thus the D.C. rules might apply. The Committee thinks that parses the rule too finely and is inconsistent with the intent to make it simple to determine the applicable Rule.

to a member of the D.C. Bar for a series of fraudulent and potentially criminal actions in connection with a business dispute with a business associate who lived in California. The dispute was litigated in both the District and California. *Id.* at 273. The case is distinguishable. While the Court applied the District Rules, it did not discuss Rule 8.5(a). It simply applied the D.C. Rules without explanation. Thus, the decision provides no guidance as to the Court's interpretation of the clear language of Rule 8.5(a). Further, to the extent that Mr. Pelkey's misconduct occurred in connection with the District aspects of the case, the District rules would apply under Rule 8.5. None of these factors exist here.

66. As distinguished from the charges concerning Respondent's representation of Ms. Armstrong, the charge that he seriously interfered with the administration of justice is unrelated to the Virginia courts. Under Rule 8.5(a), the District of Columbia rules are applicable to any misconduct allegation involving a member of the D.C. Bar unless one of the exceptions apply. None of them are applicable. The Committee will evaluate the Rule 8.4(c) allegations under the District of Columbia Rules.

67. Determining whether the District's or Virginia's rules apply to Respondent's handling of his escrow account, including the commingling claim, is a closer question. Those charges are, in part, related to his handling of Ms. Briggs' funds. On balance, however, the Committee reads the charges as addressing Respondent's management of his escrow account in general rather than solely his treatment of Ms. Briggs' funds. Given the presumption under Rule 8.5 and lacking any compelling reason why the Virginia Rules should apply, the Committee concludes that the Rule 1.15(a) & (b) charges relating to his management of the escrow account are controlled by the District of Columbia Rules.

## B. The Substantive Charges With Respect to Ms. Armstrong

68. Disciplinary Counsel charged Respondent with violations of the following Virginia rules:

- Rule 1.5(a) by charging an unreasonable fee that he called "nonrefundable;"
- Rule 1.15(b)(5) by engaging in reckless or intentional misappropriation;
- Rule 1.15(a)(1) by not treating advanced, unearned fees as entrusted funds and failing to obtain informed consent to a different arrangement; and
- Rule 1.15(a)(3) by commingling funds.[49]

### i. Rule 1.5(a) -- Charging an Unreasonable fee

69. Respondent charged Ms. Briggs $4,500 to represent Ms. Armstrong in attempting to terminate her probation early. (FF 58). He used a portion of that fee to compensate local counsel, Mr. Bond. (FF 53). Disciplinary Counsel did not introduce any evidence that would indicate that the fee was unreasonable. Indeed, at the hearing, Disciplinary Counsel stated that it was not challenging the $4,500 as unreasonable. (Tr. 701 at 1-13).

70. Disciplinary Counsel also argues that Respondent violated Virginia Rule 1.5(a) by charging a "nonrefundable." By its terms, Virginia Rule 1.5(a) does not specifically preclude a nonrefundable fee, but an opinion of the Virginia Ethics Committee, which was adopted by the Virginia Supreme Court, states that "any fee arrangement involving advanced legal fees and

[49] Disciplinary Counsel charged Respondent with violating the following District of Columbia Rules in connection with his representation of Ms. Armstrong:

- Rule 1.5(a) by charging an unreasonable fees that he call "nonrefundable;"
- Rule 1.15(a) by engaging in reckless or intentional misappropriation;
- Rules 1.15(a) & (b) by commingling and not placing client funds in an IOLTA account; and
- Rule 1.15(e) by not treating unearned fees as property of his client and failing to obtain informed consent to a different arrangement.

providing for a non-refundable or minimum fee violates the Disciplinary Rules . . . . Legal Ethics Opinion 1322." Legal Ethics Opinion 1606 (1994), approved Nov. 2, 2016 (Va. Sup. Ct.). "An advanced legal fee cannot, by employment contract or otherwise, be termed-non-refundable without violating" the Rules. *Id.*

71. By their terms, these holdings are limited to advanced fees and do not address specifically whether nonrefundable engagement fees are permissible. Respondent argues that his fee was at least, in part, an engagement fee. However, for the same reasons the Committee held that Mr. Young's fee was not an engagement fee, it concludes that Ms. Briggs' fee was not an engagement fee. If anything, her situation is clearer. The Agreement provided simply that Respondent would represent Ms. Armstrong in connection with her Virginia probation matters. (FF 63). There is nothing to indicate that Ms. Briggs was retaining Respondent to handle matters that might arise in the future; the probation matter was an immediate, active problem. (FF 64). The $4,500 she paid Respondent was an advance fee payment for assisting Ms. Armstrong. The Committee finds that Disciplinary Counsel has established by clear and convincing evidence that Respondent violated Virginia Rule 1.5(a) by calling his fee nonrefundable.

**ii. <u>Rule 1.15(b)(5) -- Reckless or Intentional Misappropriation</u>**

72. Disciplinary Counsel has charged two separate violations of Rule 1.15(b)(5): (x) reckless or intentional misappropriation, and (y) failing to treat advanced, unearned fees as property of the client or obtaining informed consent to a different arrangement.[50] The factual basis

[50] Disciplinary Counsel charged Respondent with violating D.C. Rule 1.15(e) by not depositing trust funds in an IOLTA account. This allegation is in Count 2 only. (D.C. Exh. 2 at 6, 11). Since the Virginia Rules do not require attorneys to deposit entrusted funds in an IOLTA account, the Committee does not need to reach the IOLTA question. However, if the Board or the Court concludes that the District Rules apply, it is clear that Respondent violated Rule 1.15 since he did not have an IOLTA account when he represented Ms. Briggs, and therefore could not and did not deposit the funds in one. (FF 85).

for both claims, however, is the same. Both are predicated on Respondent's failure to obtain informed consent to treat the fees paid as his own. The Committee will evaluate the charges together.

**a) Respondent's Failure to Place Ms. Briggs' Funds in Escrow**[51]

73. Virginia's Rules with respect to the handling of client and third party property are substantially similar to the District's. They require that client funds be placed in an escrow account and preclude withdrawal until earned. *See, Green v. Va. State Bar,* 278 Va. 162, 178-79, 677 S.E.2d 227, 235 (2009) (Rule 1.15 violated when attorney withdrew fees immediately before performing work); *El-Amin v. Va. State Bar,* 257 Va. 608, 613-16, 514 S.E.2d 163, 166-67 (1999)

74. Specifically, Virginia Rules 1.15(a) & (b) provide that "[a]ll funds received or held by a lawyer or law firm on behalf of a client or a third party, … other than reimbursement of advances for costs and expenses *shall be deposited in one or more identifiable trust accounts* …." (emphasis added). They also prohibit a lawyer from disbursing "funds or us[ing] property of a client or third party without their consent …, except as directed by a tribunal … ." (*Id.* at (b)(5)).

75. Virginia also requires that "[f]ees paid in advance for particular legal services not yet performed are advance legal fees regardless of the terminology used … [and must be] deposited and identified as belonging to the client until earned." Legal Ethics Opinion 1606 (1994), *supra.* "If the fee is an advance payment for legal services, … it continues to be the property of the client. The fee must be deposited in a trust account and *may only be paid over to the lawyer when and if it is earned*." (*Id.*) (emphasis added).[52] Based on these provisions, Respondent was required to

[51] For these purposes, the Committee does not think it makes any material difference whether Respondent obtained consent from Ms. Briggs or Ms. Armstrong. Ms. Briggs was paying for legal services for Ms. Armstrong; they were acting in *pari materia*.

[52] For the reasons set forth below, (¶ ¶ 79 - 80, *infra*), the Committee finds that he did not earn the fee when he took it.

obtain Ms. Briggs informed consent to treat the funds as his. The only basis Respondent has advanced for his taking the funds was that Ms. Briggs consented when she signed the retainer agreement.

76. It is arguable that Comment 2a to Virginia Rule 1.15(a) could be read to permit attorneys to withdraw funds from escrow where the client consents in the retainer agreement. It provides that:

> consent can be inferred from the engagement agreement or any consequential agreement between the lawyer and the client regarding the disbursement of fees, i.e., when earned fees are routinely withdrawn from the lawyer's trust account upon an accounting to the client, when costs and expenses of litigation are routinely withdrawn, or when other fees/costs or expenses are agreed upon in advance.

However, that interpretation is inconsistent with the Ethics Committee Opinion, ratified by the Virginia Supreme Court, that the attorney must earn the fee before he or she can take the funds.

77. Moreover, a closer reading of Comment 2a indicates that it does not authorize attorneys to take fees before they are earned based on the terms of a retainer agreement. The examples in the Comment involve situations in which the fees were earned before they were taken. In both examples, the question is whether the client had consented to the specific taking of a fee, rather than whether the lawyer could take unearned fees from a trust account. Thus, the Committee holds that Respondent was required, under the Virginia Rules, to keep Ms. Briggs' fee in his escrow account until earned or Ms. Briggs consented. He did neither.

78. Respondent withdrew his fee no later than May 1, 2012, when his escrow account balance dropped to $1,983.33, substantially less than the $14,500 in client fees he had deposited. (FF 60-61). He did not provide Ms. Armstrong any substantive assistance until September 27th and did not complete the work on the matter until June 2013. (FF 69-72). Accordingly, Respondent took his fee before he earned it.

79. The Virginia Rules do not define consent and the Committee did not find any Virginia decisions defining consent in the context of a disciplinary proceeding. The parties did not cite any. In the absence of guidance from the Virginia Courts, the Committee will look to the District of Columbia decisions to decide whether Ms. Briggs consented to Respondent's taking of his fee before earned. Under those decisions, Respondent did not obtain Ms. Briggs' consent to take his fee before he earned it for essentially the same reasons the Committee held that Respondent did not obtain Mr. Young's informed consent. *See,* ¶ ¶ *36*-43*, supra.* The lapses in Respondent's disclosure of (a) his obligations to place the funds in escrow, (b) the limitation on his taking his fee until earned, (c) the obligation to refund unearned fees, and (d) the benefits of placing funds in escrow, which precluded a finding that Mr. Young gave informed consent, preclude a finding that Ms. Briggs gave informed consent. While Ms. Briggs understood that the fee was "nonrefundable," she believed that meant that the $4,500 was what Respondent was charging to handle the matter. She did not understand that Respondent would treat the funds as his own and would have no obligation to refund any portion of it under any circumstance. (FF 64). Indeed, she sought a refund when she thought Respondent had not filed the Motion to Terminate Probation Unsuccessfully. (FF 81)

80. Respondent claims he explained the Agreement to Ms. Briggs. She does not dispute that they discussed the Agreement, but maintains that his explanation focused on the nonrefundability of the fee and that he did not explain the *Mance* requirements. (FF 65). The Committee finds Ms. Briggs' testimony more credible than Respondent's. Her testimony was forthright, sincere, and consistent. Her claim that Respondent stressed that the fee was nonrefundable is consistent with Respondent's testimony concerning how he explained the Agreement in general. (FF 16-18). There is no evidence that Respondent or Ms. Anapole

explained to Ms. Briggs the factors essential to obtain informed consent. Indeed, Ms. Anapole testified that she did not discuss escrow or IOLTA matters with clients.[53] (FF 4). Without understanding the options, Ms. Briggs could not give informed consent.[54] *See Mance* at 1207. The Committee finds that Disciplinary Counsel has established by clear and convincing evidence that Respondent did not obtain Ms. Briggs informed consent to treat her funds as his own.

**b) Misappropriation**

81. As noted, misappropriation occurs whenever "the balance in [an attorney's] trust account falls below the amount due to the client [or third party]." (¶ ¶ 46). Ms. Briggs paid Respondent $4,500 on April 4, 2012. He deposited the check in his escrow account on the same day. The balance in his escrow account fell to $3,782.23 the next day, April 5th, and to $3,183.23 on April 10th, less than the amount Ms. Briggs' paid. The balance did not exceed $4,500 until April 17th, but only because Respondent deposited $10,000 from another client. Thus, the account remained below the $14,500 of entrusted funds that had been deposited. The balance fell to $1,983.33 on May 1st. (FF 60-61). In sum, Respondent's escrow balance fell below the amount Ms. Briggs' paid almost immediately after she paid him and continued below $4,500 for an additional twelve days. It also fell below that level at various times thereafter.[55]

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[53] As noted, since Respondent's view was that he was entitled to the fees when paid no matter what transpired, there would have been no occasion for him to explain escrow accounts and their advantages to Ms. Briggs.

[54] Since the Virginia rule on advanced fees is similar to the District's, the Committee finds that, if applicable, Disciplinary Counsel has established a violation of District Rule 1.15(a) & (e).

[55] Respondent's failure to maintain adequate records, *see* ¶ 88,*infra,* did not permit Disciplinary Counsel and does not permit the Committee to track the source and disposition of his funds with any precision. But Joint Exhibit 56 shows that the balance in his escrow account was frequently not sufficient to cover his fiduciary obligations to the clients who had paid, including Ms. Briggs. (FF 60-61, ¶ 88).

82. Had Respondent commenced work on Ms. Armstrong's case immediately, his withdrawal of those funds might have been permissible. However, he did not. His first contact with Ms. Armstrong was on May 25th -- eight weeks later -- when he advised that he would call her on May 30th. (FF 69). He did not call then and, except for emails indicating that he was trying to reach her, the first substantive communication with her was on September 27th, when he sent her an email advising that Ms. Anapole had spoken to Ms. Briggs and requested certain materials. (FF 68-73).

83. The earliest point at which it might be said that Respondent completed his work was November 5, 2012, when he sent Ms. Armstrong a draft of the proposed Motion to Terminate her probation. (FF 76). It is thus clear that Respondent took his fee well before he performed any significant work, if any work at all, for Ms. Armstrong. Since Virginia prohibits lawyers from taking their fee before it is earned, the Committee finds that Disciplinary Counsel has established by clear and convincing evidence that Respondent misappropriated Ms. Briggs' funds. *See, Green v. Virginia State Bar, supra.*

84. If Respondent's conduct were subject to the District of Columbia Rules, the Committee would be required to determine whether the misappropriation was intentional, reckless or negligent. However, the Committee's review of the Virginia misappropriation cases indicates that Virginia does not employ the same culpability criteria in determining the sanction for misappropriation. *See, e,g,. Delk v. Va. State Bar,* 233 Va. 187, 192, 355 S.E.2d 558, 561 (1987); *Gay v. Va. State Bar,* 239 Va. 401, 406 n.4, 389 S.E. 2d 470, 473 n.4 (1990); *Motley v. Va. State Bar,* 260 Va. 251, 265, 536 S.E.2d 101, 108 (2000). Not surprisingly, the Committee did not find any case defining what might be reckless, as compared to negligent misappropriation under the Virginia Rules.

85. However, District of Columbia precedent controls the appropriate sanction, even in cases subject to the substantive disciplinary rules of another jurisdiction. *See, In re Deak,* 174 A.3d 867, 868 (D.C. 2017); *In re Prado,* 785 A.2d 295, 296 (D.C. 2001) (Mem); *cf In re Zilberberg,* 612 A.2d 832, 834 (D.C. 1992). Consequently, the Committee is required to determine whether the misappropriation was intentional, reckless or negligent. In the absence of guidance under Virginia law, the Committee will apply District of Columbia precedent in deciding that question. For the same reasons the Committee concluded that Respondent recklessly misappropriated Mr. Young funds, (¶ ¶ 48, 53) the Committee finds that the misappropriation was reckless.

## C. Management of Respondent's Escrow Account

### i. Failure to Keep Adequate Records

86. D.C. Rule 1.15(a) provides:

> (a) A lawyer shall hold property of clients or third persons … in connection with a representation separate from the lawyer's own property. Funds of clients … (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). … *Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.* (Emphasis added).

The comments to the Rule explain that it is intended to assure:

> that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled. Financial records are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained. Comment [2].

Quoting *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003). Comment [2] goes on to explain:

> The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Bar Counsel can be completed even if the attorney or the client, or both, are not available … Rule 1.15 requires that lawyers maintain records such that ownership or any other question

> about client funds can be answered without assistance from the lawyer or the lawyer's clients. …

87. Disciplinary Counsel maintains that Respondent failed to meet this standard. It argues that there are no records of the source of many of the deposits in Respondent's escrow account nor are there records reflecting the reasons for withdrawals that were transferred to Respondent's operating or personal accounts. (D.C. Brief at 41-43). Respondent replies that since his clients consented to his treating the payments as his own, Rule 1.15(a) is inapplicable. (Response at 40-41).

88. The record here established that Respondent failed to keep adequate records. He frequently made cash deposits to the escrow account without attributing the source. Similarly, except when making payments on behalf of clients for expert witnesses, transcripts or filing fees, etc., he withdrew funds without associating them to any client matter. (FF 86-87). Most of the withdrawals were deposited in Respondent's operating account. Some were deposited in Respondent's personal accounts at Fidelity Investments or J.P. Morgan. (FF 88). Respondent's records did not show which client's funds were withdrawn or whether the fees had been earned. These records are insufficient to "demonstrate … [Respondent's] compliance with his ethical duties" to avoid commingling and misappropriation of client and third party funds. They are also insufficient to permit Disciplinary Counsel to determine the "ownership or any other question about client funds … without assistance" from Respondent.

89. The remaining question is whether the funds in the account were "entrusted funds". Respondent's argument that they were not fails, at least as to Mr. Young's and Ms. Briggs' funds, as we concluded that he did not obtain their informed consent. (¶ ¶ 44,80). The record with respect to other clients is not as clear, as Disciplinary Counsel did not introduce any evidence whether Respondent had obtained informed consent from them. It is likely that Respondent failed to obtain

informed consent from his other clients. His testimony indicates that the disclosures he made to Mr. Young and Ms. Briggs were comparable to those he gave his other clients.

90. However, the Committee does not need to reach that question. It is sufficient that he failed to maintain adequate records of his use of the fees paid by Mr. Young and Ms. Briggs to establish a violation of Rule 1.15(a). *See, In re (Michelle) Klass,* No. 13-BD-041, 4-5 (Bd. Dec. 22, 2014) (Board reprimand for single instance of commingling); *see also, e.g. In re Saint-Louis*, 147 A.3d 1135, 1138 (D.C. 2016); *In re Mitrano,* 952 A.2d 901, 926-28 (D.C. 2008) (appending Board Report); *In re Midlen,* 885 A.2d 1280, 1292 (D.C. 2005). Accordingly, the Committee finds that Disciplinary Counsel has established by clear and convincing evidence that Respondent violated Virginia Rule 1.15(a).

**ii. Commingling**

91. Commingling occurs when an attorney does not keep entrusted funds in an account that is separate from his operating or personal accounts. *In re Moore,* 704 A.2d 1187, 1192 (D.C. 1997*)* (per curiam) (appended Board Report); *In re Hessler,* 549 A.2d 700, 707 (D.C. 1988). The prohibition on commingling "has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client fund might be taken by the attorney's creditors, and most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally or inadvertently." *In re Rivlin,* 856 A.2d 1086, 1095 (D.C. 2004) (per curiam) (citations omitted).

92. Disciplinary Counsel argues that Respondent engaged in commingling by "knowingly deposit[ing] advanced unearned fees with earned fees into his escrow account and … mov[ing] money back and forth among his various accounts — often depositing funds from his operating or personal account to his escrow when his escrow account held entrusted funds for

clients." (D.C. Brief at 40). Respondent counters that Disciplinary Counsel has not shown that Respondent commingled because the funds in the escrow account were not entrusted funds; they were his and were regularly transferred to his operating account. Next, he argues that Disciplinary Counsel has failed to show he moved funds back and forth between his escrow and operating accounts or that he used escrow account funds for his personal expenses. (Response at 39).

93. The Committee agrees with Respondent that Disciplinary Counsel has not established that Respondent frequently moved funds back and forth between his escrow and operating accounts or that he used escrow funds to pay his personal expenses.[56] Disciplinary Counsel did not identify the transactions it maintains demonstrate the wholesale transfers between Respondent's two accounts. Further, Joint Exhibit 56 does not show any transfers from Respondent's accounts at J.P. Morgan or Fidelity to the escrow account and only a few transfers from his operating account to the escrow account. The transfers from his operating account to the escrow account were made when the balance in the escrow account fell below zero. Most withdrawals from the escrow account went to Respondent's operating account or to accounts with Fidelity and J.P. Morgan. Several withdrawals were to pay for client-related expenses.[57] While there were numerous cash deposits, Disciplinary Counsel has not shown that they were Respondent's funds rather than client funds. To the extent Disciplinary Counsel's charge turns on the assertion that Respondent viewed the two accounts interchangeable, it has not made its case.

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[56] The Committee recognizes that, in transferring funds from the escrow account to the operating account, Respondent was using the funds for personal expenses. However, that does not establish that Respondent was misusing his escrow account, as Disciplinary Counsel is basically arguing. *Compare, In re Daniel,* 11 A.3d 291, 299 (D.C. 2011).

[57] *See, e.g.* J. Exh. 56 at lines 7, 8, 11, 15, 21, *id*. at line 46, *id*. at lines 81, 109.

94. On the other hand, Respondent's assertion that he did not commingle because none of the funds in the escrow account were entrusted funds is untenable. If we accept his claim that the fees were his, then he commingled. Both he and Ms. Anapole testified that his escrow account was used to hold client funds for such things as transcript costs, filing fees, etc. (FF 85). A review of Joint Exhibit 56 establishes that Respondent took funds from the escrow to pay for litigation costs for clients.[58] Unless Respondent was advancing these expenses and expected to be reimbursed, the escrow account contained both entrusted and personal funds.

95. Disciplinary Counsel did not specifically address this point but the Committee finds that the record creates a sufficient *prima facia* case that Respondent did not advance the funds. His agreement provided that the client was to pay for costs and expenses, the testimony that the escrow account was used to hold client-related expenses, and Respondent's concern that he be paid in advance support the inference that clients were required to pay the fees in advance. Joint Exhibit 56 includes at least one situation where the client prepaid a court cost. (*See*, J. Exh. 56 at lines 108 & 109 (deposit from client for appeal fee; payment of appeal fee)). It was therefore incumbent on Respondent to show that he was advancing the funds. He did not. Thus, on this theory, Disciplinary Counsel has established commingling.

96. However, the Committee is reluctant to make an adverse finding on this basis. The Committee has held that Respondent failed to obtain informed consent from Mr. & Mrs. Young or Ms. Briggs to treat their fees as his own. Those funds therefore remained client funds and were required to remain separate from his. The Committee does not think it appropriate to find another

[58] *See, e.g.* J. Exh. 56 at lines 7 & 8 (transcript payments); line 11 (expert witness fee), *id.* at line 44 (transfer payment); *id.* at line 109 (appeal fee); *id.* at lines 135 & 150 (expert witness fee).

violation by ignoring its own findings. Accordingly, we turn to the question of whether there were any of Respondent's own funds in the account.

97. Disciplinary Counsel has not pointed to any specific situation where Respondent deposited his funds in the escrow account. Its argument is effectively that Respondent's recordkeeping was so inadequate that at some point he had to have commingled. That is essentially a reiteration of the charge that he maintained inadequate financial records. Normally, Disciplinary Counsel submits a clearer factual basis to support a commingling claim, pointing to situations in which both client funds and the respondent's fund are in the same account. *See, e.g. In re Wyatt,* No. 10-BD-123, 17-18 (Board 2014), *aff'd*, 11 A.3d 635 (D.C. 2015); *In re Graham,* 795 A.2d 51, 52 (D.C. 2002).

98. Given Respondent's wholly inadequate record keeping, the Committee believes it is inconceivable that he did not at some point commingle. Except for advances of client costs, he deposited client payments in either his operating or escrow account. (FF 85). He did not keep a ledger for the escrow account, frequently made cash deposits and withdrawals, and had limited records as to whose funds were in the escrow account. He allowed the escrow account to go into negative territory with some regularity. (FF 89). He treated every payment as his own and thus had no incentive to keep records which were client funds and which were not. His only recordkeeping was Ms. Anapole's practice of keeping payments from clients with the retainer agreements. (FF 83).

99. However, Disciplinary Counsel is required to demonstrate that personal and entrusted funds were on deposit at the same time to establish commingling. *In re Smith,* 817 A.2d 196, 201 (D.C. 2003); *In re Stovell,* Board Docket No. 16-BD-046 (Feb. 7, 2018), *aff'd on other grounds,* --- A.3d ---, No. 18-BG-115, 2018 WL 3215170 (D.C. June 28, 2018). Although

some of the entries in J. Exh. 56 tend to indicate that client and personal funds might have been in the account at the same time and that Respondent moved unearned client funds to one of his personal accounts, that is not a sufficient basis to find by clear and convincing evidence that Respondent commingled. Disciplinary Counsel is required to make a clearer showing which funds were client funds and which were Respondent's. That it has not done. Accordingly, the Committee concludes that Disciplinary Counsel has not established a violation of Rule 1.15(a)(3).).

**D. Conduct Involving Dishonest, Deceit or Misrepresentation**

100. Rule 8.4(c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Disciplinary Counsel maintains that Respondent violated this rule "by dishonestly using his trust account to conceal personal and business assets from the IRS." It argues that, in light of Respondent's large outstanding obligations to the IRS, his use of his escrow account as a personal and business account, including the frequent cash transactions, precluded the IRS from ascertaining his income. (D.C. Brief at 44-46).

101. Respondent disputes Disciplinary Counsel's claim. He notes that both Respondent's operating and escrow accounts were in his name at BB&T, that he maintained these accounts for a number of years and did not open and close accounts or otherwise attempt to conceal funds, and that his personal accounts at Fidelity Investments and J.P Morgan were also in his name. He contends that he made cash deposits because his clients paid him in cash, an allegation supported on this record. (Response at 41-42).

102. It is possible that Respondent was attempting to hide funds from the IRS; he owes the government a substantial amount of money. However, Disciplinary Counsel has not established that charge by clear and convincing evidence. His assets were in his name and could

have been traced by the IRS; in fact, the IRS had a sufficient basis to file assessments of $477,377. Respondent also held a number of valuable pieces of real estate in Georgetown in his own name, (FF 97), and the IRS could have attempted to recover against them. However, as far as this record shows, the IRS has not foreclosed on its liens or taken other steps to collect its assessments, such that Respondent would have a reason to hide funds.

103. Disciplinary Counsel's reliance on *In re Daniel,*11 A.2d at 299, is misplaced. In that case, the IRS was pursuing the respondent for back taxes, the respondent used his IOLTA account to hide funds, and he lied to the IRS when he denied having any bank accounts when he had two IOLTA accounts that he used to hide funds. (*Id.* at 295). Further, the respondent used one of the IOLTA accounts solely as a personal account. (*Id.* at 299). Disciplinary Counsel's showing does not parallel that evidence in any significant way. The IRS was not actively pursuing Respondent by foreclosing on its liens, he maintained separate escrow and operating accounts (notwithstanding how he may have used them), and his assets were in his own name. It should be relatively easy for the IRS to find them. Disciplinary Counsel has also not shown that he used his escrow account to pay personal expenses, and there is no evidence that Respondent has not been truthful to the IRS.

104. Disciplinary Counsel's argument reduces to the speculation that, because Respondent was cavalier in his treatment of his escrow account and owed money to the IRS, he was attempting to hide money from it. A clear and convincing evidentiary showing requires more. Accordingly, the Committee finds that Disciplinary Counsel has not established that Respondent's handling of his escrow account gave rise to a violation of Rule 8.4(c).

**Conclusion**

105. For the reasons set forth above, the Committee finds that Disciplinary Counsel has established by clear and convincing evidence violation of the following rules:

A. District of Columbia:

- Rule 1.3(b)(1) for failing to pursue the lawful objectives of Mr. Young;
- Rule 1.15(a) for failing to maintain required records of client funds;
- Rule 1.15(a) & (e) for not placing Mr. Young's funds in an escrow account and by recklessly misappropriating Mr. Young's funds; and
- Rule 1.16(d) for failing to take reasonable steps to protect Mr. Young's interests.

B. Virginia:

- Rule 1.5(a) by charging a nonrefundable fee;
- Rule 1.15(b)(5) by recklessly misappropriating Ms. Briggs' funds; and
- Rule 1.15(b)(5) by not treating Ms. Briggs' funds as advanced, unearned fees as her property or obtaining informed consent to a different arrangement.

**Sanction**

106. Typically, the decision as to the appropriate sanction is one of the the hardest parts of a disciplinary decision. Rule XI enjoins the disciplinary system to impose consistent sanctions in similar cases; yet each case is unique. Finding comparable cases on which to base the recommended sanction is difficult, as it involves subjective judgments. *In re Yelverton,* 105 A.3d 413, 429 (D.C. 2014), *cert. denied*, 136 S. Ct. 168 (2015); *In re Kitchings,* 857 A.2d 1059, 1060 (D.C. 2004).

107. Cases where reckless or intentional misappropriation have been proven do not suffer from that problem. The Court has made it clear that, except where the misappropriation is negligent, the presumptive sanction is disbarment. *In re Addams, supra; In re Abbey,* 169 A.3d 865, 872 (D.C. 2017); *In re Mayers*, 114 A.3d 1274, 1279 (D.C. 2015); *In re Fair,* 780 A.2d 1106, 1109-10 (D.C. 2001). Only exceptional circumstances warrant a lesser sanction. *In re Addams, supra* at 191.

108. The Committee is aware of only one case in which the Court found that the misappropriation was either reckless or intention but did not disbar the respondent: *In re Hewitt, supra.* There the Court imposed a six-month sanction, stayed for a six-month probation, because the respondent, who had been practicing for over 15 years without any ethical complaints, took the funds to assure that his client would not lose his Medicaid benefits -- a benefit for his client. The fees were earned; the misappropriation resulted from the attorney taking the fees before he obtained approval from the probate court.

109. No such mitigating factors exist here. Respondent's disciplinary record is not clean. He has been sanctioned twice for Rule violations. (FF 98). His evidence in mitigation does not establish the exceptional circumstances required under *In re Addams* to support a lesser sanction. The assistance he provided to Ms. Lane, including helping her create a foundation to help other mothers facing similar difficulties, is admirable and worthy. However, those actions are not comparable to the mitigating factors in *In re Hewett*, nor are they "exceptional circumstances" which might justify imposing a sanction other than disbarment.

110. In reaching this conclusion, the Committee recognizes, as Mr. Reimer and Mr. Kramer argue, the importance to the criminal justice system of solo criminal defense practitioners and the vital role they play in providing counsel to lower income and indigent accused, including the assistance they provide to public defenders.[59]

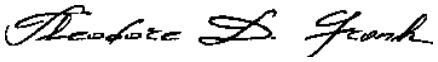
111. It is also aware of the difficulties that *Mance* imposes on them. They operate in an environment where they are frequently dealing with clients with limited funds and need to be paid up-front. If they lose, as they often do, their clients will not be in a position to pay unpaid fees.

[59] It is somewhat ironic that Respondent makes this argument. His actions in walking away from Mr. Young imposed those very burdens on public defenders.

Flat fees that these attorneys can take immediately provide them with a greater degree of financial security than advanced retainers, which must be taken more slowly. Respondent testified that Court's often do not allow attorneys to withdraw when a client fails to make a payment, and the Committee has no reason to believe that he is incorrect. However, the Court evaluated those concerns when it adopted *Mance*. The Hearing Committee is not in a position to strike a different balance than the one struck by the Court.[60]

112. Having found that Respondent was at least reckless in misappropriating Mr. & Mrs. Young's and Ms. Briggs' funds, and that exceptional circumstances do not exist that might warrant varying from the presumptive sanction, the Committee recommends that Respondent be disbarred.[61]

Respectfully submitted:
Ad Hoc Hearing Committee



Theodore D. Frank, Chair

Marcia Carter, Public Member

Jeffrey Freund, Attorney Member

[60] *Compare, In re Bernard A. Gray, Sr.,* Board Docket No. 16-BD-045 (BPR July 31, 2018) (reluctantly disbarring respondent).

[61] The Committee is not proposing a sanction if the Board or the Court should conclude that Respondent's misappropriation was negligent. It assumes that, in that event, the Board or the Court will remand the matter for hearings on the remaining six counts. The recommended sanction would then reflect the Committee's and Board's evaluation of whatever other violations might be found, rather than solely on the rule violations the Committee has found at this stage.