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

In the Matter of:	:	
	:	
PABLO A. ZAMORA,	:	
	:	
Respondent.	:	Board Docket No. 21-BD-003
	:	Disc. Docket No. 2017-D142
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 998467)	:	

REPORT AND RECOMMENDATION OF THE
AD HOC HEARING COMMITTEE

Respondent Pablo Zamora is charged with violating the District of Columbia Rules of Professional Responsibility (the "Rules") in connection with his representation of an individual who faced removal from the United States. Specifically, Respondent is charged with the following Rule violations: Rules 1.3(a) (Lack of Diligence and Zeal); 1.3(b) (Intentional Prejudice); 1.4(a) and (b) (Failure to Inform and Explain); 1.15(a) (Reckless or Intentional Misappropriation, Record Keeping,); 1.15(b) (Failure to Place Client Funds in Trust Account); 1.15(e) (Safekeeping Unearned Fees); 1.16(d) (Terminating Representation); and 8.4(c) (Dishonesty, Deceit or Misrepresentation).[1]

[1] The Specification of Charges included a typographical error by referring to Rule 8.4(d) instead of Rule 8.4(c). The error was evident based on the description of the allegation ("Rule 8.4(d), in that Respondent engaged in conduct involving dishonesty, deceit or misrepresentation."). The parties confirmed their mutual

Disciplinary Counsel contends that Respondent committed all of the charged violations, knowingly gave false testimony at his hearing, and should be disbarred as a sanction for his misconduct. Respondent contends that he did not commit any of the charged violations and states through counsel that, to the extent that Disciplinary Counsel proved any Rule violations, a sanction of no more than a censure and a requirement that Respondent attend an ethics continuing legal education course should be imposed.

As set forth below, this Ad Hoc Hearing Committee (the "Hearing Committee") finds that Disciplinary Counsel has proved, by clear and convincing evidence, that Respondent violated Rules 1.3(a), 1.15(a), 1.15(b), 1.15(e), and 1.16(d). A majority of the Hearing Committee Members find that Disciplinary Counsel failed to prove that Respondent's misappropriation (in violation of Rule 1.15(a)) was reckless or intentional and thus recommend that the Board recommend to the District of Columbia Court of Appeals that the Respondent be suspended for eight months with additional conditions. The Hearing Committee Chair submits a Dissent, in which he concludes that the misappropriation was reckless and recommends that Respondent be disbarred.

This matter deals with Federal Immigration Law. In order to make the Statement of Facts as understandable as possible, the Hearing Committee discusses the specific legal issues involved in the representation and events as they occurred.

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understanding that Respondent was charged with violating Rule 8.4(c), rather than Rule 8.4(d), at the outset of the hearing. Tr. 7-8.

See FF 8-32.[2] The Hearing Committee leaves to nearly the end of its Report its discussion of significant issues arising from the engagement agreements Respondent entered into with his client that raise issues under Rules 1.15(a), 1.15(b) and 1.15(e), which are the principal areas of concern to (and disagreement among) the Hearing Committee members.

I. PROCEDURAL HISTORY

On February 3, 2021, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"). The Specification alleges Respondent violated the following Rules:

- Rule 1.3(a), by failing to represent his client with zeal and diligence within the bounds of the law;
- Rule 1.3(b), by prejudicing the client during the course of the professional relationship;
- Rule 1.4(a) and (b), by failing to keep the client informed and failing to promptly comply with reasonable requests for information, and failing to explain matters to the extent reasonably necessary to permit his client to make informed decisions regarding the representation;
- Rules 1.15(a), by failing to maintain complete financial records and recklessly or intentionally misappropriating the client's funds;

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[2] "FF" refers to the Hearing Committee's Findings of Fact.

- Rule 1.15(b) by maintaining entrusted funds at Union Bank, which is not a trust account;
- Rule 1.15(e) by failing to obtain the client's informed consent to deposit the advance legal fees in an account other than a trust account;
- Rule 1.16(d) by failing, upon termination of the representation, to take timely steps to the extent reasonably practicable to protect a client's interests, such as refunding any unearned fees; and
- Rule 8.4(d), by engaging in conduct involving dishonesty, deceit or misrepresentation.

Respondent filed an answer on April 9, 2021, requesting that the charges be dismissed. A hearing was held via Zoom on July 13-14, 2021, before the Hearing Committee. Caroll Donayre Somoza, Esquire, represented the Office of Disciplinary Counsel. Respondent was present during the hearing and was represented at the hearing by Joseph A. Compofelice, Esquire.

Prior to the hearing, Disciplinary Counsel submitted exhibits numbered DCX 1 through 27.[3] All of Disciplinary Counsel's exhibits were received into evidence over numerous objections except for DCX 11 and 23, which were withdrawn, and DCX 18, which was excluded during the hearing (Tr. 412) but subsequently admitted by order of the Hearing Committee Chair (Order of July 27,

[3] "DCX" refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to the transcript of the hearing held on July 13-14, 2021.

2021).[4] During the hearing, Disciplinary Counsel called as witnesses Respondent, his client Jose Ascencio Torres, his client's wife Teka Stiles-Ascensio, investigative attorney Azadeh Matinpour, Esquire, and expert witness Thomas Tousley, Esquire.[5]

Also prior to the hearing, Respondent submitted exhibits numbered RX 1 through 43. All of Respondent's exhibits were received into evidence without objection. Tr. 269. Respondent testified on his own behalf and called expert witness Maricela Amezola, Esquire. The parties made brief closing arguments. Tr. 573-610.

Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the Rule violations set forth in the Specification of Charges. Tr. 610; *see* Board Rule 11.11. Although invited to do so, neither party presented evidence in aggravation or mitigation of sanction.

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on August 9, 2021 ("Disciplinary Counsel's Proposed Findings"), and Respondent filed his Post-Hearing Brief, which included proposed findings of fact, conclusions of law, and a recommendation as to

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[4] Only pages marked Bates numbers 576-584 and 615-616 of DCX 19 were admitted after Disciplinary Counsel withdrew the other pages of that exhibit. Tr. 565.

[5] In this Report, we refer to Jose Ascensio Torres as "Mr. Ascensio" and Teka Stiles-Ascensio as "Ms. Stiles," because that is how they were addressed and referred to during the hearing.

sanction, on August 27, 2021. Disciplinary Counsel filed its Reply on September 3, 2021 ("Disciplinary Counsel's Reply").

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing, and these findings of fact are established by clear and convincing evidence. *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence" is more than a preponderance of the evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established") (citation and quotation marks omitted).

Except where specifically indicated, the Hearing Committee finds testimony by all of the witnesses to be generally credible and truthful. Where testimony is inconsistent or contradicted between witnesses, the Hearing Committee has taken into account the context, motivation, and supporting evidence to give appropriate weight to one witnesses' account over another's.

A. Background

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on January 7, 2011, and assigned Bar number 998467. DCX 1.

2. Presently, and at all relevant times in 2016 and 2017, Respondent practices exclusively federal immigration and naturalization law out of his office in San Diego, California. Tr. 29-30, 133 (Respondent).

3. Respondent is able to practice law in California without being a member of the California State Bar because he exclusively practices before Federal Administrative Immigration Courts before which anyone admitted to the Bar of any U.S. jurisdiction is permitted to appear. Tr. 133-34 (Respondent).

B. Respondent is Retained for the First Time to Represent Mr. Ascensio

4. Mr. Ascensio has lived in the United States for 26 years. Tr. 273 (Ascensio). On at least one occasion, Mr. Ascensio had entered the United States from Mexico without having valid entry documents and had been either removed summarily at the border or removed through Order of Deportation while in the United States. Tr. 140 (Respondent). At some time prior to the events relevant here, Mr. Ascensio had been convicted of possession of an illegal drug. Tr. 140 (Respondent). In 2005, he witnessed a robbery at a store where he then worked. Tr. 137 (Respondent).

5. In or around May 2016, Mr. Ascensio was arrested by San Diego police on a charge of stealing a bicycle. Tr. 138 (Respondent); Tr. 274 (Ascensio). He was detained in County Jail but feared he would face deportation because he was in the United States without authority and could therefore be placed in immigration detention and subsequently face removal proceedings. Tr. 274-75 (Ascensio).

6. On June 8, 2016, Respondent met with Mr. Ascensio's then-fiancée, Teka Stiles, to discuss Respondent representing Mr. Ascensio in his anticipated removal proceedings. Tr. 42-43 (Respondent); DCX 9 at 251-52.

7. Upon meeting with Ms. Stiles, Respondent determined Mr. Ascensio's best chance to avoid deportation would be for Mr. Ascensio to apply for a "U Visa" with Respondent's assistance. Tr. 134-35 (Respondent).

a. The U Visa

8. The U Visa was created by statute in 2000 to protect certain non-citizen crime survivors and encourage them to cooperate with law enforcement to investigate those crimes. Tr. 160-61 (Amezola, Expert). The U Visa allows the recipient to remain in the United States for four years. Tr. 89 (Respondent). The decision whether to grant a U Visa is within the discretion of the U.S. Citizenship and Immigration Service ("USCIS"). Only about 60 percent of U Visa applications are granted, and a history of prior illegal entries into the United States and prior criminal convictions reduce the chances for being granted a U Visa. Tr. 136-38 (Respondent). It can take up to five years for a decision on a U Visa application because there is a significant backlog and USCIS only issues 10,000 U Visas per year. Tr. 165-66 (Amezola, Expert).

9. The U Visa application process requires filing several documents. Tr. 162 (Amezola, Expert); Tr. 517 (Tousley, Expert). The first is the Form I-918 Supplement B, with an accompanying police report, certified by the appropriate law enforcement officer and explaining how the U Visa applicant was a victim of a crime and cooperated with the investigation. Tr. 162 (Amezola, Expert); Tr. 517 (Tousley, Expert). The full Form I-918 – the actual U Visa application – follows, along with the Form I-192, which is the waiver request for any factors that

would otherwise render the applicant inadmissible, such as illegal entry into the United States. Tr. 162-63 (Amezola, Expert). Finally, because there is a fee to apply for a U Visa, an applicant may file a Form I-912 requesting a waiver of the fee based on financial hardship. Tr. 162 (Amezola, Expert).

10. A completed and signed Form I-918, Form I-192, and the Form I-912 fee waiver request must be submitted together to the Vermont Service Center of USCIS. Tr. 166, 171 (Amezola, Expert); Tr. 517-18 (Tousley, Expert). If any part of this package is missing or if any of the forms are not fully completed, USCIS will reject the application and return the entire package of documents to the sender. Tr. 171, 176 (Amezola, Expert); Tr. 518-19 (Tousley, Expert).

11. Once USCIS receives the U Visa package, the agency will issue a receipt to the applicant. Tr. 179, 191 (Amezola, Expert); Tr. 519 (Tousley, Expert). On occasion, the USCIS has misplaced or lost properly filed parts of U Visa packages and failed to issue a receipt to the applicant. Tr. 177-79, 191 (Amezola, Expert). A U Visa applicant or their counsel may call USCIS to inquire about the receipt of all submitted forms. Tr. 523 (Tousley, Expert).

b. Mr. Ascensio's U Visa Petition

12. Mr. Ascensio's application for a U Visa was based on the fact that, in 2005, Mr. Ascensio had witnessed a robbery at a store where he then worked. Tr. 134-35, 137 (Respondent).

13. During their initial meeting on June 8, 2016, Respondent indicated to Ms. Stiles that he could prepare and file a U Visa application on Mr. Ascensio's behalf. Tr. 42-44 (Respondent); Tr. 424-25 (Stiles).

14. Respondent began work on Mr. Ascensio's U Visa application shortly after Ms. Stiles retained him on Mr. Ascensio's behalf. Tr. 59 (Respondent); *see* RX 12. Respondent visited Mr. Ascensio in detention in June or July 2016, and shortly after that visit, the U Visa application and related documents were finalized. *See* Tr. 213-14, 358-59, 571 (Respondent); Tr. 276-77 (Ascensio); RX 7; RX 8; RX 9. Mr. Ascensio does not recall signing these documents and believes that Ms. Stiles signed on his behalf. Tr. 294-99 (Ascensio). Respondent did not have any reason to believe the signatures on the documents were not Mr. Ascensio's until Mr. Ascensio testified at the hearing before the Hearing Committee. Tr. 571 (Respondent).

15. On July 13, 2016, Respondent mailed on Mr. Ascensio's behalf the Form I-918 application, the Form I-192 waiver request, the I-912 fee waiver request, and supporting documents to the USCIS via priority mail. Tr. 215 (Respondent); RX 10. Respondent did not retain a signed copy of those forms in his files. Tr. 83-84, 263 (Respondent). Respondent received confirmation of receipt from USCIS for the Form I-192 only. Tr. 98, 216 (Respondent); RX 12. Sometime after, he notified Ms. Stiles that he had filed the U Visa application on behalf of Mr. Ascensio. Tr. 430 (Stiles).

16. Respondent assumed that the receipt of the Form I-192 meant that the entire U Visa application was received. Tr. 99, 105-06 (Respondent). On two subsequent occasions when Respondent contacted USCIS – requesting the agency to expedite the U Visa petition and later to withdraw from this representation – USCIS did not indicate that they did not receive Mr. Ascensio's complete U Visa submission. Tr. 216 (Respondent). However, Respondent did not take affirmative steps to confirm its receipt and, as of the date of his hearing before the Hearing Committee, had not been able to confirm that the U Visa application he filed in July 2016 was received by USCIS. Tr. 107-09 (Respondent).

17. Subsequently, in connection with Respondent's second retention by Ms. Stiles (*see* FF 19-39 *infra*), the immigration court granted Respondent's request to withdraw from his representation of Mr. Ascensio, and Mr. Ascensio began representing himself. At his bond hearing, Mr. Ascensio was informed by the U.S. Department of Homeland Security[6] personnel that the Form I-192 waiver request had been filed earlier by Respondent, but that the Form I-918 U Visa application had not been filed. Tr. 287 (Ascensio). Subsequently, after Mr. Ascensio had hired a new lawyer, that lawyer informed Mr. Ascensio that the U Visa application filed by Respondent was not completed. Tr. 289-290 (Ascensio). In a February 3, 2017 email, Ms. Stiles first informed Respondent that the USCIS had no record of the U Visa application filed by him. Tr. 258, RX 38 at 361. After Mr.

[6] All of the immigration organizations mentioned in this Report are components of the U.S. Department of Homeland Security.

Tousley testified before the Hearing Committee that Mr. Ascensio's new lawyer had to file another Form I-918 U Visa application, Respondent testified that that was the first time he became aware, definitively, of the fact that his own application was not on file. Tr. 369 (Respondent).

18. Despite Mr. Ascensio's and Ms. Stiles' testimony, the Hearing Committee concludes that Disciplinary Counsel has failed to prove by clear and convincing evidence that Respondent failed to file a Form I-918 and other supporting documents with USCIS. Respondent received a receipt for the Form I-192. Respondent and expert witnesses for both Respondent and Disciplinary Counsel testified that, had the package Respondent submitted on Mr. Ascensio's behalf not contained a Form I-918, the entire package would have been returned to him and he would not have received a receipt for one document in the package. Tr. 99 (Respondent); Tr. 171 (Amezola, Expert); Tr. 518-19 (Tousley, Expert).

C. Mr. Ascensio Retains Respondent a Second Time

19. On June 24, 2016, Mr. Ascencio was released from state custody, and U.S. Immigration and Customs Enforcement ("ICE") detained him based on a prior removal order. Tr. 143, 145 (Respondent). Shortly thereafter, after hearing from Ms. Stiles but before he was officially retained for this matter, Respondent had his law clerk draft a stay of removal application and take it directly to the San Diego ICE office. Tr. 144, 146 (Respondent). Respondent also called ICE and urged an ICE officer to interview Mr. Ascensio to see whether he had a reasonable fear of

being returned to Mexico, which would prevent Mr. Ascensio's immediate deportation. Tr. 145-46 (Respondent).

20. On August 8, 2016, while Mr. Ascencio remained incarcerated by ICE, his case was separately referred to an immigration judge for a removal proceeding hearing on whether his fears of persecution and torture upon return to Mexico were sufficient to allow him to remain in the United States and avoid the removal order. Tr. 219-220 (Respondent); RX 13. This was a separate adjudication from the U Visa application that Respondent believed USCIS was considering. Tr. 61 (Respondent).

21. On or around August 16, 2016, Ms. Stiles and Respondent agreed that Respondent would represent Mr. Ascensio in his removal proceedings and to seek a bond for his release from incarceration during consideration of the removal proceeding. Tr. 61-62, 72-73 (Respondent).

22. On September 16, 2016, Respondent entered his appearance on behalf of Mr. Ascensio for the removal proceedings and his bond hearing. Tr. 227-28 (Respondent); RX 18.

a. The Removal Hearing

23. Also on September 16, 2016, Respondent filed a motion to continue the initial master calendar hearing in Mr. Ascensio's removal case, originally set for October 19, 2016. Tr. 109-110, 229 (Respondent); RX 19. Respondent stated that the basis for his extension request was that he had a calendar conflict. Tr. 109-111 (Respondent); DCX 9 at 408. The Immigration Court granted

the motion and rescheduled Mr. Ascensio's hearing for December 7, 2016, which was an acceptable date for Respondent. Tr. 111-12, 231 (Respondent); DCX 9 at 412-13.

24. Then, the Immigration Court *sua sponte* continued the master calendar removal hearing to December 28, 2016. Tr. 112-13 (Respondent). On or around December 2, 2016, Respondent filed a motion to continue the removal hearing from December 28 on the ground that Respondent would be out of state for the Christmas holiday vacation. Tr. 113 (Respondent); DCX 9 at 421-22. Respondent's motion for a continuance was granted. Tr. 113 (Respondent).

b. The Bond Hearing

25. Respondent also requested a bond hearing (more formally termed a Custody Redetermination Hearing (Tr. 235 (Respondent)) for Mr. Ascensio. Tr. 117 (Respondent); Tr. 438-39 (Stiles).

26. On December 2, 2016, the Immigration Court scheduled a bond hearing for January 4, 2017. DCX 9 at 416. Upon learning of the bond hearing date, Mr. Ascensio and Ms. Stiles indicated that they did not like the judge assigned to that bond hearing date and requested that Respondent seek to reschedule the hearing for a date at which a more favorably disposed judge might preside. Tr. 117-19 (Respondent). Mr. Ascencio confirmed that he had wanted the bond hearing to occur, but not before the judge scheduled to hear it on the date it was scheduled. Tr. 284-86, 302-03 (Ascensio); *see also* Tr. 442 (Stiles).

27. Respondent sought a continuance of the bond hearing at his client's request. Respondent did not tell that court the reason for requesting a rescheduling of the bond hearing, explaining: "You don't tell a judge, 'We don't want you to be the judge on this bond hearing.' That's not something you do." Tr. 117-19 (Respondent). Instead, Respondent moved to continue that bond hearing on the ground, among others, that Respondent "is not available that day due to a calendar conflict." DCX 9 at 417-18; *see* Tr. 113-14 (Respondent). The Immigration Court granted the motion adding in a handwritten note that "Att[orne]y to call court and reschedule hearing." DCX 9 at 436; *see* Tr. 114-15 (Respondent). On or around December 21, 2016, Respondent filed a Brief in Support of Favorable Bond Determination on behalf of Mr. Ascensio. Tr. 243-45 (Respondent); RX 29.

28. Despite the court's order instructing Respondent "to call court and reschedule hearing," Respondent did not call the court to reschedule the hearing, nor did he communicate to Ms. Stiles or Mr. Ascencio that the judge ordered Respondent to reschedule the bond hearing. Tr. 443-44 (Stiles). Respondent simply told them, in light of his forthcoming Motion to Withdraw as counsel for Mr. Ascensio, *see* FF 33-39 *infra*, that he was leaving it up to them to reschedule the hearing and did not provide them with any instructions. *See* Tr. 533-34 (Tousley, Expert); DCX 10 at 544. Mr. Ascensio's bond hearing was ultimately rescheduled to February 9, 2017, a month later than the previous date. Tr. 452 (Stiles).

29. Mr. Ascensio, with Ms. Stiles' assistance, represented himself at that hearing and was released on a bond from ICE detention on or about February 13, 2017. *See* Tr. 293-94, 303, 307 (Ascensio); DCX 26 at 792.

30. Prior to the February 9, 2017 bond hearing, Ms. Stiles received all electronic and paper files related to Respondent's representation of Mr. Ascensio, including the Brief in Support of Favorable Bond Determination filed on or around December 16, 2016. Tr. 478-79, 484 (Stiles).

31. Ms. Stiles testified that she "more than likely" had reviewed Respondent's bond submission on behalf of Mr. Ascensio prior to the February 9, 2017 bond hearing. Tr. 484 (Stiles). Respondent's bond submission was signed and dated as being submitted on December 20, 2016 (RX 29 at 179) with a proof of service also signed and dated December 20, 2016 (RX 29 at 205). The bond submission's cover page and proof of service are also file stamped as received by the Department of Justice Executive Office for Immigration Review, Immigration Court, San Diego, CA on December 21, 2016 (RX 29 at 173, 205).

32. Notwithstanding Ms. Stiles' review of the bond submission, and the signatures, dates and file stamps of the receiving immigration court, both Ms. Stiles and Mr. Ascensio testified that they were unaware that this bond submission was filed and were forced to prepare a new bond filing themselves from scratch. Tr. 307-08 (Ascensio); Tr. 484-85 (Stiles). The Hearing Committee does not find this testimony credible.

D. Respondent's Withdrawal from Representation

a. Respondent's Communications with Mr. Ascensio

33. Throughout his representation of Mr. Ascensio, from June 2016 through January 11, 2017, Respondent frequently communicated with Ms. Stiles, by phone, in person, or in an exchange of emails and texts. Tr. 244-46 (Respondent); Tr. 460-61 (Stiles); RX 37; RX 38. Respondent only met with Mr. Ascensio once, at the detention facility in June or July 2016. Tr. 276-77, 281 (Ascensio).

34. The testimony is conflicting about whether Respondent failed to communicate with Mr. Ascensio while Mr. Ascensio was detained: "I was able to reach his office [by phone], but . . . I never got an answer from anyone. It would just go into, you know, dial and pretty much get disconnected 'cause no one would, you know, get to the phone or whatever the case might've been." Tr. 281-82 (Mr. Ascensio). Respondent's office, however, had a voice mailbox that invited callers to leave a detailed message, and the voice mailbox was operational throughout his representation of Mr. Ascensio. Tr. 567-68 (Respondent). Although there was clearly some failure of communication between Respondent and Mr. Ascensio, Disciplinary Counsel has failed to prove by clear and convincing evidence that was the result of anything more than a failure of technology or a misunderstanding.

35. By agreement, Mr. Ascensio relied on Ms. Stiles to communicate with and relay information to Respondent. Tr. 76-77 (Respondent); Tr. 281-82 (Ascensio); Tr. 431-32, 440, 494 (Stiles).

b. Respondent Announces Intent to Withdraw

36. Respondent believed that Ms. Stiles and Mr. Ascensio had asked him to change the bond hearing date with an immigration judge they considered unfavorable in the hope of getting a hearing with a more favorable judge, and that acquiescing to such a request for "judge shopping" was both ethically and strategically improper. Tr. 119, 202, 237-241, 364-65 (Respondent); Tr. 183, 202-03 (Amezola, Expert); RX 38 at 333-35. Respondent was also frustrated that Ms. Stiles appeared to consult other attorneys during her visits to the detention center and used their advice to second-guess his counsel. Tr. 240 (Respondent); Tr. 474-78 (Stiles).

37. As a result, the relationship between Respondent and Ms. Stiles, and transitively Mr. Ascensio, deteriorated to the point where Respondent notified Ms. Stiles that he intended to withdraw from the representation. Tr. 474-78 (Stiles); RX 38 at 332-34. Ms. Stiles agreed, thanked Respondent for his work to date and asked for a detailed bill to account for the flat fees she had paid Respondent. Tr. 477-78 (Stiles); RX 38 at 334.

38. Mr. Ascensio signed the consent for Respondent's withdrawal on or around December 18, 2016. RX 31 at 211. Respondent subsequently moved to withdraw as counsel of record on January 3, 2017. Tr. 115-17 (Respondent); DCX 27 at 966. The motion was granted on January 11, 2017, and Respondent ceased representing Mr. Ascensio on that date. Tr. 116-17 (Respondent).

39. Following his withdrawal, Respondent provided to Ms. Stiles all of the electronic and hard copy documents in her husband's file. Tr. 478-79 (Stiles). Respondent provided Ms. Stiles with the receipt for the I-192 waiver application but could not provide Ms. Stiles with a receipt for the Form I-918 U Visa petition. Tr. 446-47 (Stiles); *see* RX 12.

c. Mr. Ascensio's Case After Respondent's Withdrawal

40. Mr. Ascensio and Ms. Stiles rescheduled the bond hearing and prepared their own bond application package. Tr. 306-08 (Ascensio); Tr. 484 (Stiles). When Mr. Ascensio appeared representing himself for his bond hearing on February 9, 2017, USCIS officials told him they had no record of Mr. Ascensio's U Visa application having been filed. Tr. 287-89 (Ascensio); Tr. 452 (Stiles). He was released on a $3,500 bond following this bond hearing. Tr. 294 (Ascensio); Tr. 485 (Stiles); DCX 26 at 792.

41. Subsequently, Mr. Ascensio paid $10,000 to retain new counsel to represent him in connection with the U Visa application. His new lawyer filed a new U Visa application that, as of the date of the hearing, is still pending. Tr. 307, 312, 314-15 (Ascensio).

E. <u>The Engagement Agreements Between Respondent and Mr. Ascensio and Ms. Stiles</u>

42. In connection with both engagements by the then-incarcerated Mr. Ascensio, Respondent presented Ms. Stiles with his attorney-client fee agreements on or around June 13, 2016 (the "U-Visa Agreement") and August 16, 2016 (the "Removal Agreement"). Tr. 48, 61-62, 221-24 (Respondent); RX 2;

DCX 5 at 220-26. Except in describing the work to be accomplished, and the amount of the fees charged, the two Agreements are the same (*compare* RX 2, *with* DCX 5 at 220-26).

43. Both Agreements contained a flat fee provision that deemed all fees earned upon receipt. Tr. 50, 222-23 (Respondent); RX 2; DCX 5 at 220-26. The Agreements also contained the following statement: "I hereby WAIVE the requirement that the flat fee, given to Pablo A. Zamora, Esq. for work to be performed on my behalf, is to be held in trust." RX 2 at 1; DCX 5 at 220. Respondent testified that, although this waiver provision refers to Rule 1.15(d), he had not changed the form of his engagement agreement since the reorganization of Rule 1.15 in 2010, which inserted a new subsection (b) and thus renumbered Rule 1.15(d) as 1.15(e). Tr. 36-37 (Respondent). He meant the waiver provision to refer to Rule 1.15(e), as it existed in 2016, instead of Rule 1.15(d). *Id*.

44. Respondent testified that he "discuss[ed] each page with [prospective clients] prior to having them initial [each page]," signaling their agreement and understanding. Tr. 210 (Respondent). Respondent also testified that he "explain[ed] when [he was] going through the retainer agreement with each client, [sic] each page to them and [he] explained what [Rule 1.15(d/e), the flat fee] provision meant to [the client]." Tr. 50 (Respondent). Respondent further testified that he explained to Ms. Stiles:

> [The] provision [relating to Rule 1.15(d/e)] meant that because this was a flat-fee attorney agreement and because the attorney fees were considered earned upon receipt or signature of the contract, that they would not be placed into a trust account. And I further advised her, as

> you can see on subsequent pages, of her right to an accounting of the money or return of any unused funds should there be a situation in which there was a necessity to return any.

Id.

45. Regarding the flat fee provision, Respondent testified that he explained to Ms. Stiles how:

> the flat fee is earned upon receipt, signature of the retainer agreement, and how a flat fee means that [Ms. Stiles] is not billed at an hourly rate. What it means is that I will do the case for the flat fee agreed upon and that [Ms. Stiles] would not be billed for anything outside of that flat fee that was included in the attorney/client agreement.

Tr. 210 (Respondent). Respondent also "informed [Ms. Stiles] . . . that [her payment] wouldn't be put into a trust account, which was why she initialed -- by her signature, kind of, after that section [of the U Visa Agreement]." *Id*.

46. Ms. Stiles, however, testified Respondent did not explain the agreement to her:

> Q. Now, Ms. Stiles, did you read this retainer agreement in its entirety when Mr. Zamora provided it to you?
>
> A. No, ma'am. We just skimmed though it.
>
> . . . .
>
> Q. Did Mr. Zamora explain any of the retainer agreement language to you?
>
> A. No, it was a very quick run through. . . .
>
> . . . .
>
> Q. What if anything did Mr. Zamora explain to you about where he would maintain the fees?

A. I don't believe we discussed where the fees would be put.

Q. Did he discuss anything about any risks or consequences of where he decided to deposit those legal fees?

A. No.

Q. Did he discuss anything about any risks of waiving your right to have that money in a trust account?

A. No.

Q. Do you know what a trust account is?

A. No.

Tr. 426-28 (Stiles).

a. The U Visa Agreement

47. The flat fee for the U Visa Agreement was $2,000, which Ms. Stiles paid with two money orders. RX 2 at 3; DCX 19 at 616; Tr. 53-54 (Respondent); Tr. 428 (Stiles). Respondent indicated to Ms. Stiles that, because it was a flat fee for his services, Respondent would not place Ms. Stiles' payment in a trust account because "the attorney fees were considered earned upon receipt or signature of the contract." Tr. 50 (Respondent). Respondent did not tell Ms. Stiles where he would hold the advance fee she had paid. Tr. 51 (Respondent); Tr. 428 (Stiles). Subsequently, on June 14, 2016, Respondent testified that he deposited the $2,000 in his personal account at Union Bank and simultaneously withdrew $500. Tr. 56-59 (Respondent); Tr. 400 (Matinpour); DCX 19 at 583, 615. The resulting balance in the Union Bank account was $1,706.36. *See* DCX 19 at 583-84. Thus, Respondent had $206.36 in other funds in his Union Bank account when he made

the deposit. Disciplinary Counsel did not establish whether these funds came from other clients or were other funds he also considered personal funds.

48. However, Respondent did indicate that this bank account was his business operating account and his was the only name on the account. Tr. 33 (Respondent); Tr. 401 (Matinpour). Funds in this account were treated as received payment by Respondent, with no need to "differentiate beyond that" regarding their source. Tr. 71 (Respondent).

49. Respondent sent an invoice to Mr. Ascensio and Ms. Stiles after he had withdrawn from representing Mr. Ascensio, which showed that, as of June 15, 2016, he had put in one hour of work in their case. Tr. 59 (Respondent); DCX 9 at 472-73. The billed value of that one hour was $250. DCX 9 at 472-73.

50. Respondent could not recall any situation in which he had charged a flat fee to a client and not gotten a waiver allowing that client's flat fee payment not to go into a trust account. Tr. 382 (Respondent). "If [Ms. Stiles] had said she would rather [her flat fee payments to Respondent] be put in a trust, then I would've requested that it would've been an hourly billing retainer." Tr. 383 (Respondent). When presented with the hypothetical scenario in which Ms. Stiles insisted that the money she paid Respondent be placed in a trust account, Respondent replied that he would have had to reassess whether he could have taken the case while charging an hourly rate. Tr. 381 (Respondent). Respondent doubted that Ms. Stiles could afford his rate of $250 per hour. Had she agreed to pay the higher rate

of $250 per hour and had he agreed to take the case, he estimated that Ms. Stiles would have had to put down a retainer of $4,000 or $5,000. Tr. 381-82.

51. There is no evidence that Respondent presented an alternative fee or billing arrangement, such as hourly billing, for the U Visa Agreement or the Removal Agreement. Neither party appears to have considered an alternative fee or billing arrangement at the time of initiating the representations in 2016. *See* Tr. 381 (Respondent).

b. The Removal Agreement

52. The Removal Agreement was nearly identical to the U Visa Agreement except that it required a payment of a flat fee of $3,800. Tr. 61-63, 66-67, 222-24 (Respondent); DCX 5 at 220-26. Respondent noted that the $3,800 flat fee for the removal proceeding representation was "a lesser amount than [he] would normally accept because of the situation Ms. Stiles was in at the time." Tr. 223-24 (Respondent). He had quoted Ms. Stiles a higher fee for the engagement, but $3,800 was all the money she could put together and he agreed to cap his fees at this amount. Tr. 224 (Respondent).

53. Like the U Visa Agreement, the Removal Agreement contained a provision whereby Ms. Stiles, on Mr. Ascensio's behalf, waived the right to have the money deposited in a trust account. DCX 5 at 220. Ms. Stiles paid Respondent with a cashier's check drawn from her credit union. Tr. 436 (Stiles); DCX 22 at 717. Respondent cashed Ms. Stiles' $3,800 payment and placed the funds into his safe. Tr. 64, 67-68 (Respondent). Ms. Stiles was not informed that her payment would be

placed, as cash, in Respondent's safe. Tr. 436 (Stiles). Respondent believed the cash was his own property, and he was not keeping it in the safe on Ms. Stiles' behalf (Tr. 64); yet, there is no evidence as to whether Respondent ever spent those funds or how they were spent, if at all.

54. Respondent has a trust account at Wells Fargo Bank, but he typically does not have any advance fees in that account. The account holds funds deposited by Respondent's clients to pay government fees in connection with applications or petitions. Tr. 31 (Respondent).

c. The Agreement to Waive Deposit in a Trust Account

55. As stated above, both the U Visa Agreement and the Removal Agreement contained a waiver provision, specifically: "I hereby WAIVE the requirement that the flat fee, given to Pablo A. Zamora, Esq. for work to be performed on my behalf, is to be held in trust." RX 2 at 1; DCX 5 at 220. Respondent testified that he did not understand that Rule 1.15(e) required him to discuss with his client the potential risks of not having their advance fees placed in a trust account:

> Q. Do you have to notify the client about any risks or consequences of not putting their money in a trust account?
>
> A. You know, I'm not entirely sure if I understand . . . rule [1.15(e)] to say that, exactly.

Tr. 46 (Respondent).

56. Respondent testified that he did not believe that there were any material risks in this case that required further explanation. Tr. 380 (Respondent).

Respondent also testified that he was not familiar with the D.C. Court of Appeals' 2009 *Mance* decision[7], which held that flat fees paid to an attorney at the outset of representation are deemed unearned and remain property of the client until earned, absent the client's informed consent to a different arrangement. Tr. 385 (Respondent); *Mance*, 980 A.2d at 1202, 1206 (citing what is now Rule 1.15(e)).

57. In light of the witnesses' divergent accounts of Respondent's explanation to Ms. Stiles of the trust account waiver provisions in the U Visa and Removal Agreements, both Respondent's and Ms. Stiles' respective credibility is challenged.

58. In the Hearing Committee's observation, Ms. Stiles' testimony on this point was colored by general animus towards Respondent, the passage of five years' time, the stresses of seeing her partner jailed and possibly deported, and the layperson's disinterest in the dryness and legalese of contracts prepared by lawyers. As evidenced throughout her testimony, Ms. Stiles was loath to give Respondent credit for any task, effort, or work product.

59. Similarly, it is not fully credible that Respondent went through the two agreements with Ms. Stiles with the detail necessary to obtain informed consent to place client funds outside of a trust account. *See* Rule 1.0(e) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the

[7] *In re Mance*, 980 A.2d 1196 (D.C. 2009).

material risks of and reasonably available alternatives to the proposed course of conduct."). His recounting of his typical review of engagement agreements appears more aspirational than actual. Indeed, by his own admission, Respondent was not familiar with this jurisdiction's controlling case law on the ownership of flat fees nor did he understand Rule 1.15(e) to require explanation of the risks of not placing client funds in a trust account until earned. Respondent testified that he did not explain "material risks . . . to the proposed course of conduct" (Rule 1.0(e)) of Ms. Stiles waiving her right to have her advanced fees deposited in a trust account. *See* Tr. 46-47, 380 (Respondent). The Hearing Committee concludes Respondent lacked the ability to obtain, and failed to obtain, informed consent from Ms. Stiles of the trust account waiver provisions.

60. Disciplinary Counsel did not establish the cause or basis for Respondent's lack of familiarity with the *Mance* decision or Rule 1.15(e)'s requirement that he explain the risks of not placing Ms. Stiles' funds in a trust account until earned.

61. Thus, the majority of the Hearing Committee finds credible that Respondent believed, albeit mistakenly, that he was fulfilling the mandates of Rule 1.15 by including appropriate waiver language in his client agreements, reviewing (somewhat) these agreements with prospective clients, and obtaining their informed consent to all terms including the trust account waiver in the form of client initials and signatures. Respondent's admission, against his own interest, that he was not familiar with this aspect of Rule 1.15 or the *In re Mance* decision, lends credibility

to his account. The majority of the Hearing Committee also finds that Respondent lacked any intention to deceive client or knowingly skirt Rule 1.15 based on his rudimentary accounting methods (*see* FF 62-65 *infra*), his utilization of the office safe, and his overall lack of a disciplinary record in ten years of practice as a member of the District of Columbia Bar.

F. Post Representation Fee Dispute

62. In response to Ms. Stiles' request for detailed billing, Respondent created a billing statement in January 2017 detailing work done since June 2016 on both the U Visa representation and the removal representation. Tr. 57-60 (Respondent); Tr. 479-481 (Stiles); RX 39; RX 40.

63. Respondent did not keep contemporaneous time records for his work on behalf of Mr. Ascensio. Tr. 38-39 (Respondent). When asked for a statement of time spent on this matter, Respondent reviewed the file and his notes and then, based on his experience, assigned an amount of time to each task or activity. Tr. 39-40, 58-60 (Respondent). Respondent also consulted Google or Yahoo maps to find distances travelled and assign time spent on travel. Tr. 383-84 (Respondent).

64. Based on his reconstruction of the bill from his notes, Respondent prepared billing statements indicating that he had spent 12.3 hours working on Mr. Ascensio's U Visa application and 15.8 hours working on the removal and bond proceedings. RX 39; RX 40. Respondent believes that the billing statements omit several hours that he spent working on the representations, including

his meeting with Mr. Ascensio at the detention center. Tr. 266 (Respondent); *see also* RX 39; RX 40; Tr. 59 (Respondent). At that time, Ms. Stiles did not challenge Respondent's time entries or ask Respondent to refund any portion of the flat fees she paid. Tr. 267 (Respondent); Tr. 480-81 (Stiles).

65. Respondent's expert testified that the time billed by Respondent working on both the U Visa application and the removal and bond proceedings was reasonable, and that it was likely that the time Respondent spent working on the U Visa application was greater than what he recorded. Tr. 187-88 (Amezola, Expert). Disciplinary Counsel's expert did not address the reasonableness of time billed by Respondent, and based on all of the testimony and exhibits, Disciplinary Counsel's contention that Respondent did no work on either representation has been disproved in its entirety. *See* FF 15-16, 18, 30-31 *supra*. Consequently, the Hearing Committee finds that Respondent has earned most – *but not all* – of the flat fees paid by Ms. Stiles for Mr. Ascensio's U Visa application and for the removal and bond proceedings. The precise amounts are discussed in Section III.H *infra*.

66. Respondent testified that, despite believing the advance fee paid was immediately earned, his retainer agreement provided for a return of funds and Respondent would have been prepared to return funds that, per his billing record, were any not earned at the conclusion of a representation. Tr. 71-72 (Respondent). However, he did not recall ever having the "necessity" to issue refunds. Tr. 72 (Respondent).

67. Ms. Stiles later sought a refund for both the U Visa and removal matters and filed for fee arbitration in the District of Columbia. Tr. 481-82, 496-97 (Stiles). She and Mr. Ascensio believed they were owed a refund because Mr. Ascensio had to hire and pay $10,000 for new counsel to re-file the U Visa application and because Respondent did not appear in the removal proceedings. Tr. 496-97 (Stiles); Tr. 304-05, 307 (Ascensio). Ms. Stiles' arbitration claim was not denied, but she was told that she had not exhausted all avenues of relief. Tr. 481-82 (Stiles).

68. In or around March 2017, Mr. Ascensio hired new counsel to represent him and file a new U Visa application. He paid the new lawyer $10,000. Tr. 306-07 (Ascensio); Tr. 490-91 (Stiles). A new U Visa application was filed on Mr. Ascensio's behalf in October 2017, about seven months after he retained new counsel. Tr. 313 (Ascensio); DCX 27 at 809-820.

69. Mr. Ascensio and Ms. Stiles filed a complaint against Respondent with the California State Bar on April 10, 2017, alleging that he had not done anything to help Mr. Ascensio during the course of both representations. Tr. 78-79 (Respondent); DCX 5. Their complaint was referred to the District of Columbia Bar because Respondent is not a member of the California State Bar. DCX 5 at 206.

70. Presently, Mr. Ascensio lives in San Diego and his U Visa application remains pending. Tr. 273, 312 (Ascensio).

III. CONCLUSIONS OF LAW

At the conclusion of the two-day hearing in this matter, Disciplinary Counsel and Respondent's Counsel provided brief closing arguments that they further elaborated upon in their briefs. Disciplinary Counsel contended that Respondent breached all of the Rules alleged in the Specification of Charges, and recommended a sanction of disbarment. Tr. 573-586.

Respondent's Counsel contended that Disciplinary Counsel had failed to prove with clear and convincing evidence that Respondent had violated any of the Rules as alleged. Respondent's Counsel referred to expert testimony during the hearing indicating that Respondent must have filed the Form I-918 with the Form I-192 or the whole package would have been returned and Respondent would not have received a receipt for just one of the documents. Respondent's Counsel also argued that Mr. Ascensio suffered no harm from Respondent's actions because he was able to obtain release on bond soon after Respondent withdrew from representing him and Mr. Ascensio's new counsel waited a number of months to file a new Form I-918. Tr. 586-608.

After considering the evidence, documents, and testimony before it, and reviewing the briefs from both sides, the Hearing Committee concludes that Disciplinary Counsel has proven by clear and convincing evidence that Respondent has violated Rules 1.3(a), 1.15(a), 1.15(b), 1.15(e), and 1.16(d) and that Disciplinary Counsel has failed to prove by clear and convincing evidence that Respondent has violated Rules 1.3(b), 1.4(a), 1.4(b) and 8.4(c).

A. Disciplinary Counsel Proved by Clear and Convincing Evidence that Respondent Violated Rule 1.3(a) by Failing to Represent his Client with Diligence and Zeal.

Disciplinary Counsel argues that Respondent violated Rule 1.3(a) in two instances: first, that Respondent failed to ensure that the U-Visa application, Form I-918, was received by the USCIS, and second, that Respondent failed to follow through with the immigration judge's request to obtain a new bond hearing for the Mr. Ascensio. Disciplinary Counsel's Proposed Findings at 14. The Hearing Committee concludes Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent did not file a U Visa application (Form I-918) on Mr. Ascensio's behalf. The Hearing Committee concludes, however, that Disciplinary Counsel has proven by clear and convincing evidence that Respondent failed to take reasonable efforts to refile a complete U Visa application package on Mr. Ascensio's behalf, once it became clear that there was some question whether all portions of the application package he had mailed earlier were being processed. The Hearing Committee also concludes that Disciplinary Counsel has failed to prove by clear and convincing evidence that Respondent violated Rule 1.3(a) by his failure to schedule a new bond hearing in light of Respondent's forthcoming Motion to Withdraw.

Rule 1.3(a) states that an attorney "shall represent a client zealously and diligently within the bounds of the law." "Neglect has been defined as indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re*

Wright, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc) ("*Reback II*")).

> This duty requires the lawyer to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client.

Id. at 1254-55 (quoting Rule 1.3(a), cmt. [1]). Rule 1.3(a) "does not require proof of intent, but only that the attorney has not taken action necessary to further the client's interests, whether or not legal prejudice arises from such inaction." *In re Bradley*, Board Docket No. 10-BD-073, at 17 (BPR July 31, 2012), *recommendation adopted in relevant part*, 70 A.3d 1189, 1191 (D.C. 2013) (per curiam); *see also In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report) (Rule 1.3(a) violated even where "[t]he failure to take action for a significant time to further a client's cause . . . [does] not [result in] prejudice to the client"). The Court has found neglect in violation of Rule 1.3(a) where an attorney persistently and repeatedly failed to fulfill duties owed to the client over a time period. *See, e.g.*, *In re Ukwu*, 926 A.2d 1106, 1135 (D.C. 2007) (appended Board Report) (respondent violated Rule 1.3(a) when he repeatedly failed to inform his clients about the status of their cases, prepare his clients for hearings and interviews with immigration officials, or prepare himself for court appearances); *Wright*, 702 A.2d at 1255 (appended Board Report) (respondent violated Rule 1.3(a) by failing to respond to discovery requests, a motion to compel, and a show cause order); *In re Chapman*,

Bar Docket No. 055-02, at 19-20 (BPR July 30, 2007) (respondent violated Rule 1.3(a) where he did virtually no work on the client's case during the eight-month term of the representation, failed to conduct any discovery, and did not respond to discovery requests from the opposing party), *recommendation adopted*, 962 A.2d 922, 923-24 (D.C. 2009) (per curiam).

In this case, after receiving a receipt for the Form I-192 but not for the Form I-918 (which had been mailed together), Respondent took no immediate actions to determine the whereabouts of the Form I-918. FF 16. As his own expert testified, after receiving no receipt for the Form I-918 for 60-120 days, Respondent should have assumed the Form I-918 was lost and resubmitted the whole package. *See* FF 18; Tr. 194-95 (Amezola, Expert). While Respondent did contact the Office of the Principal Legal Advisor ("OPLA") and ask that the processing of the U Visa application be expedited (FF 16; Tr. 369-370 (Respondent)), Respondent failed to take the apparently simple step of resubmitting the full set of documents, including the Form I-918. Respondent's expert testified that, nonetheless, Respondent acted within the "standard of care for an Immigration lawyer in his preparation and filing of Mr. Ascencio's U Visa application and the related documents." Tr. 181 (Amezola, Expert). This conclusion, however, appears to conflict with that expert's own recommendation as to the actions Respondent should have taken in this case. On the other hand, Disciplinary Counsel's expert testified that Respondent's actions fell below the standard of care. He explained that: "By not following up on whether the I-918 was filed, he jeopardized having his client removed from the United

States." Tr. 539-542 (Tousley, Expert). That testimony is consistent with the actions both experts recommended Respondent should have taken. The Hearing Committee concludes the failure to take the action of refiling the U Visa Application materials once he did not receive a receipt for the entire package and thus it appeared some of the forms may have been lost, as recommended by Respondent's own expert, violated the appropriate standard of care and constitutes a violation of Rule 1.3(a).

By the time the Immigration Court had instructed Respondent to contact the court to reschedule Mr. Ascensio's bond hearing, Respondent was in the process of filing a Motion to Withdraw as counsel for Mr. Ascensio. FF 27-28; Tr. 115-18 (Respondent). Respondent did inform Ms. Stiles and Mr. Ascensio that they needed to reschedule the bond hearing themselves, without disclosing to them that the court had instructed Respondent to do so. Tr. 115-18. The fact that Mr. Ascensio was able to schedule a successful bond hearing a month later is informative but not controlling since the presence or absence of legal prejudice to the client is irrelevant to finding a Rule 1.3(a) violation. *See Bradley*, Board Docket No. 10-BD-073, at 17. Therefore, the Hearing Committee concludes Disciplinary Counsel has failed to prove a violation of Rule 1.3(a) in this regard.

B. Disciplinary Counsel Did Not Prove that Respondent Violated Rule 1.3(b)(2) by Intentionally Prejudicing his Client.

Disciplinary Counsel asserts the same set of facts set out above in support of finding a violation of Rule 1.3(b)(2). Disciplinary Counsel argues that Respondent's failure to ascertain the circumstances regarding the missing Form I-918 was intentional. Disciplinary Counsel also asserts that Respondent's failure to contact

the Immigration Court to schedule a new date for the bond hearing "constituted intentional prejudice to" Mr. Ascensio. Disciplinary Counsel's Proposed Findings at 15-18. The Hearing Committee does not agree.

Rule 1.3(b)(2) provides that "[a] lawyer shall not intentionally . . . prejudice or damage a client during the course of the professional relationship."[8] "Proof of actual intent to harm . . . is not necessary to establish a violation of Rule 1.3(b)(2); but [Disciplinary] Counsel must establish that the attorney 'knowingly created a grave risk' that the client would be financially harmed and understood that financial damage was 'substantially certain to follow from his conduct.'" *In re Wright*, Bar Docket Nos. 377-99 *et al.*, at 24-25 (BPR Apr. 14, 2004) (quoting *In re Robertson*, 612 A.2d 1236, 1250 (D.C. 1992) (appended Board Report)), *recommendation adopted*, 885 A.2d 315, 316 (D.C. 2005) (per curiam). A violation of Rule 1.3(b)(2) cannot be sustained "unless there is actual prejudice or damage to the client." *In re Cohen*, 847 A.2d 1162, 1165 n.1 (D.C. 2004); *see, e.g.*, *Robertson*, 612 A.2d at 1250

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[8] We note that the Specification of Charges appeared to allege a violation of Rule 1.3(b)(2) only, as it alleged that Respondent violated "Rule 1.3(b), in that Respondent prejudiced the client during the course of the professional relationship." This tracks the language of Rule 1.3(b)(2): "A lawyer shall not intentionally . . . [p]rejudice or damage a client during the course of the professional relationship." Disciplinary Counsel's post-hearing brief references Rule 1.3(b)(1) (intentional failure to seek a client's lawful objectives), as well as 1.3(b)(2), though its heading and analysis focuses on the latter. Respondent's Post-Hearing Brief track Disciplinary Counsel's analysis and do not claim any surprise by Disciplinary Counsel's reference to Rule 1.3(b)(1). Because Disciplinary Counsel did not directly argue that Respondent violated Rule 1.3(b)(1), we do not consider that possible argument.

(appended Board Report) (finding intentional damage to a client where the respondent failed to file a client's tax returns before the deadline, thus forfeiting the client's requests for tax refunds).

Here, Respondent's failure to take all appropriate actions to ascertain the whereabouts of the Form I-918 and to file a new set of documents to apply for the U Visa for Mr. Ascensio caused harm to Mr. Ascensio and Ms. Stiles because they had to pay $10,000 to hire a new lawyer to file a new, complete U Visa application. FF 68. Relying on his judgment, Respondent took some steps to determine the status of the U Visa application, but he failed to take adequate steps, including refiling the U Visa package, that would have allowed Mr. Ascensio and Ms. Stiles to avoid the cost of refiling (*see* discussion of Rule 1.3(a) *supra*). Disciplinary Counsel has argued that these actions, however, were intentional. Disciplinary Counsel's Proposed Findings at 15-16. Upon review of the entire record, the Hearing Committee does not agree that Respondent acted intentionally, nor does it find that he knowingly created a grave risk.

Additionally, according to his expert's testimony, Respondent's actions in failing to schedule a new date for a bond hearing while he was in the process of filing a Motion to Withdraw were reasonable. *See* Tr. 200-01 (Amezola, Expert). The steps Respondent did take regarding the bond hearing did not cause a grave risk to Mr. Ascensio. Recognizing that even 30 more days of incarceration is significant, Mr. Ascensio was able, a month later, to obtain release on bond, and there is no evidence in the record that had Respondent requested a new hearing date, in front of

a different judge, that would have occurred any sooner. *See* FF 28-29; Tr. 563 (Tousley, Expert).

C. Disciplinary Counsel Did Not Prove that Respondent Violated Rules 1.4(a) and (b) by Failing to Communicate with his Client.

Disciplinary Counsel based the charged violations of Rules 1.4(a) and (b) on Mr. Ascensio's testimony that he attempted to contact Respondent while he was incarcerated but was never able to reach him because his calls never went through. Additionally, Respondent took no steps to speak directly with his client when Respondent and Ms. Stiles developed a conflict. Disciplinary Counsel further alleges that Respondent failed to inform Mr. Ascensio that the court had requested Respondent to schedule a new date for a bond hearing; instead, Respondent simply told Mr. Ascensio and Ms. Stiles that it was their responsibility to obtain a new hearing date. Disciplinary Counsel's Proposed Findings at 19.

Rule 1.4(a) provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Under Rule 1.4(a), an attorney must not only respond to client inquiries, but must also initiate contact to provide information when needed. *See, e.g.*, *In re Robbins*, 192 A.3d 558, 564-65 (D.C. 2018) (per curiam); *In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998). The purpose of this Rule is to enable clients to "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Rule 1.4, cmt. [1]. In determining whether Disciplinary Counsel has established a violation of Rules 1.4(a) and (b), the question is whether Respondent fulfilled his client's reasonable expectations for

information. *See In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001) (quoting Rule 1.4, cmt. [3]). Attorneys are obligated to respond to client requests for information even when there are no new developments to report. *See In re Lattimer*, 223 A.3d 437, 442-43 (D.C. 2020) (per curiam). In addition to responding to client inquiries, a lawyer must initiate communications when necessary. *See In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (citing Rule 1.4, cmt. [1]).

Similarly, Rule 1.4(b) states than an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This Rule provides that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." Rule 1.4, cmt. [2]. The Rule places the burden on the attorney to "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." *Id*.

Disciplinary Counsel has failed to prove by clear and convincing evidence that Respondent violated Rules 1.4(a) and (b). There is a clear conflict in testimony regarding Mr. Ascensio's efforts to speak by telephone with Respondent. Mr. Ascensio testified his calls were never answered while Respondent testified he had a voice mailbox to record calls, and he never received a message on that system showing Mr. Ascensio had tried to call him. FF 34; Tr. 281-82, 301 (Ascensio); Tr. 567-68 (Respondent). Both witnesses were credible. In a circumstance where Disciplinary Counsel has the burden of proof by clear and convincing evidence, a

direct conflict in credible testimony, without more, is insufficient to meet that burden.

While it may have been preferable for Respondent to speak with Mr. Ascensio directly before moving to withdraw as counsel, the parties' practice up until that time had been that Ms. Stiles spoke for Mr. Ascensio. FF 35; *see also* Tr. 244-46 (Respondent); Tr. 460-61 (Stiles). Ms. Stiles agreed to Respondent's Motion to Withdraw, and, given their typical method of communication, Respondent had no reason to believe that Mr. Ascensio's position would be different from Ms. Stiles', especially given that Mr. Ascensio signed the Motion to Withdraw himself. FF 37-38. Finally, although Respondent failed to inform his client that the court had ordered Respondent, as counsel of record, to schedule a new date for a bond hearing (FF 28), there was little or no practical effect arising from Respondent informing Mr. Ascensio and Ms. Stiles that it was their responsibility to arrange a new hearing date, which they were able to do. FF 28-29.

D. Disciplinary Counsel Proved that Respondent Violated Rule 1.15(e) by Failing to Keep Advance Fees in Trust Without Informed Consent.

The Specification raises a number of different, but related allegations that Respondent violated various components of Rule 1.15. In summary, Disciplinary Counsel notes that Ms. Stiles, on Mr. Ascensio's behalf, made advance payments of $2,000 and $3,800 as flat fees for the U Visa application and the removal action, respectively. Respondent takes the position that immediately upon payment, those funds were no longer client funds but had become Respondent's funds to do with as

he wished.[9] Respondent justifies this action by pointing to Ms. Stiles' consent (on Mr. Ascensio's behalf) to not have the advance, flat fee payments deposited in a trust account. Disciplinary Counsel contends that consent was not "informed consent." In addition, Disciplinary Counsel contends that Respondent did not maintain adequate records to account for his application of client funds.

Rule 1.15(e) provides that "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement." The Court has held that "when an attorney receives payment of a flat fee at the outset of a representation, the payment is an 'advance[ ] of unearned fees'" and must be held as property of the client pursuant to Rule 1.15(e). *Mance*, 980 A.2d at 1202

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[9] Disciplinary Counsel contends that, as a result, Respondent "commingled" client funds received from Mr. Ascensio and Ms. Stiles with his personal funds by failing to place the client funds he received in a trust account, but rather placing them in a personal bank account that also held his own funds. The Specification of Charges does not allege that Respondent engaged in commingling in violation of Rule 1.15(a) ("A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. . . ."). Rather, Disciplinary Counsel's allegation of commingling is limited to the context of its argument that Respondent's misappropriation was reckless or intentional. We do not consider Disciplinary Counsel's commingling argument because (1) Respondent lacked sufficient notice of that charge and did not defend against it, and (2) in any event, Disciplinary Counsel did not prove that the existing funds in the Union Bank account originated from clients' fee payments or were otherwise Respondent's private property. *See* FF 47; *In re Smith*, 403 A.2d 296, 300 (D.C. 1979) ("[A]n attorney can be sanctioned only for those disciplinary violations enumerated in formal charges.").

(alteration in original). Thus, the Rule 1.15(e) exception to Rule 1.15 cannot apply in the absence of "informed consent."

Respondent contends that Ms. Stiles gave informed consent when she waived the requirement for him to hold her fees in a trust account and permitted him to treat those payments as his own property upon receipt. Disciplinary Counsel, however, has proved with clear and convincing evidence that whatever consent Ms. Stiles gave was not "informed" and, therefore, was inadequate to permit Respondent to ignore the trust account requirements of Rule 1.15.

"'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and *explanation about the material risks* of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e) (emphasis added). For a client to give informed consent in this context, the attorney must explain that an alternative to that arrangement is for the attorney to hold advance fees in trust until earned. *See Mance*, 980 A.2d at 1207 ("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.").

Citing *In re Sather*, 3 P.3d 403, 413 (Colo. 2000) (en banc), the Court held that an:

> [A]ttorney 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 agreement 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), hold the flat fee in escrow until it is earned by the lawyer's provision of legal services.

Mance, 980 A.2d at 1206-07.

These requirements were explained in a Legal Ethics Committee Opinion released in June 2010, shortly after the decision in *Mance* was issued. D.C. Bar Ethics Opinion 355 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 further provides that the "lawyer must explain that, in contrast to a trust account, funds 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*." *Id.* The Ethics Opinion 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."[10] *Id.* (internal quotation marks omitted).

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[10] *See also* D.C. Code provision 7-1305.06a(a), which defines informed consent in a medical service context, and requires the service provider, "[i]n seeking informed

Although Respondent testified he went through the engagement agreement "page by page" and explained its meaning to Ms. Stiles, that testimony is contradicted by Ms. Stiles' testimony that she did not understand what a trust account is or its benefits to her. FF 44-46. As noted in FF 55-59, the truth lies somewhere in the middle; however, it is clear to the Hearing Committee that Respondent's actions fell short of those necessary to elicit informed consent under Rule 1.15.

Furthermore, one of the clear purposes of holding client funds in a trust account is to avoid loss of those funds to a creditor of the lawyer. In this case, there was also a risk of the funds simply disappearing without a proper accounting when they were held as cash in Respondent's safe. FF 53. It is clear from the testimony that Respondent did not disclose those risks to Ms. Stiles since he testified he did not understand the Rules of Professional Conduct to require such disclosure. FF 55-56. In fact, he testified he did not believe there was any risk to Ms. Stiles of her consenting to not placing her prepaid fees in Respondent's trust account, which, as explained above, was incorrect. FF 56. Therefore, it is apparent that Respondent failed to inform Ms. Stiles of the implications of her consent or the risks she was taking by her agreement. Accordingly, her consent cannot be viewed as "informed

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consent . . . shall present the person [from whom consent is requested] with available options and all material information necessary to make the decision, including information about . . . potential benefits and risks of the proposed service . . . ." This provision suggests that the strict requirements of informed consent are not limited to the field of legal ethics.

consent" and the provision of Rule 1.15(e) did not permit Respondent to fail to protect Ms. Stiles' two advance fee payments by placing them in his non-trust account.

E. Disciplinary Counsel Proved that Respondent Violated Rule 1.15(b) by Failing to Deposit his Client's Funds in a Trust Account.

Disciplinary Counsel contends that Respondent accepted $2,000 from Ms. Stiles as an advance payment for the U Visa matter, in the form of two money orders. He cashed those money orders and deposited the proceeds in his personal account at Union Bank. Respondent also received a check for $3,800 from Ms. Stiles as an advance payment for work on the removal matter. Respondent cashed that check and placed the cash proceeds in his office safe. In neither case did Respondent inform Ms. Stiles how he would handle her payments, and in neither case did he place the funds in his trust account at Wells Fargo Bank.

Under Rule 1.15(a), "[f]unds of clients or third persons that are in the lawyer's possession" are denoted as "trust funds." Rule 1.15(b) requires that all trust funds be deposited with an "approved depository" as defined by the Rules Governing the D.C. Bar. *See* D.C. Bar R. XI, § 20. Under Rule 1.15(e), discussed above, a client may waive this requirement by providing informed consent to a different arrangement.

As shown in the discussion of Rule 1.15(e) above, Disciplinary Counsel has proved by clear and convincing evidence that Ms. Stiles did not provide informed consent to maintain the advance fees she paid Respondent outside of a trust account. Accordingly, Disciplinary Counsel has proved by clear and convincing evidence that

Respondent violated Rule 1.15(b) by failing to deposit his client's advance payment funds in his trust account.

F. Disciplinary Counsel Failed to Prove that Respondent Violated Rule 1.15(a) by Engaging in Reckless or Intentional Misappropriation.

a. Respondent Misappropriated Funds Belonging to Mr. Ascensio and Ms. Stiles for the U Visa Application.

As discussed above, Disciplinary Counsel has proved clearly and convincingly that Ms. Stiles, on Mr. Ascencio's behalf, made two advance payments to Respondent for the U Visa and the removal matter. FF 47, 52. Disciplinary Counsel has also established clearly and convincingly that, although Ms. Stiles initialed a statement in the two engagement agreements she had with Respondent that indicated she waived the requirement that these payments be placed in a trust account, her consent thereto was not "informed," and therefore was insufficient to invoke the Rule 1.15(e) exception. *See* Section III.D *supra*. Further, Disciplinary Counsel has established clearly and convincingly that Respondent failed to deposit the funds received from Ms. Stiles in his trust account. Instead, he deposited $2,000 in his personal bank account and converted Ms. Stiles' $3,800 check into cash and left it in his safe. FF 47, 53. Finally, Disciplinary Counsel has proved that Respondent withdrew $500 from his personal checking account immediately after depositing the $2,000 in money orders from Ms. Stiles, leaving a balance of $1,706.36 in his Union Bank account. FF 47; DCX 19 at 615. The billing statement provided to Mr. Ascensio and Ms. Stiles showed that, on the day after he made the withdrawal, Respondent had provided one hour of billable work for the U Visa

application, at a value of $250. FF 49; Tr. 59 (Respondent); DCX 9 at 472-473. Thus, even assuming Respondent was only required to hold $1,750 in trust for his client, when he withdrew $500, the balance in Respondent's account fell below that amount.

Rule 1.15(a) prohibits misappropriation of entrusted funds. Misappropriation is "any unauthorized use of [a] client's funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not [the lawyer] derives any personal gain or benefit therefrom." *In re Nave*, 197 A.3d 511, 514 (D.C. 2018) (per curiam) (quoting *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (alterations in original) (internal quotation marks omitted)).

The three elements of misappropriation are (1) that client funds were entrusted to the attorney; (2) that the attorney used those funds for the attorney's own purposes; and (3) that such use was unauthorized. *In re Harris-Lindsey*, 242 A.3d 613, 620 (D.C. 2020) (citing *In re Travers*, 764 A.2d 242, 250 (D.C. 2000)). Funds are "entrusted" when the lawyer is "imbued with authority to prevent their unauthorized use." *Id.* at 625-26 (applying holding prospectively); *see Anderson*, 778 A.2d at 335; *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983).

Misappropriation is essentially a *per se* offense and does not require proof of improper intent. *See Anderson*, 778 A.2d at 335. Thus, an attorney commits "unauthorized use" when either "the client did not consent to the attorney's use of the funds" or "the funds or assets were accessed without required advance approval

by a court," where required. *Harris-Lindsey*, 242 A.3d at 624-26 (applying holding regarding court approval prospectively). It occurs where "the balance in [the 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) (first alteration in original,) (internal quotation marks and citations omitted). Thus, "when the balance in [a] [r]espondent's . . . account dip[s] below the amount owed" to the respondent's client or clients, misappropriation has occurred. *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Pels*, 653 A.2d 388, 394 (D.C. 1995)). This is the case even when the attorney has sufficient cash on hand in other accounts to cover the shortage. *See Pels*, 653 A.2d at 394.

In light of the evidence discussed above, Disciplinary Counsel has proved by clear and convincing evidence that Respondent misappropriated from the $2,000 advance payment by Ms. Stiles for the U Visa application in violation of Rule 1.15(a) by using an unearned portion of it for his own purposes before it was earned. There appears to be no records about how and when Respondent spent the cash he put in his safe from the $3,800 check he received from Ms. Stiles. Thus, Disciplinary Counsel has been unable to prove, either way, whether the advance fee paid for the removal proceeding representation was misappropriated.

b. The Misappropriation was Negligent, Not Reckless or Intentional

Having found that misappropriation occurred, the majority of the Hearing Committee next finds that the misappropriation occurred solely due to the Respondent's negligence – specifically his mistaken understanding of what

constituted informed consent necessary to effect a trust account waiver for an advance fee payment pursuant to *In re Mance*.

Where Disciplinary Counsel establishes the first element of misappropriation (unauthorized use) but fails to establish that the misappropriation was intentional or reckless, "'then [Disciplinary] Counsel proved no more than simple negligence.'" *Anderson*, 778 A.2d at 338 (quoting *In re Ray*, 675 A.2d 1381, 1388 (D.C. 1996)). The District of Columbia Court of Appeals has defined negligent misappropriation as:

> [A]n attorney's non-intentional, non-deliberate, non-reckless misuse of entrusted funds or an attorney's non-intentional, non-deliberate, non-reckless failure to retain the proper balance of entrusted funds. Its hallmarks include a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded.

In re Abbey, 169 A.3d 865, 872 (D.C. 2017); *see also Anderson*, 778 A.2d at 339 (providing that negligent misappropriation occurs where "the unauthorized use was inadvertent or the result of simple negligence"). The Court recognized a "special form of misappropriation [may exist] based on a lawyer's good faith, negligent mistake of established law" that "careful analysis of a known legal doctrine would have revealed." *In re Haar*, 698 A.2d 412, 421-22, 424 (D.C. 1997) (finding a 30-day suspension warranted where an attorney mistakenly withdrew from a trust account $4,000 to which he believed he was entitled before the client manifested unequivocal agreement).

By contrast, intentional misappropriation most obviously occurs where an attorney takes a client's funds for the attorney's personal use. *Anderson*, 778 A.2d at 339 (intentional misappropriation occurs where an attorney handles entrusted funds in a way "that reveals . . . an intent to treat the funds as the attorney's own"). Similarly, reckless misappropriation

> reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds, and its hallmarks include: the indiscriminate commingling of entrusted and personal funds; a complete failure to track settlement proceeds; the total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition; the indiscriminate movement of monies between accounts; and finally the disregard of inquiries concerning the status of funds.

Ahaghotu, 75 A.3d at 256 (alteration in original) (internal quotation marks and citation omitted); *see also Anderson*, 778 A.2d at 339 ("[R]ecklessness is a state of mind in which a person does not care about the consequences of his or her action." (internal citation and quotation marks omitted)). Further, "'[r]eckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person.'" *Anderson*, 778 A.2d at 339 (quoting 57 Am. Jur. 2d *Negligence* § 302 (1989)).

An objective standard is applied in determining whether a respondent's misappropriation was negligent versus reckless. *See In re Gray*, 224 A.3d 1222, 1232 (D.C. 2020) (per curiam); *see also In re Delsordo*, 241 A.3d 305, 307-08 (D.C. 2020) (finding non-negligent misappropriation, and thus substantially different

discipline in reciprocal matter, where the respondent did not reconcile trust account and made some deposits into the wrong account, and despite a finding that "no money was actually missing according to the firm's records," and despite claims that he "had earned and was owed the money," and that he "did calculations in his head and knew how much he was entitled to receive" (internal quotation marks omitted)). Extensive commingling and a poor system of record keeping that result in misappropriation are not, in themselves, sufficient to support a finding of recklessness. *See In re Dailey*, 230 A.3d 902, 912 (D.C. 2020) (per curiam) (noting the absence of a "flagrant disregard for third-party or client funds" that might support a finding of recklessness).

By the Court's past rulings, Respondent's understanding of what constituted informed consent to waiving placement of advance fees in a trust account and his subsequent entitlement to these funds as "immediately earned," FF 66, falls squarely within a good faith but incorrect grasp of Rule 1.15. Respondent testified to his then-understanding of Rule 1.15, admitting his lack of familiarity with *In re Mance* regarding what comprised informed consent in the trust account waiver scenario. FF 56; DCX 9 at 255-56, 295-96. He then admitted against his own interest (essentially conceding he could not have obtained the requisite informed consent) that he did not believe there to be any risks worth outlining to Ms. Stiles. Respondent mistakenly believed he had disclosed everything there was to disclose.

The Hearing Committee takes care to note that the concept of "informed consent" is long standing and universal, long predating the *Mance* decision. *See,*

e.g., Rule 1.0(e). Respondent was well aware of the existence of informed consent and his need to obtain it for the trust account waiver provision. Indeed, had Respondent professed a complete lack of knowledge of this basic principle of the attorney-client relationship, the Hearing Committee majority's calculus would shift heavily toward recklessness. Here, Respondent was simply unaware of *Mance*'s articulation of the disclosures necessary to obtain informed consent to treat advance flat fees as his own property.

The Court of Appeals' recent decision in *In re Haar*, No. 19-BG-554 (D.C. Feb. 24, 2022) ("*Haar III*") further supports the majority's finding that Respondent acted negligently. *Haar III* involved an immigration attorney who, like Respondent, did not deposit his client's flat fee in a trust account due to his lack of full understanding of the *Mance* decision or the application of Rule 1.15(e). *Haar III* at 18-19. Similarly, the respondent in *Haar III* "did not take active steps to stay updated on the field of legal ethics," a lapse the Court called "lamentable" but not "automatically render[ing] him 'consciously indifferent' with respect to *any* violation of the Rules of Professional Conduct, regardless of context." *Id.* at 21 (emphasis in original). The Court further noted that the respondent's immigration matters did not typically involve large fees and were resolved quickly, "and thus his cases were not often pending for very long." *Id*. Such client turnover "may have [given] little reason to consider *Mance*'s application to unearned flat fees." *Id*.

The Court in *Haar III* went on to find a lack of "reckless misappropriation 'hallmarks'" despite the respondent's clear commingling of client funds. *Id*. at 22

(citing *Anderson*, 778 A.2d at 338). There, as here, Disciplinary Counsel did not prove the respondent's "complete failure to track settlement proceeds" or frequent overdrafts. *Id*. at 23 (citing *Anderson*, 778 A. 2d at 338). Nor was there any proof that the respondent ignored client inquiries about funds or "indiscriminately moved money between accounts." *Id*. Indeed, the circumstances and analysis of *Haar III* make clear that additional proof of Respondent's conscious indifference to the consequences of his behavior—here, his failure to meet every requirement of informed consent—are necessary to find his misappropriation reckless. Such proof has not been presented here.

G. Disciplinary Counsel Proved that Respondent Violated Rule 1.15(a) by Failing to Keep Complete Records of Entrusted Funds.

Disciplinary Counsel contends that Respondent failed to maintain records sufficient to show the manner by which the funds paid to Respondent by Mr. Ascensio and Ms. Stiles were handled.

Rule 1.15(a) requires lawyers to keep "[c]omplete records of . . . account funds and other property" and preserve them "for a period of five years after termination of the representation." *See In re Edwards*, 990 A.2d 501, 522 (D.C. 2010) (appended Board Report). The *Edwards* decision explained that "[f]inancial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" 990 A.2d at 522 (appended Board Report) (alteration in original) (quoting *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (per curiam) (finding Rule 1.15(a) and D.C. Bar R. XI, § 19(f) violations)). The purpose of the requirement of "complete records is so that 'the documentary

record itself tells the full story of how the attorney handled client or third-party funds' and whether, for example, the attorney misappropriated or commingled a client's funds." *Edwards*, 990 A.2d at 522 (appended Board Report); *see also Pels*, 653 A.2d at 396 (finding Rule 1.15(a) violation when attorney showed a "pervasive failure" to maintain contemporaneous records accounting for the flow of client funds within various bank accounts). Thus, "[t]he records themselves should allow for a complete audit even if the attorney or client is not available." *Edwards*, 990 A.2d at 522 (appended Board Report).

Respondent's records relating to his retention by Mr. Ascensio and Ms. Stiles consisted of his engagement letters with them, and billing statements he prepared at their request, after he had withdrawn from representing them. FF 47, 52, 62; Tr. 395 (Matinpour). These billing statements were summary in nature and showed hourly charges for what Respondent represented was only a portion of the work he had performed for them. FF 63-64. Respondent maintained no contemporaneous time records for the work. FF 63; Tr. 374 (Respondent). The reflection of time spent, as contained in the billing statements, stemmed from Google map representations of time to travel distances (at the time the Google map was consulted, not when the travel actually occurred) and Respondent's estimate, from experience, of the time required to prepare certain filings. FF 63; Tr. 39-40, 58-60, 383-84 (Respondent). As a result, these statements are not fully reliable.

There are no records showing how Respondent handled trust funds received from Ms. Stiles because Respondent did not hold them as trust account funds.

Instead, he deposited $2,000 in his personal account and converted $3,800 into cash which he placed in his safe. There are no records showing how Respondent used the funds he held as cash in his safe. FF 53; Tr. 395 (Matinpour).

Accordingly, Disciplinary Counsel proved by clear and convincing evidence that Respondent violated Rule 1.15(a).

H. Disciplinary Counsel Proved that Respondent Violated Rule 1.16(d) by Failing to Give Reasonable Notice of His Withdrawal, Leaving his Client Without Representation, and Failing to Return Property, Including Paid Fees, to his Client.

Disciplinary Counsel argues that Respondent failed to give Mr. Ascensio and Ms. Stiles sufficient notice of his withdrawal to allow them to retain new counsel prior to his bond hearing. As Disciplinary Counsel points out, on December 16, 2016, Respondent filed a motion to continue the bond hearing for Mr. Ascensio scheduled to be held on January 4, 2017. DCX 9 at 417-420; *see* FF 27. On December 28, 2016, the court granted the motion for an extension, but noted that Respondent should contact the court to reschedule Mr. Ascensio's bond hearing. DCX 9 at 436; *see* FF 27. Respondent did not do so, but filed his Motion to Withdraw as counsel on January 3, 2017, which was granted on January 11, 2017. FF 28, 38. Respondent did obtain Mr. Ascensio's consent to his Motion to Withdraw and informed Ms. Stiles and Mr. Ascensio that it was up to them to schedule a bond hearing. *Id.* Mr. Ascensio was able to obtain a new bond hearing date the next month but did not have an opportunity to obtain new counsel for that proceeding. Nonetheless, Mr. Ascensio was able to obtain bond release at that hearing appearing *pro se* and preparing his own petition. FF 40.

Disciplinary Counsel also contends that Mr. Ascensio and Ms. Stiles sought a refund of their payments to Respondent, which Respondent did not provide.

Rule 1.16(d) provides:

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

Comment [9] to Rule 1.16 further states that even if a lawyer has been unfairly discharged, "a lawyer must take all reasonable steps to mitigate the consequences to the client."

Here, Respondent sought, and received permission to withdraw from representing Mr. Ascensio at a critical time in his representation. If Mr. Ascensio was successful in his bond hearing, he could be released from detention while awaiting the outcome of his U Visa application and removal proceeding. If not, he would continue to be detained, without the freedom to be with his family or contribute to their well-being. The timing of Respondent's withdrawal, just weeks prior to Mr. Ascensio's bond hearing, left Mr. Ascensio little time to obtain new counsel.[11] *See* FF 40. The fact that Mr. Ascensio, with the assistance of Ms. Stiles, was successful in representing himself at the rescheduled bond hearing does not

[11] Although there is also no evidence to indicate that they tried to obtain new counsel at that time and failed.

diminish the fact that Respondent left his client "high and dry," without counsel, at this important stage of the proceedings. This failure to protect Mr. Ascensio's interests violated Rule 1.16(d).

The parties dispute whether Mr. Ascensio and Ms. Stiles sought a return of funds paid to Respondent. Mr. Ascensio and Ms. Stiles testified that they did want Respondent to return unearned fees. That was why they asked Respondent to provide to them a detailed billing statement. Additionally, Ms. Stiles testified she had filed a petition with the D.C. Bar's fee arbitration service, seeking a return of the fees she paid. FF 67. Respondent claims that Mr. Ascensio and Ms. Stiles never made a direct demand for him to return any portion of the fees and he was not aware of the petition filed with the arbitration service. Tr. 571-72 (Respondent); *see* FF 64.

Failure to refund any unearned portion of a fee violates Rule 1.16(d). *See, e.g.*, *In re Samad*, 51 A.3d 486, 497 (D.C. 2012) (per curiam) (finding a violation where the respondent claimed that he did some work on the case, but did not "suggest that he earned the entire flat fee or that he returned any portion of the fee"); *In re Carter*, 11 A.3d 1219, 1222-23 (D.C. 2011) (per curiam) (finding a violation of Rule 1.16(d) where the attorney failed to pay an arbitration award for unearned fees); *In re Kanu*, 5 A.3d 1, 5, 10 (D.C. 2010) (finding a violation of Rule 1.16(d) where the attorney failed to abide by a clause in her retainer agreement promising a refund if she failed to meet her clients' objectives).

Respondent concedes that he did not provide a refund; thus, the question of whether the failure to do so also violates Rule 1.16(d) hinges on whether

Disciplinary Counsel proved by clear and convincing evidence that Respondent failed to earn the full amount of fees he was paid. Disciplinary Counsel has established that there was a dispute over fees between Respondent and Mr. Ascensio and Ms. Stiles. It is not conceivable that their request that Respondent prepare a detailed bill could have been for any other purpose. It is also clear that Respondent viewed the request that way, since the statements he prepared made clear that, by his calculation, his fees had been fully earned. *Compare* RX 39, *and* RX 40, *with* RX 2, *and* DCX 5 at 220-26.

The engagement agreements made clear that although Ms. Stiles and Mr. Ascensio were being charged a flat fee for Respondent's services, should the relationship terminate before completion of the to-be-provided services, Mr. Ascensio and Ms. Stiles would be refunded any unearned portion of the fee. In calculating any unearned portion, however, the flat fee arrangement would convert to an hourly fee agreement, with Respondent charging $250.00 per hour for all work done.

Respondent's invoice reflects 12.3 hours billed for work done on the U Visa application and 15.8 hours billed for work done in the removal and bond proceeding. FF 64. While Respondent's expert witness confirmed the reasonableness of this time spent working on the U Visa application, Disciplinary Counsel chose to focus on Respondent's performance falling below the standard of care of a reasonable immigration attorney in both representations.

Consequently, absent a compelling challenge by Disciplinary Counsel, the Hearing Committee finds that Respondent's post hoc timekeeping, although far from ideal, is at least reasonable in the amount of time spent on tasks performed. However, the Hearing Committee agrees with Disciplinary Counsel's expert witness: Respondent's performance fell below the reasonable standard of care when he failed to follow up on the status of Mr. Ascensio's U Visa application that was ultimately lost by USCIS. Coupled with the earlier finding that Respondent failed to adequately protect Mr. Ascensio's interests in his withdrawal prior to his bond hearing, *see supra* at 53-55, the Hearing Committee finds that through his action and inaction, which fell below the standards expected of a reasonable attorney, there is clear and convincing evidence that Respondent undid part of his legal work for Mr. Ascensio, thus negating any benefit to the client.

Respondent's itemized invoices allow the Hearing Committee to pinpoint exactly which time entries were ultimately rendered fruitless, or otherwise conferred no benefit to Mr. Ascensio. In the U Visa application, all entries relating to the application's preparation, filing, follow up and the preparation of Respondent's withdrawal were of no value to Mr. Ascensio. These entries total 5.7 hours, or $1,425.[12] *See* RX 39. Respondent was justified in billing 6.6 hours to this matter, for $1,650 in fees.

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[12] The following time entries are included:

6/17/2016 Draft, review, finalize U Visa Certification and Application (1.5 hours)

7/7/2016 Draft, review, finalize I-912 Fee Waiver Request (0.5)

The Hearing Committee next finds that 2.2 hours billed by Respondent in the removal and bond proceeding following his preparation of Mr. Ascensio's bond hearing package, totaling $550, conferred absolutely no benefit to Mr. Ascensio.[13] *See* RX 40. Respondent was justified in billing only 13.6 hours to this matter, for $3,400 in fees.

Having collected $5,800 in fees from Ms. Stiles while only earning $5,050 in beneficial work performed, Respondent improperly kept $750 that he did not earn. For these reasons, Disciplinary Counsel has proved that Respondent violated Rule 1.16(d).

I. Disciplinary Counsel Did Not Prove that Respondent Violated Rule 8.4(c) by Engaging in Dishonesty.

Disciplinary Counsel alleges that Respondent was engaged in dishonesty[14] in violation of Rule 8.4(c) when Respondent represented to the immigration court that

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7/7/2016 Draft, review, finalize U Visa Waiver Request (1)
All entries from 7/8/2016 through 1/18/2017, totaling an additional 2.7 hours.

[13] The following time entries are included:
12/28/2016 Draft, Review, Finalize, and submit to DHS and EOIR Motion to Withdraw (1.5 hours)1/5/2017 Review IJ Order RE: Bond Hearing Continuance (0.1)
The pro-rated time spent on review and composition of emails from/to Ms. Stiles. Respondent billed 4.2 hours to these combined tasks over a 7-month representation, the last month of which came after he notified Ms. Stiles of his intention to withdraw on December 16, 2016. Without more accurate records, the Hearing Committee assumes that 1/7 of the time billed, or 0.6 hours, occurred after this date.

[14] The Specification of Charges alleges that Respondent engaged in "dishonesty, deceit or misrepresentation"; however, Disciplinary Counsel's post-hearing brief

he had a "calendar conflict" which prevented him from appearing at a January 4, 2017 bond hearing for Mr. Ascensio. In fact, Respondent was not planning to be in his office on that day because of the Christmas holiday. *See* Tr. 113, 237 (Respondent). Disciplinary Counsel failed to prove with clear and convincing evidence that Respondent's use of the term "calendar conflict" did not refer to his scheduled time off, such that he violated Rule 8.4(c) in making this representation to the court.

IV. RECOMMENDED SANCTION

As stated above, Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of disbarment. Respondent has requested that the Hearing Committee dismiss the charges, or at a maximum, a sanction of a censure, along with a requirement that Respondent attend an ethics continuing legal education course approved by Disciplinary Counsel.

Respondent's negligent misappropriation of the client's advance fee for the U Visa application requires suspension from the practice of law for six months. *See In re Edwards*, 870 A.2d 90, 94 (D.C. 2005) ("A six-month suspension without a fitness requirement is the norm for attorneys who have committed negligent misappropriation of entrusted funds together with the related violations (commingling, deficient record keeping) exhibited here."). The remaining violations

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only discusses "dishonesty." *See* Disciplinary Counsel's Proposed Findings at 26-27.

and mitigating factors therefore serve to add to or subtract from this period of suspension.

For these reasons and those described below, due to the majority of the Hearing Committee finding only negligent misappropriation, in addition to the other violations of Rules 1.3(a), 1.15(a), 1.15(b), 1.15(e), and 1.16(d) found unanimously by the Hearing Committee, the majority members recommend a sanction of an eight-month suspension, required attendance at a continuing legal education program regarding flat fee billing practices, and a refund to Ms. Stiles and Mr. Ascensio of $750 out of the $5,800 total that they paid Respondent plus interest at the applicable rate. The Chair of the Hearing Committee, finding reckless misappropriation, recognizes the precedent the Court of Appeals has established and recommends that Respondent be disbarred. *See* Dissent, *infra*.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d at 17. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

The majority of the Hearing Committee takes issue with what the dissent characterizes as our incorrect finding of negligence. Ignorance of proper procedure in accepting a fee is one of the simplest examples of negligent misappropriation. *See Ray*, 675 A.2d at 1387-88 (attorney's failure in taking estate assets as his fee without an accounting or court approval constituted negligent misappropriation of client funds). Moreover, it is Disciplinary Counsel's burden to prove an intentional or reckless state of mind, and here, as in *Haar III* (discussed in Section III.F.b, *supra*) Disciplinary Counsel has not done so.

None of the cases Disciplinary Counsel cites in its brief are analogous to the instant case in that all involved attorneys did not rely on a good faith belief in their fee agreements comporting with the D.C. Rules. *See* Disciplinary Counsel's Proposed Findings at 23-24. Rather than point to authority in which ignorance of the Rules is found to be reckless, Disciplinary Counsel and the Dissent argue that Respondent's behavior *after* receiving the flat fee was *ipso facto* reckless or intentional without weighing the earnestness of his belief that he understood the rules behind flat fee arrangements. *See* Dissent at 2-3. Two of the main cases cited, *In re Berryman* and *In re Ahaghotu*, are easily distinguishable in that the respondent in *Berryman* knew that the funds they received and misappropriated through commingling and overdraft were not rightfully theirs from the outset of their behavior, while the respondent in *Ahaghotu* put his clients' funds in obvious danger by ignoring clear warning signs regarding his accounting practices and his bank account.[15]

The Dissent's hypotheticals of Respondent's safe being robbed with Ms. Stiles' check inside or cadres of experienced attorneys staying ill-informed of the D.C. Rules in order to maintain the defense of negligence[16] attempt to stretch the

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[15] The distinction between a mistaken belief of entitlement to the funds and its absence in *Berryman* and *Ahaghotu* demonstrates that reckless misappropriation is in no danger of becoming "dead letter." *See* Dissent at 6.

[16] The majority of the Hearing Committee agrees with the Dissent's view that an attorney licensed to practice in D.C. should endeavor to stay abreast of current Rules no matter where their practice is located. Good faith mistake does not excuse

current facts to their logical extremes in the hope of imputing a reckless state of mind to the Respondent. *See* Dissent at 3, 6. This attempt fails to persuade the majority of the Hearing Committee.

B. Comparable Sanctions for Negligent Misappropriation

The Court of Appeals' presumptive sanction for negligent misappropriation is a six-month suspension with reinstatement without a fitness requirement. *See Edwards*, 870 A.2d at 94; *In re Davenport*, 794 A.2d 602, 603 (D.C. 2002) ("When the Board finds that an attorney has commingled and negligently misappropriated funds, we have uniformly imposed a suspension for a period of no less than six months."). The *Edwards* Court found the six-month suspension appropriate for a

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violations of the Rules of Professional Conduct where members of the Bar are deemed to have been put on notice, as instructed by the Court of Appeals in *In re Mance*. Here, good faith mistake serves only to inform the Respondent's state of mind, rather than absolve him of any violation.

Moreover, in *Haar III*, the Court of Appeals notes that an attorney who has stayed apprised of recent developments in the Rules governing flat fees still might not grasp all of the informed consent requirements of *Mance* and Rule 1.15(e), stating:

> [T]he proper interpretation of Rule 1.15(e) has been the subject of substantial confusion, and the rule still has not been updated to reflect *Mance*, despite 1) this court's conclusion that "[t]he rule's application to flat fees is not clear on its face."
> . . . .
> [W]e conclude that a practitioner who operated according to Mr. Haar's typical [flat] fee arrangements could reasonably fail to perceive such a danger, especially if the trainings he attended never mentioned it.

Haar III at 22 (citing *Mance*, 980 A.2d at 1206).

single instance of misappropriation entwined with related violations: the commingling of funds, and deficient record keeping in violation of Rule 1.15(a) and failing to deposit unearned client funds into a trust account in violation of Rule 1.15(b). As this case involves one proven instance of misappropriation and two of the attendant three violations listed in *Edwards*, the Committee finds that a six-month suspension is the proper starting point. *See also Haar III* at 25 (imposing a seven-month suspension plus one year of probation for negligent misappropriation).

C. Additional Sanctions for Violation of Rules 1.3(a) and 1.16(d)

Respondent's violations of Rules 1.3(a) (Lack of Diligence and Zeal) and 1.16(d) (Terminating Representation) are cause for additional sanction. Violations of Rule 1.3(a) involving incompetence and neglect have resulted in a range of sanctions, from informal admonition to a six-month suspension. *See In re Speights*, 173 A.3d 96, 139-140 (D.C. 2017) (per curiam) (appended Hearing Committee Report) (collecting cases); *Id.* at 103 (six-month suspension); *see also, e.g.*, *In re Thai*, 987 A.2d 428 (D.C. 2009) (per curiam) (60 days' suspension, partially stayed); *In re Steinberg*, 878 A.2d 496 (D.C. 2005) (per curiam) (60 days' suspension with reinstatement conditioned upon payment of restitution); *In re Shepherd*, 870 A.2d 67 (D.C. 2005) (per curiam) (public censure with continuing legal education requirement). The failure of an attorney to promptly return client funds in violation of Rule 1.16(d) has typically been met with public censure. *See Martin*, 67 A.3d at 1053; *Mance*, 980 A.2d at 1208-09 (collecting cases). Additionally, a Respondent may be ordered to pay restitution for fees improperly kept at the termination of

representation where a violation of Rule 1.16(d), among other, related violations, has been established. *See Samad*, 51 A.3d at 497, 499-501 (ordering restitution of the entire flat fee paid by the client, plus interest).

Consequently, the majority of the Hearing Committee finds that a further sanction of two-months' suspension, one month for each violation of Rule 1.3(a) and 1.16(d) is merited, for a total baseline sanction of eight months' suspension.

Additionally, Disciplinary Counsel has proved with clear and convincing evidence that Respondent misappropriated at least a portion of the flat fee paid for the U Visa application, that Respondent's filed U Visa application appears to have been lost thus conferring no benefit to his client, and that Respondent should have taken steps to learn of this fact before the termination of the representation. Further, Respondent's violation of Rule 1.16(d) rendered a portion of his fees charged in the removal and bond proceeding unearned. Accordingly, the majority of the Hearing Committee finds that restitution to Ms. Stiles and Mr. Ascensio of $750.00 plus interest at the legal rate from the date of the termination of the representation (January 11, 2017, *see* FF 38)[17], should be made by Respondent as a condition of his reinstatement following suspension.

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[17] On December 16, 2016, Respondent informed Ms. Stiles that he intended to withdraw from the representation and offered to refund any unearned fees. *See* FF 37; RX 38 at 334. In response, Ms. Stiles asked Respondent to provide a "detailed account" for the fees she had paid. *Id.* As explained in Section III.H, *supra*, that request put Respondent on notice that Ms. Stiles was disputing his entitlement to keep the full amount of flat fees she had paid.

D. Application of the Sanction Factors

Having arrived at the baseline calculation of eight months' suspension plus partial restitution of fees by Respondent, the majority of the Hearing Committee now reviews this overall sanction with an eye toward consistency with prior dispositions, taking into account Respondent's disciplinary history as well as mitigating and aggravating factors. *See Edwards*, 870 A.2d at 94; *In re Vohra*, 68 A.3d 766, 784 (D.C. 2013).

a. The Seriousness of the Misconduct

Respondent's misconduct was serious. He failed to follow-up and remedy the apparent loss of his U Visa application on Mr. Ascensio's behalf. He failed to ensure that Mr. Ascensio would be represented at his bond hearing before withdrawing as counsel to Mr. Ascensio, and he failed to properly evaluate and return to Ms. Stiles and Mr. Ascensio those fees that were unearned in his representation of Mr. Ascensio.

Moreover, even negligent misappropriation based on an erroneous understanding of the Rules of Professional Conduct is a serious violation and one of the most visible and harmful actions to affect the reputation of lawyers in any jurisdiction.

b. Prejudice to the Client

Respondent's actions prejudiced Mr. Ascensio, making it necessary for him to hire new counsel to resubmit and pursue his U Visa application. Because of the substantial backup in processing of U Visa applications, it is not clear that the delay

in his reapplication was itself substantively prejudicial, but the additional $10,000 fee that Mr. Ascensio had to pay for a new lawyer was clearly an additional cost to Mr. Ascensio.

c. Dishonesty

Disciplinary Counsel has failed to establish that Respondent engaged in dishonesty, whether by its charged Rule violation or by its assertion that he testified dishonestly before the Hearing Committee.

d. Violations of Other Disciplinary Rules

Disciplinary Counsel has proved Respondent violated Rules 1.3(a) and 1.16(d), along with Rules 1.15(a), (b) and (e). However, the violation of five Rules of Professional Conduct is not a *per se* aggravating factor and given no weight outside of the calculation of the baseline sanctions.

e. Previous Disciplinary History

Respondent has practiced for over ten years with no previous disciplinary history. Respondent's Post-Hearing Brief at 37; Disciplinary Counsel's Proposed Findings at 29.

This is an important mitigating factor in Respondent's favor as it is generally understood that a federal immigration practitioner takes on dozens of cases each year, making them disproportionately subject to disciplinary complaints as compared to practice areas which tend to have less client turnover. *See* Tr. 30 (Respondent).

f. Acknowledgement of Wrongful Conduct

Respondent denies that he committed any misconduct; rather, Respondent's defenses against the various charges are summed up in two positions: 1) he performed the work he was engaged to do for Mr. Ascensio and thus earned all fees collected, and 2) he believed in good faith that he had obtained the informed consent from Ms. Stiles necessary to place the two advance fees paid by her directly into his firm's operating account. Regarding the first position, Respondent proved (despite not bearing the burden to do so) that he did do quite a bit of work on Mr. Ascensio's behalf, even if a portion of it conferred no benefit to his client. As to the second position, the majority of the Hearing Committee has found that Respondent's incomplete understanding of the requirements of informed consent was nonetheless held in good faith. Respondent's lack of acknowledgement of his wrongful conduct during the proceedings is therefore given no weight as an aggravating factor.

g. Other Mitigating Circumstances

Several other circumstances in this case favor mitigation.

First, the fact that Respondent services an underserved population, while not excusing his misconduct, provides important context for it. His immigration practice addresses the needs of persons facing deportation in a U.S. border city. In light of the increasing spotlight on immigration issues and immigrants themselves, as well as dangerous conditions in the home countries of many immigrants, the need for effective immigration attorneys is heightened. If Respondent were suspended or otherwise removed from this field, the growing needs of the immigrant population

seeking legal entry and residence in the United States would have one less person willing and able to assist it. Though clients in immigration cases are entitled to the same level of protection from ethical misconduct as all other populations, reducing the number of practicing immigration attorneys would result in higher caseloads for the remaining practitioners, increasing the risk of inattention and mistakes.

Second, the majority of the Hearing Committee notes that while Respondent's violations of the Rules of Professional Conduct, including negligent misappropriation, have been established, this disciplinary action arose out of an exaggerated complaint. The majority of the Hearing Committee is particularly concerned with the clearly disproven allegation that Respondent did little to no work on Mr. Ascensio's behalf. These are the overblown allegations with which Mr. Ascensio and Ms. Stiles commenced this disciplinary investigation. As the evidence bore out, Respondent did substantial work, including preparing a bond package application in late December 2016. That Ms. Stiles was aware of this bond package application as well as other work product by Respondent yet chose to disregard it and make the claim of total neglect by Respondent, as advanced by Disciplinary Counsel, is disingenuous.

Third, the majority of the Hearing Committee is well aware of the difficulties faced by solo practitioners who maintain high volume practices. Whether by choice or necessity, attorneys like Respondent, who began his immigration practice out of law school, forego the amenities enjoyed by the many junior lawyers practicing at established firms, in-house or with the government. Such amenities include

managing attorneys who assist with and monitor that status of filings; administrative assistants who handle messages, calendars and sometimes billing; billing software; finance departments to send bills, pay invoices and manage accounts; and professional development specialists to update on legal developments and monitor continuing education requirements. Had Respondent had access to such help – that many attorneys take for granted – it is possible that he would have avoided the pitfalls (or the "unknown unknowns") that led to the instant disciplinary action.

h. Impact of All Sanctions Factors

The majority of the Hearing Committee considers the mitigating factors (Prior Disciplinary History, Lack of Dishonesty, and Other Mitigating Circumstances) and the aggravating factors (Seriousness of Misconduct and Prejudice to Client) in this case to carry equal weight.

As a result of this offset, the majority of the Hearing Committee's overall sanction calculation and recommendation remains the same: Respondent should be suspended from the practice of law for eight months and be ordered to pay restitution to complainants in the amount of $750.00 plus interest accrued since January 11, 2017. Additionally, the full Hearing Committee recommends that Respondent be required to attend a continuing legal education program regarding flat fee billing practices.

V. CONCLUSION

For the foregoing reasons, the Hearing Committee finds that Respondent violated Rules 1.3(a), 1.15(a), 1.15(b), 1.15(e), and 1.16(d), and the majority of the

Hearing Committee recommends that Respondent be suspended for eight months with restitution to the complainants of $750.00 plus interest at the legal rate of six percent. The majority further recommends that Respondent be required to complete a continuing legal education course regarding flat fee billing practices.

AD HOC HEARING COMMITTEE

Daniel M. Portnov

Daniel Portnov, Attorney Member

Matthew Heller

Matthew Heller, Public Member

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

In the Matter of:	:	
	:	
PABLO A. ZAMORA,	:	
	:	
Respondent.	:	Board Docket No. 21-BD-003
	:	Disc. Docket No. 2017-D142
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 998467)	:	

DISSENT AS TO THE NATURE OF RESPONDENT'S MISAPPROPRIATION AND THE RECOMMENDED SANCTION

I reluctantly must dissent to the conclusion of my colleagues on the Hearing Committee in two regards. First, I conclude, contrary to the Hearing Committee's majority opinion, that Disciplinary Counsel has proved by clear and convincing evidence that Respondent's misappropriation was at least reckless if not intentional. Second, based on the precedent of the Court of Appeals, I conclude that, Respondent's misappropriation having been reckless, the only authorized sanction against him would be disbarment.

It should be noted that, with the exception of the nature of Respondent's misappropriation, the Hearing Committee Members do not disagree as to the Statement of Facts or the implications of those facts in reaching their legal conclusions. In particular, the Hearing Committee unanimously agrees that Respondent misappropriated his client's funds in violation of Rule 1.15(a). Furthermore, the Hearing Committee members unanimously agree that "Respondent

lacked the ability to obtain, and failed to obtain, informed consent from Ms. Stiles of the trust account waiver provisions." FF 59. I do not agree with the majority of the Hearing Committee that Respondent could have failed to recognize what is required to obtain "informed consent," in general, even though he professed a lack of knowledge about the specific requirements to comply with Rule 1.15(e) as interpreted by the Court in *Mance*.

As the Hearing Committee has noted:

> Reckless misappropriation reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds, and its hallmarks include: the indiscriminate commingling of entrusted and personal funds; a complete failure to track settlement proceeds; the total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition; the indiscriminate movement of monies between accounts; and finally the disregard of inquiries concerning the status of funds.

Ahaghotu, 75 A.3d at 256 (alteration in original) (internal quotation marks and citation omitted).

A number of these characteristics are present here. Respondent unquestionably considered the monies received from Ms. Stiles on Mr. Ascensio's behalf to be his money to do with as he pleased. Respondent repeatedly made that point in his testimony and his agreements with Ms. Stiles make clear that Respondent believed he had earned the entire amount of the fees she paid him as of the dates on which the engagement agreements were signed. FF 56; DCX 9 at 255-56, 295-96. Respondent placed the first $2,000 he received from Ms. Stiles in his personal bank

account. Disciplinary Counsel has proved at least one overdraft from that account beyond what he had earned to the date of that draft.

In addition, "recklessness is a state of mind in which a person does not care about the consequences of his or her action." *Anderson*, 778 A.2d at 339 (internal quotation marks and citation omitted). It is difficult to evaluate Respondent's conversion of Ms. Stiles' $3,800 check into cash and placing that sum in his safe as anything but further proof of Respondent's failure both to recognize Ms. Stiles' risk in agreeing to not have the funds deposited in a trust account, and in failing to obtain her informed consent. As Disciplinary Counsel argued, recklessness, in this circumstance "reveals . . . a conscious indifference to the consequences of his behavior." Disciplinary Counsel's Proposed Findings at 24 (quoting *Anderson*, 778 A.2d at 339, and citing *Berryman*, 764 A.2d at 768-770).

The cash in Respondent's safe was only as safe as whatever else was inside. It was not secure from a sudden, enforceable demand from a creditor. Moreover, Respondent did not deposit it in his personal account at a bank (much less a trust account), where presumably it would at least be protected by federal deposit insurance had there been an unwelcomed or criminal access to his safe. Hypothetically, had Ms. Stiles terminated the agreement with Respondent and demanded her cash be returned the following day, but Respondent's safe had been robbed overnight, Respondent could not have complied with that request. There were no records about how and when Respondent spent the $3,800 he received from Ms. Stiles and put in his safe. It is difficult for me to conclude that these actions

constitute merely "negligent misappropriation," a hallmark of which is "an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded." *See Abbey*, 169 A.3d at 872.

Not only did Respondent clearly think the fees paid by Ms. Stiles were his own, but he also believed that he did not owe any standard of care or safekeeping to Ms. Stiles for protecting those funds, despite his commitment to refund any portions of the fixed fee he ultimately did not earn. *See* RX 2 at 4 (the U Visa Agreement) ("Should Client terminate the attorney-client relationship prior to completion of services, Client will be refunded any unearned portion of the fee."); *see also* RX 15 at 122 (the Removal Agreement) (same language). The majority of the Hearing Committee argues this was mere negligence because of Respondent's lack of knowledge of the *Mance* decision and the 2010 Legal Ethics Committee Opinion. I disagree. There are two elements to the *Mance* decision that are relevant here: first, the requirement that Respondent obtain Ms. Stiles' "informed consent" to not place in a trust account the fixed fees she paid, and second, what was required in order to obtain "informed consent."

Despite his proclaimed lack of knowledge of the *Mance* decision (FF 56), Respondent clearly knew that Rule 1.15(e) required that he obtain Ms. Stiles' informed consent to avoid the requirement of Rule 1.15 that advanced fee payments be placed in a trust account because he intentionally referenced it in his engagement agreements with Ms. Stiles (albeit by mistakenly referencing Rule 1.15(d), which was renumbered as Rule 1.15(e) in 2010). Unlike the circumstances in the Court of

Appeals' recent decision in *Haar III*, Respondent here attempted to comply with Rule 1.15(e) by seeking to obtain Ms. Stiles' informed consent to waive the requirement that the fixed fee be placed in a trust account. Tr. 46-51 (Respondent). The Hearing Committee, however, unanimously agreed that, by clear and convincing evidence, Respondent's efforts in this regard were unsuccessful. FF 59.

Therefore, the remaining question is whether Respondent failure to appreciate the requirements necessary to obtain "informed consent" rendered his misappropriation negligent. The *Mance* Court made clear that "inadvertent" violations of Rule 1.15(e) had to be both "reasonable" and "mistaken" to avoid discipline. *Mance*, 980 A.2d at 1206; *see, e.g.*, *Haar III* at 22 (finding negligent misappropriation where "a practitioner who operated according to [the respondent]'s typical fee arrangements could reasonably fail to perceive" the risk that he would violate the application of Rule 1.15(e) set forth in *Mance*). Respondent's failure to observe the requirements necessary to obtain Ms. Stiles' informed consent, even if mistaken, were not reasonable. Even if the application of Rule 1.15(e) may remain unclear to members of the Bar despite the 2009 decision in *Mance* (*see Haar III* at 22), the concept of "informed consent" is long standing and predates the *Mance* decision. *See Mance*, 980 A.2d at 1206 n.10 (pointing out that the current definition of "informed consent" in Rule 1.0 had been in place since 2008 and was not substantially different from the previous concept of consent after consultation). It is a defined term in the Rules of Professional Conduct, which requires that "the lawyer . . . communicate[] adequate information and explanation about the material risks of

and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e). There can be no reasonable excuse for Respondent to have failed to apply the most rudimentary safeguards in obtaining true "informed consent" from Ms. Stiles.

Respondent assumes the risk for failing to do so correctly. A Comment to the definition of "informed consent" in Rule 1.0 points out that the concept of "informed consent" appears in a number of different Rules of Professional Conduct and that:

> [A] lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved . . . .

Rule 1.0, cmt. [2].

Ms. Stiles was not a sophisticated consumer of legal services; she did not know what a "trust account" was, much less the risks of not using one for her fees. Tr. 428 (Stiles). Respondent argues that his negligence, if any, was in his "good-faith [belief] . . . that Ms. Stiles gave her informed consent to the handling of the retainer fees." Respondent's Post-Hearing Brief at 33. This argument, however, fails because Disciplinary Counsel has proved by clear and convincing evidence that Respondent knew that the Rules required him to take certain steps in order to obtain "informed consent" (Tr. 379 (Respondent)), even if he was not aware of the *Mance* decision (FF 56). Therefore, I must disagree with my colleagues in the majority of the Hearing Committee: this is a different situation from what was decided in *Haar*

III because Respondent's reckless conduct here stemmed not from his misunderstanding of *Mance* but from his reckless misapplication of the doctrine of informed consent. Although Respondent testified that he had explained and obtained Ms. Stiles' agreement to the provisions of the Engagement Agreements (FF 44-45), the Hearing Committee, taking all of the evidence into account, decided otherwise and unanimously concluded that Respondent had not obtained Ms. Stiles' "informed consent." *See* section III.D *supra*.

To conclude that Respondent's misappropriation of his client's funds was negligent, that is, "non-intentional, non-deliberate, non-reckless . . ." and including an "honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded" (*Abbey*, 169 A.3d at 872), would require the Board and the Court to conclude that Respondent was innocently ignorant of the requirements to be met in order to obtain "informed consent" as used in Rules 1.0(e) and 1.15(e). Unlike in *Haar III*, Respondent knew he needed informed consent. Thus, he was "aware of facts which *should* have put him on notice of a 'serious danger to others.'" *See Haar III* at 21 (emphasis in original) (quoting *Anderson*, 778 A.2d at 339). In contrast to *Haar III*, this knowledge is "clear and convincing evidence that [Respondent here] was 'conscious[ly] indifferen[t] to the consequences of his . . . behavior.'" *See id.* (alteration in original) (quoting *Anderson*, 778 A.2d at 339).

The majority of the Hearing Committee concludes that Respondent's failure to provide the information necessary in order to obtain Ms. Stiles' "informed consent" was negligent. I disagree. It defies belief that Respondent could have

reasonably believed he "communicated adequate information and explanation about the material risks of and reasonably available alternatives" to allow Ms. Stiles to knowingly agreeing to forego the requirement of depositing the fixed fees in a trust account (*see* Rule 1.0(e)), in light of Respondent's own testimony. Respondent testified that he did not believe there were any material risks to Ms. Stiles that required further explanation. Tr. 380 (Respondent); FF 56. Nor did Respondent discuss alternative fee proposals with Ms. Stiles. Tr. 381 (Respondent); FF 51. Therefore, it is not possible that Respondent described to Ms. Stiles the risks and alternatives involved.

It is significant that the Court in *Mance*, while making its decision prospective only (and giving a pass to the respondent then before it), assumed that members of the District of Columbia Bar would be educated as to the decision's requirements. *Mance*, 980 A.2d at 1206 ("We are confident that the D.C. Bar Board of Governors, the Bar's relevant sections, and the Board and [Disciplinary] Counsel will take steps to inform the Bar and provide attorneys with helpful guidance on how to conform their practice to the rule we announce in this opinion."); *see also* D.C. Bar Ethics Op. 355 ("Pursuant to the Court's comments, after outlining the Court's holdings in *Mance*, we address the issues relating to agreements between the client and the lawyer regarding transferring portions of a flat fee from a trust account to an operating account prior to the conclusion of the representation.").

There must come a point at which lawyers who are members of this Bar have a responsibility to maintain current knowledge, even in the absence of a mandatory

Bar education requirement. As Disciplinary Counsel argued, "[i]f a failure to understand the most central Rules of Professional Conduct could be an acceptable defense for a charged violation, even in cases of good faith mistake, the public's confidence in the bar, and, more importantly, the public's protection against lawyer overreaching would diminish considerably." Disciplinary Counsel's Reply Brief at 11 (quoting *In re Smith*, 817 A,2d 196, 202 (D.C. 2003) (internal quotation marks omitted); *see also In re Pierson*, 690 A.2d 941, 947 (D.C. 1997) ("[I]gnorance or a claim of 'innocent' behavior is not an acceptable defense to a charge of misappropriation."); *Harrison*, 461 A.2d at 1036. Otherwise, staying ill-informed will become every lawyer's pathway to a finding that each such misappropriation is merely negligent no matter how long the Bar tries, at the Court's instruction, to make plan the meaning of Rule 1.15(e) (*see Haar III* at 4, 20). Whatever laxity in compliance may be explained by the uncertain grasp of *Mance* cannot excuse the failure to comply with such a significant safeguard of a lawyer's clients as the concept of "informed consent" without gutting the Rules altogether.

The majority of the Committee advances the argument of negligence by explaining that lawyers are busy and cannot take time out to learn the current Rules and their meaning. The busier a lawyer is, however, the more prone the lawyer will be to have many clients that may be harmed through the lawyer's disregard for the Rules in the absence of educating him- or herself about the Rules' requirements. In that case, "reckless" misappropriation will be a dead letter.

In this case, I must disagree with my Hearing Committee colleagues. I believe their conclusion was well motivated and rationally argued. I do conclude, however, that their finding of negligent misappropriation stemmed, at least in part, from a desire to reach what they rightly considered a recommendation leading to a more just sanction to be imposed against Respondent. Considering all of the evidence and our findings of fact, I must conclude, instead, that Respondent's conduct constituted reckless misappropriation.

Recommended Sanction

The law regarding misappropriation is clear and consistent: absent "extraordinary circumstances," disbarment is the presumptive sanction for reckless misappropriation. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc); *see also In re Mayers*, 114 A.3d 1274, 1279 (D.C. 2015) (per curiam); *In re Hewett*, 11 A.3d 279, 286 (D.C. 2011). Once it has been established that a misappropriation is reckless or intentional, the inquiry turns to whether sufficient mitigating factors rebut the presumption of disbarment as the appropriate sanction. *Anderson*, 778 A.2d at 337-38 (citing *Addams*, 579 A.2d at 191). No mitigating factors, other than Respondent's ignorance of the law, have been presented.

The majority of the Hearing Committee points to the fact that Respondent is a solo practitioner and serves an underserved community. While those factors are relevant, they do not excuse Respondent's conduct. An attorney who is a solo practitioner, particularly one who practices outside of the District of Columbia, should make a special effort to inform himself of the Rules of Professional Conduct

that govern his behavior or he will remain increasingly non-compliant with the evolving Rules. It is true that Respondent serves an underserved community, but it is also true that his clients and potential clients are persons least sophisticated and knowledgeable about their rights as clients. As unsophisticated consumers of legal services, they are the ones most in need of the protections the Rules of Professional Conduct provide to them. It is also true that disbarring Respondent would remove one of a relatively small number of immigration practitioners willing to represent needy clients, but, with thousands of law students graduating each year, it is hard to believe others will not come to the practice. Moreover, we all conclude that Respondent has violated the Rules (although we disagree to what extent). Under its precedent, the Court has determined that lawyers who engaged in reckless misappropriation should be disbarred; the Court did not distinguish among the practice areas in which those lawyers practice or the type of clients they serve.

Were it not for the precedent of *Addams* and its progeny, in light of my finding that Respondent's misappropriation was reckless, I would recommend a lighter sanction. I would recommend a suspension for at least a year; a reimbursement of certain payments to Ms. Stiles and Mr. Ascencio (I agree with the majority's calculation of the reimbursement); completion of appropriate courses; and a proof of fitness before being reinstated. Disciplinary Counsel has neither alleged nor proved that Respondent acted corruptly or exhibited moral turpitude and there is no evidence he intentionally stole his client's property. Those factors are relevant to a finding that the misappropriation was intentional, but they are not elements of a

finding of recklessness. Since I conclude Respondent was at least reckless in his misappropriation of Ms. Stiles' funds, *Addams* gives me no choice but to recommend disbarment.

I recognize that the Court has permitted some flexibility in the application of *Addams* in a negotiated sanction context (*see In re Mensah*, 262 A.3d 1100 (D.C. 2021) (per curiam)), but has not expanded that flexibility to contested cases. I also recognize that I am not the first person to question the rigidity imposed by the *Addams* decision. *See Mensah*, 262 A.3d at 1102-03 (collecting cases). It would be better for the Court to find ways to soften the *per se* rule of *Addams* and its progeny in cases involving reckless misappropriation with the absence of a finding of moral turpitude. Otherwise, as here, the majority of this Hearing Committee – and other Hearing Committees and the Board – is forced to reach what I contend is an incorrect finding of negligent misappropriation in order to recommend a more just sanction. I urge the Court to do so.

Daniel C. Schwartz
Chair, Ad Hoc Hearing Committee