DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
ROBERT W. MANCE,	:	
	:	
Respondent.	:	Bar Docket No. 241-04
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 285379)	:	

REPORT AND RECOMMENDATION OF
THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter comes before the Board on Professional Responsibility (the "Board") on review of the Report and Recommendation ("Report") of Hearing Committee Number One (the "Committee"). The Committee found that Respondent commingled his own funds with those of his clients in violation of District of Columbia Rule of Professional Conduct 1.15(a). The Committee did not sustain charges by Bar Counsel that Respondent misappropriated client funds in violation of Rule 1.15(a), that Respondent failed to treat an advance as client funds in violation of Rule 1.15(d), that Respondent failed timely to surrender client funds in violation of 1.16(d), that Respondent failed to deposit the fee in a specially titled trust or escrow account in violation of Rule 1.17(a) and that Respondent failed to maintain proper records in violation of D.C. Bar R. XI, § 19(f) of the District of Columbia Court of Appeals Rules Governing the Bar. Based on these findings, the Committee recommended that Respondent be publicly censured. Bar Counsel takes exception to nearly all of the Committee's conclusions of law and several of its findings of fact.

The critical facts of this matter are simple and undisputed. Respondent agreed with the father of a man charged with first degree murder to represent the son throughout the criminal matter for a total fee of $15,000. Upon retention, pursuant to an agreement with Respondent, the father paid Respondent half of that sum. Shortly thereafter, the father decided to terminate Respondent and hire different counsel. Respondent immediately agreed to repay the father the $7,500, but delayed doing so. Six months after the termination, Respondent repaid the $7,500 in full to the father, whereupon the client formally withdrew his complaint to Bar Counsel. Prior to the repayment, Respondent had placed a portion of the $7,500 in an escrow account containing client funds while he placed another portion of the funds in his operating account.

The key legal question posed by this matter is whether the $7,500 paid as part of the retainer was the lawyer's money upon receipt or whether it remained "client funds" in the lawyer's possession. Both Respondent and the client testified before the Committee that they believed that the funds belonged to the lawyer to do with as he saw fit. While the retainer letter is not a model of clarity and does not directly address this issue, it is not inconsistent with the attested understanding of both Respondent and the client. The Board concludes, in light of the nature of the arrangement and the mutually expressed understanding of both Respondent and his client, that the funds were the lawyer's funds upon receipt.

Having reviewed the record, we concur with the Committee's conclusion that Respondent violated Rule 1.15(a) by commingling his funds with those of his clients. However, the Board also concludes that under Rule 1.16(d), Respondent had an obligation, upon termination, to make a prompt return of the retainer since he was no longer in a position to carry out his end of the bargain. For both the admitted commingling and the failure to take timely

steps to protect the client's interests by promptly returning the retainer, the Board concludes that a public censure by the Court is the appropriate sanction.

I. Procedural History

On July 27, 2005, Bar Counsel filed a Specification of Charges and a Petition Instituting Formal Disciplinary Proceedings in this matter alleging that Respondent violated the following Rules of Professional Conduct: 1.15(a), 1.15(d), 1.16(d) and 1.17(a) and D.C. Bar R. XI, § 19(f).

The Committee held an evidentiary hearing on October 21, 2005. Respondent was represented by counsel. The Committee granted Bar Counsel's unopposed motion to amend the Specification of Charges to include, in the alternative, violations of the Maryland Rules of Professional Conduct, which Bar Counsel had filed the week before the hearing. Bar Counsel's Exhibits ("BX") A-D and 1-14 were admitted into evidence without objection. Bar Counsel called one witness, Mr. William Saunders, the father who had retained Respondent for his son's criminal case. Respondent testified and called David Schertler, a criminal defense lawyer and a former chief of the homicide division of the U.S. Attorney's office in the District of Columbia, as an expert witness in fee arrangements with regard to street crime cases. During the second phase of the hearing, Bar Counsel presented evidence in aggravation.

Following the hearing, Bar Counsel filed Proposed Findings of Fact and Conclusions of Law and Recommendation for Sanction on November 28, 2005. Respondent filed Proposed Findings of Fact, Recommendations and Brief in Support Thereof on December 28, 2005.

The Committee issued its Report and Recommendation on February 2, 2006 finding that Respondent violated Rule 1.15(a) for failure to segregate his funds from client funds, and recommended that Respondent be publicly censured. The Committee found that Bar Counsel had not sustained its burden of establishing violations of Rules 1.15(a) (misappropriating client

funds), 1.15(d) (failing to treat an advance as client funds), 1.16(d) (failing to timely surrender client funds), 1.17(a) (failing to deposit the fee in a specially titled trust or escrow account) or D.C. Bar R. XI, § 19(f) (failing to maintain proper records). Bar Counsel filed exceptions on March 13, 2006. Respondent filed a brief objecting to Bar Counsel's exceptions and supporting the Committee's Report on March 31, 2006. Oral argument was held before the Board on April 20, 2006.

II. Standard of Review

The Board defers to the factual findings made by the Committee "if those findings are supported by substantial evidence in the record, viewed as a whole." *See In re Micheel*, 610 A.2d 231, 234 (D.C. 1992). "Substantial evidence means enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam). However, the Board owes no deference to the Committee's determination of "ultimate facts," such as whether the underlying facts constitute a violation of a Rule, "which are really conclusions of law." *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000) (internal quotation marks and citation omitted).

III. Findings of Fact

The following facts are adopted by the Board as either (1) established by clear and convincing evidence or (2) found by the Committee and supported by the substantial evidence in the record as a whole. Board R. 13.7; *In re Micheel*, 610 A.2d at 234. We have included independent findings of fact, *see* Board R. 13.7, eliminated certain findings that are unnecessary

to the analysis and outcome of this matter, and have revised and reorganized the findings for ease in evaluating the charged violations.[1]

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on November 19, 1979, and assigned Bar number 285379. Respondent is also a member of the Maryland Bar. HC Rpt. 2.

2. Respondent's practice focuses on criminal defense work, with an emphasis on defending those accused of street crime. Tr. 59-64. He is a solo practitioner. Tr. 60.

The Retainer Agreement

3. Mr. William Saunders worked for ten years as a security guard for the District of Columbia Public School System. Previously, Mr. Saunders worked for 26 years as detective for the Metropolitan Police Department. HC Rpt. 2; Tr. 25-26.

4. On or about December 2, 2003, Mr. Saunders retained Respondent to represent his son, Arron Saunders, in a criminal case. There was an outstanding arrest warrant for Arron Saunders in Charles County, Maryland for first degree murder. HC Rpt. 2.

5. Pursuant to a conversation with Respondent concerning fees, Mr. Saunders agreed that Respondent would undertake the representation of Arron for the entire criminal matter, presumably at least through trial, for a total fee of $15,000, with a maximum additional $5,000 for potential third-party investigative services. HC Rpt. 2.

6. Respondent testified that his agreement with Mr. William Saunders was for a flat fee of $15,000 to represent Arron Saunders through final resolution of this criminal matter. HC Rpt.

[1] Findings made by the Hearing Committee will be cited to the Hearing Committee Report ("HC Rpt."). For those proposed facts proffered by Bar Counsel in its Exception to the Hearing Committee Report which were adopted by the Board, the cite is to "BX Exception." The cite, "Tr.", refers to the transcript of the October 21, 2005 evidentiary hearing.

2-3. Respondent testified that "[o]nce I signed the retainer agreement, I signed on to represent him in whatever matters took place in the Circuit Court for Charles County." Tr. 65.

7. Mr. William Saunders' testimony is consistent on this issue. Mr. Saunders testified:

> The best of my recollection was that he told me, this is what it would take to obtain him and this is what it would take to handle the whole thing.

HC Rpt. 2-3. Mr. Saunders further agreed, on cross-examination by Respondent's counsel, with the report of an interview he had with Respondent's counsel, wherein counsel reported that Mr. Saunders had said "when he sent the money to Mance, it was Mance's money to do with it as he wanted." HC Rpt. 3.

8. The $15,000 fee was to be paid in two installments of $7,500 each. HC Rpt. 3.

9. The first installment was paid on or around December 2, 2003, by way of two third-party checks, one for $5,000 and one for $500, and one check, valued at $1,010, payable to Respondent. Neither Respondent nor Mr. Saunders remembers or has records of how the balance of $990 was paid; however, Mr. Saunders believes it was paid in cash. The second installment was to be paid after Respondent helped Arron Saunders surrender himself to the authorities. HC Rpt. 4; BX Exception 6.

10. Upon the payment on or about December 2, 2003, Respondent prepared and signed a one paragraph retainer agreement that stated as follows:

> Received from William Saunders, $7,500.00 as partial retainer for Arron Saunders for homicide case in Charles County Maryland. Balance on retainer is $8,000.00 to paid [sic] at time of surrender. If additional fees are owed Mance agrees that it will not exceed an additional $5,000.00.

BX Exception 4.[2] Mr. Saunders also signed this retainer agreement. *Id.*

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[2] Respondent testified that the $8,000 was a typographical error and should have read $7,500 for a total fee of $15,000. Tr. 91. This is consistent with Mr. Saunders' understanding. Tr. 33.

11. In his complaint to Bar Counsel, Mr. Saunders wrote "I initially gave funds to Mr. Mance to obtain his representation. . . ." BX D-1 (emphasis added).

12. Respondent deposited Mr. Saunders' funds as follows:

a. $500 into Respondent's operating account from a third-party check;

b. $5,000 into Respondent's escrow account from a third-party check; and

c. $1,010 into Respondent's Escrow Account from a check made payable to Respondent.

HC Rpt. 4.

13. Asked why he deposited some of the funds in the escrow account, Respondent testified:

> I was putting funds in an escrow account, even though I considered it to be my funds because I guess at the time, I just didn't like to have -- I didn't maintain much of a balance at all in my actual operating account. And I would transfer funds from there into the operating account.

Tr. 80-81. Respondent also explained that he did not want to maintain a large operating account balance because of an ongoing tax controversy with the District of Columbia. BX Exception 9.

14. Respondent does not know if or where he deposited the $990 cash payment. HC Rpt. 4.

The Representation

15. William Saunders requested that Respondent contact the Charles County Police Department, determine what the charges were against Arron Saunders, and confer with the police about surrendering his son. HC Rpt. 5.

16. Respondent believed, based on his prior experience, that he would not be able to obtain meaningful information from the Charles County authorities concerning Arron Saunders

until Arron Saunders had surrendered or a representation was made that surrender was imminent. HC Rpt. 5.

17. Soon after the meeting with William Saunders, Respondent met privately with Arron. They discussed Arron's case. At this meeting, Respondent learned that Arron was not ready to surrender until at least January 2004. HC Rpt. 5.

18. Arron told Respondent that he was concerned for his safety if he turned himself in and was detained. Arron Saunders had a prior federal drug charge and had been a cooperating witness. HC Rpt. 5. Respondent told Arron he would tell the sheriff's department and the State's Attorney about this issue when Arron made up his mind to surrender. HC Rpt. 5.

19. Respondent testified that during his brief representation Arron never did agree to start the process of surrendering to the police. Therefore, Respondent did not contact the Charles County Police Department. HC Rpt. 5.

20. In accordance with the agreement, Respondent undertook the representation of Arron Saunders. Respondent gave legal advice to William Saunders and Arron Saunders as to what he thought Arron should do and the possible consequences of turning himself in. Respondent considered himself obligated to make arrangements to turn Arron in to authorities when Arron notified him that he was ready to surrender. HC Rpt. 5.

21. Under these circumstances, Respondent understood that he was not to contact the authorities until Arron was ready to surrender. Respondent believed that William Saunders, Arron and he were in full agreement as to the plan. William Saunders did not subsequently inquire as to whether Respondent had placed any calls to authorities about this case. HC Rpt. 6.

Termination of the Representation

22. In January 2004, William Saunders telephoned Respondent, terminated his services and requested that the portion of the retainer he paid be refunded. HC Rpt. 6.

23. Mr. Saunders testified: "I told him that since he hadn't done what I needed him to do, that I needed another attorney and I would like to have my money back." BX Exception 13.

24. During the telephone conversation in which William Saunders terminated the representation, Respondent said that he would not charge for his time spent on the various meetings and telephone calls and agreed to refund all funds paid to date. HC Rpt. 6.

25. After the initial telephone call, William Saunders attempted to obtain his refund through more telephone calls and office visits to Respondent, but was unsuccessful. HC Rpt. 6.

26. On February 26, 2004, Mr. Saunders wrote Respondent requesting a refund of his retainer fee. Respondent received this letter. HC Rpt. 6.

27. On May 27, 2004, Mr. Saunders filed a Complaint with Bar Counsel concerning Respondent's delay in repaying the $7,500. Mr. Saunders had not as yet received any refund of his retainer fee from Respondent. HC Rpt. 6.

28. Respondent refunded $5,000 to William Saunders on June 4, 2004, and the remaining $2,500 shortly after June 16, 2004. HC Rpt. 6. There is no evidence in the record that Respondent was aware of the complaint to Bar Counsel when he refunded the $5,000 on June 4th.

29. Respondent received notice of the Bar Counsel's inquiry on or around June 10, 2004. Tr. 115.

30. William Saunders withdrew his complaint to Bar Counsel in late June 2004 after receiving the $7,500 in payments from Respondent. He wrote: "I would like to formally notify

you that Mr. Robert W. Mance has satisfied the debt owed . . . I would like to request that no further action be taken." BX 3.

IV. Analysis

A. Choice of Law

As a preliminary issue, Bar Counsel objects to the Hearing Committee's finding that the D.C. Rules of Professional Conduct should apply to this case. The Hearing Committee granted Bar Counsel's motion to amend the Specification of Charges to charge similar substantive violations, in the alternative, under the Maryland Rules of Professional Conduct. The Committee then found that D.C. rules should apply.

The choice of law provision of the D.C. Rules of Professional Conduct states:

> (b) *Choice of Law.* In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for the purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise, and
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> (2) For any other conduct,
>
> (i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and
>
> (ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

R. 8.5(b). There is no dispute that the conduct being challenged here did not occur in connection with a proceeding in a court. Respondent never appeared in court on behalf of Arron Saunders. Further, no dispute exists that Respondent is admitted to the practice of law in both Maryland

and the District of Columbia. Accordingly, Rule 8.5(b)(2)(ii) applies. Under this section, the rules of the jurisdiction where Respondent principally practices control, unless the conduct "clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice . . . ." R. 8.5(b)(2)(ii). Respondent principally practices in the District of Columbia. Thus, the D.C. Rules apply unless the predominant effect of the conduct at issue was elsewhere.

The Commentary to Rule 8.5 calls for the predominant effect exception to be a narrow one. *See* Rule 8.5 cmt. [4]. The District of Columbia Bar Legal Ethics Committee reiterated that this exception is for "unusual and unique cases," advising that:

> [T]he predominant effect exception properly will be invoked in the narrow set of cases where the factors relevant to the particular conduct in question clearly establish that State X manifestly has a substantially greater interest in the resolution of the question to that of the principal place of practice.

D.C. Ethics Op. 311 (2002).

Here, the "particular conduct in question" is Respondent's handling of the fee paid by his client pursuant to the signing of a retainer letter. Respondent principally practices in the District of Columbia. All of the relevant conduct underlying the charges brought by Bar Counsel took place in the District of Columbia.

- Respondent conferred with Mr. Saunders and entered into a written retainer agreement with Mr. Saunders in his District of Columbia office;
- Respondent met with Arron Saunders, his client, at his District of Columbia office;
- Respondent spoke by phone with Arron Saunders in the District of Columbia;
- The retainer fee was paid to Respondent in the District of Columbia;
- The fee was put into bank accounts by Respondent in the District of Columbia.

Accordingly, the Board finds that the particular conduct charged in this case did not have its predominant effect in Maryland, but in the District of Columbia. As such, the Board finds that the District of Columbia Rules of Professional Conduct apply to the conduct charged in this case.

B. Bar Counsel's Charges

1. Client's Funds versus Attorney's Funds

Bar Counsel charged Respondent with the following violations of the D.C. Rules:

a. Rule 1.15(a), for failing to safeguard client funds in an escrow account (misappropriation) and/or failing to keep client funds separate from his own funds (commingling) and/or failed to maintain complete records of his client's funds;

b. Rule 1.15(d), for failing to treat an unearned advance fee as client property;

c. Rule 1.16(d), for failing to take timely steps to surrender client funds after Mr. Saunders terminated the representation; and

d. Rule 1.17(a) for failing to deposit client funds in a specially designated "account with a title of 'trust account' or 'escrow account;'" and

e. District of Columbia Bar Rule XI, § 19(f) for failing to maintain proper records of client funds.

Specification of Charges 3.

With the exception of the commingling charge and the obligations under Rule 1.16(d) upon termination, a violation of each of these rules requires a preliminary finding that the fee at issue in this case remained the client's property after payment. Bar Counsel argues that the facts establish this under Rule 1.15(d), which provides:

> Advances 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 consents to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of

> advanced legal fees and unincurred costs at the termination of the lawyer's services.[3]

According to Bar Counsel, the fee involved in this case is an advance of an unearned fee, and the fee remained Mr. Saunder's property upon transfer to Respondent, as no client consent was provided to a different arrangement. Respondent contends that the fee was understood to be his property. William Saunders testified that he also understood the fee to be the attorney's property. Respondent presented evidence through an expert witness that a flat fee, as used frequently in the defense of street crime cases, does not fit neatly into the concept of "unearned advance fee arrangements" as envisioned by Rule 1.15(d). To resolve this critical dispute, the Board analyzes the objective evidence, the statements of the principals to discern the parties' intent and the precedents and analysis in this and other jurisdictions.

Bar Counsel claims that the fee in this case was "task-based" and distinguishes such fees from a "general retainer" which it describes, in reliance upon D.C. Ethics Opinion No. 264 as a "fee paid solely for availability." BX Exception 7; D.C. Ethics Op. 264 (1996). According to the Bar Committee opinion, a general retainer is "'not . . . an advance fee but a fee that is fully earned when paid.'" *Id.* (quoting Lester Brickman & Lawrence A. Cunningham, *Non-Refundable Retainers Revisited,* 72 N.C. L. Rev. 1, 5 (1993)).

As evidence that the fee was to be "task-based," Bar Counsel argues that under the retainer agreement "Respondent would not earn the $7,500.00, until Arron Saunder's surrender and he would earn the balance upon 'final resolution' of the matter." BX Exception 7. This is not an accurate reading of the written retainer agreement and seems entirely implausible. The retainer simply stated that the balance of the retainer – another $7,500 – was due at the time of

[3] This Rule was changed in January 2000. Prior to that time, the Rule had been "advances of legal fees and costs become the property of the lawyer upon receipt."

surrender. It did not state or suggest that the first $7,500 was just to arrange the surrender. It is difficult to credit the notion that of the total payment of $15,000, $7,500 was to be for the relatively ministerial task of arranging the surrender and the remaining $7,500 was to deal with all of the rest, including arraignment, pretrial motions, pretrial hearings, discovery, trial and sentencing.

The objective actions and statements of the parties contemporaneous with the retainer and their testimony at the hearing demonstrate that the parties intended the flat fee to be something other than an advance of unearned fees. William Saunders wanted the comfort of having an experienced criminal defense attorney representing his son from the pre-surrender stage through trial. He got that comfort when he paid the $7,500 as part of the full $15,000 retainer. As he stated in his letter to Bar Counsel, he paid the funds "to obtain [Mr. Mance's] representation." BX D-1. He amplified this concept at the hearing when he testified that Mr. Mance told him in advance of representation that $15,000 is "what it would take to obtain him" and "is what it would take to handle the whole thing." Tr. 33.

There apparently was no discussion, let alone an agreement, that the $15,000 would be divided into specific sub-tasks or would be earned on an hourly or other periodic basis. A flat fee was clearly to be paid for Respondent to be available and to represent Arron Saunders throughout the criminal proceeding whether it was resolved a day after surrender by a plea or months or years later by trial. If the $15,000 were to be considered an advance against unearned fees, there would be no rational way to determine when Respondent would be able to take into income in his operating account any given portion of the $15,000. Until the representation was fully concluded, there would be no objective or defensible way to apportion the funds because it

would not be clear how long the representation would last or what specific tasks would have to be performed.

The testimony of the expert, David Schertler, illuminates the parties' intent. According to the expert, on whom both sides appear to rely, flat fees are common in criminal cases involving street crimes. Thus, in contrast to the arrangement where an attorney may get an advance payment from a client and then bill against it hourly for her work, under a flat-fee arrangement, an attorney charges one fee for the entire representation, often from surrender through trial. Mr. Schertler explained:

> [T]he reason is because the vast majority of criminal defendants cannot afford the hourly rates, given the amount of work that must go into a case, and given the hourly rates that are pretty standard here in Washington.
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> And these are folks with limited financial resources. And what they're looking for is some certainty in terms of what the legal fees are going to be.
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> They don't want to enter into an arrangement where the fees could be expanding over a period of time and they have no idea of what it would ultimately result in.
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> So these are folks who are willing to enter into an agreement where they will pay a set fee for representation in a certain type of criminal case.

Tr. 139-40. According to Mr. Schertler, an attorney accepting a flat fee may lose money in the event of a protracted trial, or make money in the event a case pleads out early in the proceedings. Tr. 140. Attorneys are amenable to the practice of obtaining a flat, upfront fee because often they will not get paid otherwise, and nonpayment is rarely a basis for withdrawal from such criminal cases. Tr. 141. In Mr. Schertler's opinion, upon acceptance of the street crime representation and the payment of the fee, the fee has been earned and as such, is the attorney's property. Tr. 147-48.

In short, the flat fee approach described by the expert seems inconsistent with the concept of "[a]dvances of unearned fees" as set forth in Rule 1.15(d). The upfront fee for being available

and performing all future services in the matter is more like an undivided fee similar to the general retainer for availability than it is like a fee to be earned on a future hourly or task-based basis. Mr. Schertler recognized the ambiguity regarding the application of Rule 1.15(d) to a flat fee street crime representation and described the best practice approach which is to state clearly in the retainer letter that the representation involves a flat fee and that the funds become the attorney's property upon payment. Tr. 150-51. While we share the view that this is the preferred approach, our task here is to determine how to characterize this arrangement in the absence of such a clear provision in the written retainer agreement.

Consistent with the real world situation described by the expert, as noted, Mr. Saunders confirmed at the hearing that he had agreed and understood from the outset that "it was Mance's money to do with it as he wanted." Tr. 49. Respondent testified to the same understanding. Bar Counsel provided no contrary testimony. In our judgment, the testimony of Mr. Saunders and Respondent, along with the written retainer agreement, establishes a meeting of the minds that the payment was not "an advance of unearned fees" within the meaning of Rule 1.15(d) but a flat fee payment at the outset for the entire representation, and thus, the property of the attorney upon receipt.

This was the conclusion reached almost twenty-five years ago by the D.C. Legal Ethics Committee, where it noted in D.C. Ethics Opinion No. 113 (1982) that "[a] fee advance is <u>not</u> a retainer given by the client to assure the attorney's availability and not necessarily related to the time expended on the client's matter." (Emphasis added.) In that opinion, the dissent concurred with the majority that the inquiries "do not involve retainers paid by a client to insure the availability of a lawyer's services where the lawyer is entitled to [the] sum regardless of whether he actually renders any services. In that situation, the lawyer has earned the money upon receipt

by promising to be available to perform legal work." *Id.* at n.1. While D.C. has since that time changed the Rule on how "advance fees" should presumptively be treated, it has not changed the meaning of what an "advance fee" is. It has been understood in this jurisdiction for a quarter of a century that a flat fee paid for retaining a lawyer and performing a specific task, without reference to future time charges or sub-tasks performed, is not an advance fee.

The amendment to Rule 1.15(d) was designed to reverse the conclusions of Opinion 113, which, as discussed above, provided that advance fees were the attorney's property. There was no indication or suggestion by the Rules of Professional Conduct Review Committee or the Court of Appeals that the amended rule would now encompass flat fees, which were expressly excluded in Opinion 113. Indeed, nowhere in the Committee's Report is there any discussion of flat fees or any expansion of the definition of advance fee beyond what was understood in Opinion 113. Instead, the Committee made clear that the impetus behind the rule amendment was not any dissatisfaction with how D.C. had understood fees, rather, it was to make the D.C. rule consistent with similar rules in Maryland and Virginia. In those states, a fee advance remains the client's property until earned by the attorney. D.C. Bar Counsel at the time identified a potential "trap for the unwary," for those attorneys practicing in D.C. and Maryland or Virginia, who in one jurisdiction would have their fees become client's property subject to separate escrow, and in another, attorney's property.[4] Thus, the rule was amended to default to an advance fee becoming the client's property with the ability of the client to consent to another arrangement. To argue now that this amendment also encompassed flat fees is to set a new "trap for the unwary."

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[4] *See* Memorandum from Daniel Joseph, Chair, Rules of Professional Conduct Review Committee to Members of the Board of Governors 2 (Aug. 29, 1997) (Interim Report on Review of Rule 1.15(d)).

Contrary to the implication of the dissent, the resolution of whether a flat fee paid in advance is the attorney's property upon receipt or remains client property has hardly been uniform among the jurisdictions. Reflecting the fact that many U.S. jurisdictions view the flat fee arrangement as the attorney's property, the Restatement (Third) of the Law Governing Lawyers § 44 cmt. f (2000), as adopted in 1998, concluded that "if a payment to a lawyer is a flat fee paid in advance rather than a deposit out of which fees will be paid as they become due, the payment belongs to the lawyer . . . ."

Similarly, in a recent Second Circuit case, *United States v. Parker,* 439 F.3d 81, 100 n.18 (2d Cir. 2006), the unanimous court noted that when a "retainer" is a "'prepayment for all future services to be performed, amounting to a flat fee,'" then "'the attorney acquires title to the retainer fee at the time he receives it, regardless of whether he thereafter performs legal services for the client.'" (quoting *In re Equipment Servs., Inc.*, 290 F.3d 739, 746 (4th Cir. 2002)). The Court specifically distinguished the situation, not present here, when there is a trust arrangement "'in which the attorney holds the retainer for the client as security for the payment of future fees, then the retainer, so held, less any fees charged against it, constitutes the property of the client.'" *Id.* (quoting *In re Equip. Servs.*, 290 F.3d at 746.) While there are less than a handful of states that have treated flat fees as an advance that remain the clients funds that must be placed in a client trust account (*see, e.g., Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Apland,* 577 N.W.2d 50, 55-56 (Iowa 1998); *In re Dawson,* 8 P.3d 856, 859 (N.M. 2000)), more jurisdictions find that flat fees belong to the lawyers upon receipt. *See, e.g., In re Kendall,* 804 N.E.2d 1152, 1156-58 (Ind. 2004) (relying on *In re Stanton,* 504 N.E.2d 1 (Ind. 1987) to hold that "flat fees do not have to be deposited in a trust account" and "need not be segregated from an attorney's operating expenses"). Endorsing this concept, a federal court in Arkansas stated

just before the D.C. Rule change: "The reality in the criminal defense context (given the nature of the proceedings) and the oft-times result of the proceedings is that criminal defense attorneys must obtain a flat fee, up front, which is property of the attorney." *Meeks v. Perroni (In re Armstrong)*, 234 B.R. 899, 904 (Bankr. E.D. Ark. 1999).

After carefully considering this issue in the late 1990's, the State Bar of North Carolina stated that a flat fee is "usually collected at the beginning of the representation, treated by the lawyer as money to which the lawyer is immediately entitled, and deposited into the lawyer's general operating account or paid to the lawyer." *See North Carolina State Bar, Revised 97 Formal Ethics Opinion 4* (1998). According to bar opinions, the same rule appears to apply at least in New York[5], Ohio[6], Connecticut[7] and Georgia[8]. The Ohio Board of Commissioners on Grievances and Discipline stated that the Rule on preserving client funds and property "does not require that flat fees paid in advance for representation in a criminal matter be placed in a trust account. A flat fee . . . may be placed into the attorney's business account upon receipt, based upon the agreement between the lawyer and client that the flat fee will be paid in advance of representation." Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, Op. 96-4 (1986) ("Ohio Op. 96-4"), at 4.

As noted in a law review article on the subject and reiterated in the recent opinion of the Supreme Court of Indiana, the majority of jurisdictions have held that flat fees may, with the

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[5] *See* New York State Bar Ass'n Comm. on Professional Ethics, Op. 570 (1985); New York County Lawyers' Ass'n Comm. On Professional Ethics, Op. 690 (1992).

[6] *See* Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, Op. 96-4 (1996).

[7] *See* Connecticut Bar Ass'n, Comm. On Professional Ethics, Informal Op. 90-29 (1990).

[8] *See* State Bar of Georgia, Formal Advisory Op. 91-2 (1991).

consent of the client, be considered to be earned upon receipt and thereafter are not required to be placed in a trust account. Alec Rothrock, *The Forgotten Flat Fee: Whose Money Is It and Where Should It Be Deposited?* 1 Fla. Coastal L. J. 293, 305-20 (1999); *In re Kendall*, 804 N.E.2d at 1157. In this article, admittedly written before the change in Rule 1.15(d), the District of Columbia is listed as the leading jurisdiction where a flat fee paid in advance is treated as the lawyer's property. Rothrock, *supra*, at 300-01.

On the basis of this analysis, we conclude that a flat fee arrangement, that guarantees the availability of counsel and provides no expectation or basis that fees will be charged against that amount on an hourly or specific sub-task basis, constitutes an agreement and understanding between the lawyer and the client that the fees are to be the lawyer's upon receipt and that they are not "[a]dvances of unearned fees" within the meaning of D.C. Rule 1.15(d). As the Ohio Board reasoned, "By agreement, the funds are given to the lawyer in exchange for the promise to represent the client in the matter." Ohio Op. 96-4, at 4.

Alternatively, even assuming the $15,000 was an advance against unearned fees, the Board finds that Mr. Saunders consented to an arrangement whereby the funds could be treated as the property of the attorney within the meaning of Rule 1.15(d). Mr. Saunders testified that this was his understanding prior to entering into the retainer agreement and prior to paying the $7,500. Tr. 34. As Rule 1.15(d) makes plain, and in accordance with the majority rule in this country, the client can consent to an arrangement whereby an advance of unearned legal fees becomes the property of the lawyer upon receipt. Rule 1.15(d) does not require any formality for the consent and does not require that it be in writing.

Bar Counsel argues that the consent cannot be effective because it does not comport with the definition of "consent" in the Terminology section of the Rules. The Terminology section

provides that consent "denotes a client's uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question." In turn, the Rules' Terminology provides that a consultation "denotes communications of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." To show the absence of such a communication, Bar Counsel relies upon a stipulation that it prepared stating: "When Mr. Saunders retained Respondent's legal services, he did not discuss whether to have the legal fees retained in a non-trust account. Mr. Saunders did not discuss whether to allow Respondent to treat the retainer fee as his own upon receipt." Stip. 1-2; BX Exception 5.

The Board concludes that Bar Counsel's position accords more formality to the concept of consent than is warranted by the Rules. The testimony reveals that prior to agreeing to the representation, Respondent made clear to Mr. Saunders that it would take an upfront payment of $15,000 to secure his agreement to represent Mr. Saunders' son and to handle the criminal case. Mr. Saunders clearly acquiesced in that arrangement with the understanding, based on his experience and the statements of Respondent, that once the money was paid, it would be Respondent's property to do with as he saw fit. As the Court has emphasized, it is the "obligation of [District of Columbia] attorneys to ensure that their fee arrangements are understood by their clients." *In re Schlemmer*, 870 A.2d 76, 79 (D.C. 2005) (internal quotation marks and citation omitted) (alteration in original). It appears that Respondent satisfied this obligation prior to the retention, and Mr. Saunders agreed to it as a basic part of the retention. If he did not agree, Mr. Saunders had the option of choosing other counsel or negotiating the issue. The fact that the parties did not discuss escrow accounts does not mean that Mr. Saunders did not give his uncoerced consent to permitting Respondent to treat the retainer as his own funds upon receipt.

Because we conclude that the flat fee was not an advance of unearned fees, within the meaning of Rule 1.15(d) and, that in any event, Mr. Saunders consented that the $7,500 would be Respondent's property upon receipt, we conclude that Respondent did not engage in misappropriation in violation of Rule 1.15(a) and did not violate Rule 1.15(d), Rule 1.17(a) or D.C. Bar R. XI, §19(f). Each of these rules requires the funds at issue to be the client's funds.[9]

2. Violation of Rule 1.16(d)

Rule 1.15(d) provides that, even if there is a consent to have the retainer treated as the lawyer's property, Rule 1.16(d) applies to require the return of any unearned portion of the advance legal fees upon the termination of the lawyer's services. Thus, even assuming there was consent, Rule 1.16(d) applies. Further, the Board believes that, even if the retainer payment was not an advance of unearned legal fees within the meaning of Rule 1.15(d) but the payment of a retainer belonging to the lawyer, the provisions of Rule 1.16(d) still apply upon termination of a representation.

Rule 1.16(d) states in pertinent part:

> In connection with any termination or representation, a lawyer shall take timely steps to the extent reasonably practicable to protect the client's interests such as . . . surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned.

In this case, the retainer payment was intended to cover the Respondent's handling of the criminal matter from beginning to end. Even though upon payment the retainer belonged to the

[9] If the Court were to conclude, contrary to our analysis, that the flat fee was an advance of unearned fees and that the consent was ineffectual, then the Board, like the dissent, urges the Court to make such a ruling prospective only and not to find collateral consequences, such as misappropriation. In light of the ambiguity of the Rules, the prior rulings of the D.C. Ethics Committee, the law in other jurisdictions, the lack of guidance in the commentary to the D.C. Rules and the absence of a precedent dealing with flat fees under the amended D.C. Rules, we believe that no suspensory discipline is warranted for treating these funds as the lawyer's until after a definitive ruling by the Court.

attorney, when he was terminated even prior to the Defendant's surrender, it was clear that there was no longer any basis to keep the payment. Respondent was no longer in a position to carry out his end of the bargain, and the termination had occurred before Respondent had taken any substantive steps or incurred much expense in relation to the matter. At that point, Respondent had an obligation to return the retainer, regardless of whether it was deemed to be his property upon receipt. This is consistent with the approach of other jurisdictions which have found that flat fees do not need to be placed in client trust accounts. *See, e.g.,* State Bar of Georgia, Formal Advisory Op. 91-2 (1991) (recognizing that regardless of the particular fee arrangement, a lawyer has a duty upon termination to "return to the client any unearned portion of a fee"); Connecticut Bar Ass'n, Comm. on Professional Ethics, Informal Op. 90-29 (1990) (instructing that where a lawyer received a flat fee, if "discharged by your client, under Rule 1.16(d), you must reimburse to your client that portion of the fee that you have not earned"); New York State Bar Ass'n, Comm. of Professional Ethics, Op. 570 (1985) (same); Ohio Op. 96-4, at 4 ("deposit into a [lawyer's] business account does not mean that the fee is nonrefundable"). Such an approach is also consistent with common law in this jurisdiction. Where performance of a contract becomes impossible, it becomes a nullity and all parties are to be returned to the status quo ante. *See, e.g., Fischer v. Estate of Flax*, 816 A.2d 1, 11 (D.C. 2003); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 320 (D.C. Cir. 1966). Of course, the client had the right to discharge Respondent. Respondent promptly and properly recognized the obligation to return the retainer due to the impossibility of performance and agreed to return the payment and not to charge anything for the limited services that had been rendered to that point.

However, after agreeing to the return of the payment, Respondent failed to live up to his word and to his obligation under Rule 1.16(d) to take "timely" steps to return the "property to

which the client" was entitled. Respondent was aware that the delay could have adverse consequences because the client advised that he needed the funds to retain substitute counsel. The Board concludes that Respondent violated Rule 1.16(d) when he failed to make a prompt return of the $7,500 retainer and delayed six months in returning the funds.

3. Violation of Rule 1.15(a) - Commingling

The finding of the Committee on the one remaining charge, commingling, has not been objected to by either Bar Counsel or Respondent. The evidence shows that Respondent deposited $6,010 of his funds into an escrow account which contained the trust funds of clients. Moreover, Respondent stipulated to this fact. Stip. 3. Rule 1.15(a) provides: "A lawyer shall hold property of clients . . . that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." Accordingly, the Board concludes that the Respondent violated Rule 1.15(a) as it pertains to commingling.

V. Sanctions

The Committee recommended that Respondent be publicly censured for the violation of Rule 1.15(a). H.C. Rpt. 15, 19. Bar Counsel objects to this recommendation and urges the Board to find Respondent guilty of all the charges brought against him and to adopt an 18-month suspension.[10] In the event the Board rejects the charges of misappropriation, Bar Counsel proposes that a short suspension would still be appropriate. Bar Counsel's Proposed Findings of Fact and Conclusions of Law and Recommendation for Sanction (Nov. 28, 2005) ("BX Br."), at 38.

[10] Along with the 18-month suspension proposal, Bar Counsel also proposed that a stayed sanction may be appropriate in view of mitigating circumstances. *See* BX Br. 32.

The Court has recognized numerous factors to consider in determining what an appropriate sanction should be. These factors include the nature of Respondent's misconduct, the sanctions imposed in comparable cases, the Respondent's history of prior discipline, the degree to which Respondent's client was prejudiced by his neglectfulness, Respondent's attitude and circumstances in mitigation. *See In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). The Board discusses the pertinent considerations below.

A. Nature of Respondent's Conduct and Sanctions for Similar Misconduct

As discussed above, the Board has found a violation of Rule 1.15(a) as it pertains to commingling and a violation of Rule 1.16(d) for an undue delay in returning the retainer. The Board recognizes that commingling of attorney's funds with client funds is a serious breach of an attorney's ethical obligations. As this Court stated in *Hessler*:

> By mingling client funds with the attorney's own, the client's funds become more difficult to trace and are subject to the risk that they may be taken by creditors of the attorney.

In re Hessler, 549 A.2d 700, 702 (D.C. 1988). However, the Board also observes that no misappropriation, intentional or negligent, has been found in this case, nor is there any claim of dishonesty.

A review of case law reveals that public censure is the typical sanction imposed in cases which involve simple commingling with no other related disciplinary violations. *See, e.g., In re Goldberg*, 721 A.2d 627, 628 (D.C. 1998) (per curiam) (public censure and enrollment in CLE class for commingling law firm operating funds with funds in the firm's escrow accounts with no harm to client); *In re Teitelbaum*, 686 A.2d 1037, 1039 (D.C. 1996) (per curiam) (public censure for commingling without injury to client); *In re Ingram*, 584 A.2d 602, 603-04 (D.C. 1991) (per curiam) (public censure where commingling lasted for approximately six months); *see also In re*

Keilp, 600 A.2d 1089 (D.C. 1992) (per curiam) (recognizing that for simple commingling, "our sanction in the past has typically been public censure"). Where there is commingling and a related violation, such as misappropriation, a suspension or disbarment will be imposed. *See, e.g., In re Berryman*, 764 A.2d 760, 774 (D.C. 2000) (disbarment where there was commingling and intentional misappropriation); *Hessler*, 549 A.2d at 702-03 (commingling and negligent misappropriation resulted in six-month suspension).

Here, the Board has found a violation involving commingling and a violation of Rule 1.16(d). The violation of Rule 1.16 was unrelated to the commingling because it was not the commingling that prevented Respondent from making a prompt return of the funds. Violations of Rule 1.16(d) generally result in a public censure. *See, e.g., In re Mitchell*, 727 A.2d 308, 314 & n.7, 315 (D.C. 1999) (imposing a public censure for violations of Rules 1.15(b), 8.4(c) and 1.16(d) where the attorney failed to inform his client of the firm's bankruptcy). As discussed *supra*, no harm is alleged to have come to the client in this case. Moreover, Respondent has taken relevant CLE classes and is now knowledgeable of the requirements of the rules regarding fee arrangements. The Board, therefore, finds that the facts of Respondent's case more closely resemble those cases in which public censures were imposed, and do not warrant a finding of greater sanction. *See, e.g., In re Goldberg*, 721 A.2d at 628.

B. History of Prior Discipline

Respondent has twice received informal admonitions for failure to provide a written retainer agreement as required by Rule 1.5(b). The conduct occurred in 1996 and in 2000 respectively. BX 12 and BX 13. Respondent was also given a 30-day suspension in 2005, stayed during a one-year period of probation, for failure to protect his client's appeal rights in a

criminal case.[11] As part of his probation, Respondent was required to attend six hours of CLE courses in legal ethics and law office management.

The Board finds that the prior discipline did not go to Respondent's moral character or integrity. Furthermore, the current and prior cases involve different conduct. Respondent is not being charged with repeating past wrongs. In light of this, and mitigating circumstances discussed below, the Board does not find that the Respondent's prior discipline is a significant aggravating factor in the sanction analysis.

C. Prejudice to Client

Bar Counsel states that "Respondent risked financial prejudice to the client by not creating and maintaining records of the funds . . . ." BX Exception 30. The Board recognizes, as discussed above, the serious risk to a client's funds which comes with commingling funds. However, Bar Counsel is not alleging here that financial prejudice occurred to the client in this case. Indeed, Bar Counsel does not dispute that it has not alleged any legal prejudice to the client. *Id*. Nor has Bar Counsel shown prejudice as to the clients whose funds were in the escrow account when Respondent deposited his own funds. Accordingly, the Board finds no prejudice to the client resulted from Respondent's commingling of his funds with client funds and no prejudice from the delay since Mr. Saunders was able to retain successor counsel to handle the criminal case. Indeed, as noted, the client specifically asked Bar Counsel to drop this matter shortly after he received the refund of his retainer amount.

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[11] The Court also ordered that: "If, during the period of his probation, the Board finds that respondent has violated the conditions of his probation or has committed any additional violation of the Rules of Professional Conduct, the stay shall be lifted and the suspension shall take effect ten days after the Board submits its findings to this court." *In re Mance*, 869 A.2d 339, 343 (D.C. 2005). The one-year probationary period extended from March 2005 through March 2006. The conduct at issue here occurred in late 2003 and early 2004 before the probationary period began and thus does not constitute a violation of probation.

D. Respondent's Attitude

Bar Counsel stated that Respondent cooperated in the proceeding. In addition, Bar Counsel noted that Respondent did not appear hostile, nor did he act inappropriately by making light of the proceedings. BX Exception 31. The Committee also observed that it was "impressed with the seriousness with which Respondent appeared to take these proceedings." HC Rpt. 16. Therefore, nothing regarding Respondent's attitude warrants consideration of a more stringent sanction than would typically be imposed in these cases.

E. Mitigating Circumstances

With regard to possible mitigating circumstances, Bar Counsel observed that Respondent offered immediately after being informed by Mr. Saunders that his representation was being terminated to return all of the fee which Mr. Saunders had paid and eventually did so. BX Exception 13. Mr. Saunders also requested that the proceeding against Respondent be dropped. BX 3. In addition, Respondent has completed CLE courses in legal ethics and law office management, which have addressed the issue at the core of this case and makes repetition of the violations unlikely. Furthermore, Respondent is a highly regarded member of the Bar and part of a small number of Bar members who offer representation for street crime defendants.

F. Recommended Sanction

Bar Counsel recommends an 18-month suspension for multiple rule violations. For commingling alone, without misappropriation, Bar Counsel still recommends a short suspension. The Board concludes that a suspension is too harsh a sanction for the violations we have found. As this Board previously explained:

> An attorney's suspension can create difficulties for the courts, the public, and other members of the legal profession, such as significant delay of pending cases and/or the transfer of such cases to other attorneys. There may be times when the

> needs of the court, the public, and the legal profession would be better served by allowing a respondent with a lengthy and well-reputed history of providing an important service to continue providing this service rather than . . . impos[e] a suspension that creates unnecessary difficulties.

In re Mance, 869 A.2d 339, 342 n.10 (D.C. 2005) (quoting the Board's Recommendation). The Board finds that here, where Respondent serves a very important and necessary role in our criminal justice system, where there is little chance of recurrence of the conduct at issue, and where the conduct did not involve dishonesty or prejudice to the client, a public censure is appropriate.

VI. Conclusion

In view of all the foregoing considerations, we recommend that Respondent be publicly censured by the Court for a violation of Rule 1.15(a) for commingling and for a violation of Rule 1.16(d) for the delay in returning the retainer.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Irvin B. Nathan

Dated: JUL 28 2006

All members of the Board concur in this Report and Recommendation except Mr. Willoughby, who is recused, and Ms. Helfrich who has filed a separate statement dissenting in part and concurring in part.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
ROBERT W. MANCE,	:	
	:	
Respondent.	:	Bar Docket No. 241-04
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 285379)	:	

STATEMENT OF MS. HELFRICH
DISSENTING IN PART AND CONCURRING IN PART

From the Majority's tone, one might think that there is a great gulf of disagreement between my recommendation and my colleagues' with regard to the appropriate result in this case. Actually, there is not. I concur with the Majority that a public censure is the most appropriate sanction to impose on this Respondent. In fact, as regards Respondent's dealings with his client's father, Mr. Saunders, and his treatment of the flat fee as his "property," I agree that Respondent's actions were reasonable given the absence of any definitive District of Columbia (D.C.) case law on an attorney's fiduciary obligations for holding flat fee payments in trust or otherwise. Thus, it should be understood at the outset that my references to Respondent's conduct in this case are for illustrative purposes only.

Where the Majority and I part ways is in terms of what is the soundest interpretation of Rule 1.15(d) for the future. According to the Majority, to interpret Rule 1.15(d) to encompass flat fee payments would be to set up a "trap for the unwary." Majority at 17. The Court, however, modified Rule 1.15(d) in 2000 to close that "trap", a

"trap" that was caused by the differences between our old Rule 1.15, which permitted advances to be treated as property of the attorney with or without consent, and the Rules in other jurisdictions, particularly our neighbors in the Metropolitan area, which required an advance to be treated as client property, period.

That "trap" was particularly pronounced here because of the many lawyers who are members of both the D.C. Bar and the Maryland and Virginia Bars. The same types of fees had to be handled differently by multi-jurisdictional practitioners because of the different treatment by D.C. under the older Rule.

While, as the Office of Bar Counsel ("OBC") notes, there were suggestions that Maryland viewed flat fees as falling within its Rule 1.15 at the time Respondent entered into his fee agreement with Mr. Saunders, any ambiguity in the Maryland decisions no longer exists. *Attorney Grievance Commission v. Zuckerman*, 872 A.2d 693 (Md. 2005). Thus, at least for flat fees, lawyers practicing in both D.C. and Maryland will face the same "trap" under the Majority's approach. For example, a lawyer, like Respondent, who practices in Maryland and D.C., will face the constant threat that s/he will be in violation of one or the other jurisdiction's rule on handling fees.

The vexing determination of which rule to follow is particularly problematic for those many lawyers who have regular and routine practices in the Metropolitan area, particularly when the choice may result in a finding of misappropriation by one jurisdiction. Take, for example, the assertion by OBC that Maryland rules applied to this

case under Rule 8.5. This was not a frivolous argument.[1] While I concur in the Majority's conclusion on that issue, it was because, in my view, the interests of both Maryland and D.C. were, in essence, "tied." D.C. has a regulatory interest[2] in assuming authority over fee contracts actually entered into here. Maryland, however, has a regulatory interest in protecting its consumers of legal services, particularly when the case matter involves the performance of services within its borders, not ours. Lawyers who charge flat fees, however, will need to make this risky determination, similar to that under Rule 8.5, on a regular basis and with no guidance.

Then, there is of course reciprocal discipline. Will Maryland regularly defer to a D.C. sanction that is inconsistent with its public policies on the handling of client funds? If the shoe was on the other foot and the case involved misappropriation, we would not. *E.g.*, *In re Mirsky*, 860 A.2d 363 (D.C. 2004) (per curiam).

While the Court, in fact, changed Rule 1.15(d) to relieve multi-jurisdictional practitioners from the "trap," standing alone that might not justify including flat fees within the phrase "advances of unearned fees." In this regard, it is simply undeniable that the underlying purpose of Rule 1.15 is not to protect the lawyer, but to serve the client. Accepting the Majority's construction means that one segment of legal consumers, those

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[1] *See e.g.*, Rule 8.5, comment [4] (when "particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer was admitted in, and principally practiced in, State A, but also admitted in State B, handles an acquisition by a company whose headquarters and operations were in State B of another, similar such company"). The facts of this case can clearly be fit within this example. The expert in this case thought that Maryland ethics rules would apply to a case to be handled in Maryland. Tr. 157.

I disagree with the Majority that the location of Respondent's office or his bank is relevant to the Rule 8.5 inquiry. Nonetheless, I agree that D.C. has a regulatory interest over agreements made here and the handling of funds transferred under those agreements.

[2] *See* Rule 8.5, comment [3] (recognizing importance of "appropriate regulatory interests of relevant jurisdictions" in choice of law determination).

charged flat fees, are deserving of less protection under the ethical rules designed to protect their interests, than other legal consumers, those who are not uncommonly required by both large and small firms to remit advances of unearned fees. And, as the Majority notes, albeit in different context, those who will receive less protection are likely to be those of limited means and in need of immediate assistance. Majority at 27.

As regards Rule 1.15(d) there are two issues. First, does the phrase "advances of unearned fees" logically include flat fee payments? If the answer is no, the Rule 1.15(d) issue disappears; there is no need to consider consent.

If the answer is yes, however, the second issue is whether by simply agreeing to enter into an agreement for legal services, with no disclosure of the issue of ownership of funds, a client can be deemed to have consented to the treatment of a flat fee payment as the property of the lawyer.

Obviously, as a matter of future guidance to attorneys, I disagree with the Majority's answers to both of these questions. Before discussing the case law of other jurisdictions, which I recommend to the Court, it is necessary to clear out some of the underbrush beneath the Majority's opinion.

First, neither generally nor under the facts of this case does a flat fee payment represent a "retainer," *i.e.*, a nonrefundable payment to assure the availability of the attorney whether services are performed or not. D.C. Legal Ethics Opinion 264 (February 14, 2006) (distinguishing general retainers and special retainers). As Opinion 264 demonstrates, the term "retainer" has a specific meaning, narrower than simply that an attorney has been retained or hired. Nothing in Opinion 113, cited by the Majority, suggests otherwise and, indeed, that Opinion was rendered well before the amendment of

D.C. Rule 1.15(d). Reliance on Opinion 113 by the Majority, in that respect, is somewhat odd.

A flat fee is, in fact, a payment for future or "advance" services, *e.g.*, the drafting of a will or incorporation papers. Unlike a general retainer, a flat fee agreement will specify the services to be performed. That is exactly what the facts in this case demonstrate: Mr. Saunders hired Respondent, not to be available if and when a need arose or not, but to defend his son against criminal charges. Indeed, Respondent's own description of his agreement with Mr. Saunders confirms that his was a fee for specific, albeit future, services.[3] Citing the expert testimony in this case, flat fee is defined by Respondent as "the fee agreed upon by the attorney and a client *for legal services to be provided* by the attorney." Respondent's Brief at 17-18 (emphasis added). It is also what Mr. Saunders understood: he was paying an upfront fee to "handle the whole thing." Tr. 27. *See also* Tr. 31. That is what the evidence shows regarding the "meeting of the minds" in this case.

Second, applying Rule 1.15(d) to flat fee agreements would not preclude a lawyer from requiring an upfront fee payment in a criminal case or any other case. Majority at 15. Certainly there are cases in which a lawyer needs to protect his financial interests from clients who may refuse to pay for his services in the future. Yet, all Rule 1.15(d) does is set the requirements for the attorney's handling of the upfront payment when it is made.

[3] Any "advance" fee, of course, presupposes that the client will receive the benefit of future legal services. As OBC correctly notes this was termed a "special retainer" in Opinion 264. The suggestion by the Majority that a flat fee payment is a "general retainer" – a payment to remain available – could equally be applied to an "advance" fee, contrary to Rule 1.15(d). Every agreement between an attorney and a client presupposes that the attorney is "available" to provide legal services. *See e.g.*, Rule 1.5(a)(2), (a)(5) & (a)(6). The difference between a general and specific retainer is that the former is nonrefundable, whether services are provided or not.

Third, the testimony of the expert witness does not support any conclusion that there is no "objective or defensible" way to apportion a flat fee over the course of representation. Majority at 14. In fact, the expert testified that it could be done and was done by some attorneys, including, at times, the expert. Tr. 151-152. It may be true that apportionment would have been difficult under Respondent's fee agreement with Mr. Saunders, but that is because it was not addressed in the agreement. If hourly apportionment is unrealistic in any case, task-based apportionment or allocation based upon milestones[4] are options that are not beyond the capabilities of an attorney to include in any standard or particular fee agreement.[5] Moreover, under our Rule 1.15(d), client consent to a different arrangement is also an option.

Fourth, I have absolutely no disagreement with what the Majority posits as the majority position on handling of flat fees. As the Majority summarizes, "the majority of jurisdictions have held that flat fees *may, with the consent of the client,* be considered to be earned upon receipt *and thereafter* are not required to be placed in a trust account." Majority at 19 (emphasis added). The corollary to this obviously must be that *without "the consent of the client"* a flat fee payment is *unearned "and thereafter*" must be placed in a trust account. In this respect, the majority position under the case law reflects the very options D.C. provides under its formulation of Rule 1.15(d): the handling of an advanced fee payment depends on client consent. It does not, however, answer the question whether under D.C. Rule 1.15(d) a flat fee is a species of an advanced fee

[4] *In re Sather*, 3 P.3d 403, 411 (Colo. 2000).

[5] Overlooked is the fact that specifying tasks or milestones also benefits the attorney by providing defensible grounds for *quantum meruit* recovery.

payment and neither does the Majority, except that it casually refers to a flat fee as a general retainer throughout its discussion.

A. Flat Fee as an Advance on Unearned Fees

Rule 1.15(d) states:

> "Advances 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 consents to a different arrangement."

Paragraph (a) requires advanced fees to be maintained in the attorney's trust account.

The first question in this case is whether, as a matter of law, a flat fee is a form of advanced fee under Rule 1.15(d), thus obligating attorneys to segregate those funds. The following courts have been presented with this question and, addressing it squarely, have answered it in the affirmative. *In re Sather*, 3 P.3d 403 (Colo. 2000); *Iowa Supreme Court Board of Professional Ethics and Conduct v. Apland*, 577 N.W. 2d 50 (Iowa 1998*); In re Dawson*, 8 P.3d 856 (N.Mex. 2000). In my view, the analyses in these decisions set forth the interpretation of Rule 1.15(d) that should be adopted by the Court.

In the decisions cited above, the courts acknowledged the benefits of flat fee arrangements. Unlike the Majority, these laudatory features of flat fee arrangements did not convince these courts to exclude them from the scope of their rules requiring advance fees to be deposited in trust accounts. Thus, for example, in *Sather*, the Colorado court stated that clients still had the expectation of receiving a benefit from a flat fee payment and until that benefit was received, in whole or in part, the fee remained the property of the client. *Sather*, 3 P.3d at 410. This is consistent with the definition of a flat fee generally and as understood under the fact of this case. Thus, the court in *Sather* held:

> In contrast to engagement [general] retainers, a client may advance funds – often referred to as "advance fees," "special retainers," "lump sum fees," or "flat fees" -

> - to pay for specific legal services to be performed by the attorney and to cover future costs. *See Scimeca*, 962 P.2d 1091; *Lochow*, 469 N.W.2d at 98, Model Rules, supra, Rule 1.5, commentary at 59; ABA/BNA Lawyers' Manual, supra at 45:111. We note that unless the fee agreement expressly states that a fee is an engagement retainer and explains how the fee is earned upon receipt, we will presume that any advance fee is a deposit from which an attorney will be paid for specified legal services. *See* Draft Restatement, supra, § 50 cmt. (g) ("A fee that does not cover services already rendered and that is not otherwise identified is presumed to be a deposit against future services.").

Id. at 410-411. D.C. Rule 1.15(d), although using only the term "advances," also adopts a presumption that such are the property of the client. Rule 1.15, comment [2].

In *Dawson*, the New Mexico court acknowledged that determining any "earned" portion of a flat fee might be difficult. *Compare* Majority at 23. Nonetheless, that court concluded that the difficulty arose because of the attorney's failure to set forth any methodology in the retainer agreement; this was, in the New Mexico court's view, the responsibility of the lawyer. *Dawson*, 8 P.3d at 860.

Clearly influencing the courts in the above-cited cases were the purposes served by Rule 1.15(d). These are threefold.

First, segregation of funds serves a client's interests by insuring that the fee is protected from an attorney's creditors or is not misused by the attorney. *Sather*, 3 P.3d at 409.

> [E]mpirical data on the causes of lawyer defalcation indicates that the failure to return unearned fees constitutes a major disciplinary problem and generates substantial claims by clients against client protection funds. Clients often are unable to obtain the return of unearned advanced fee payments because their lawyers have either spent the money or otherwise made it unavailable to the client. A rule mandating that advance fees be deposited to the client trust account would reduce both the volume of litigation that clients pursue against lawyers for refunds of advance fee payments as well as the number of client claims against lawyers that are paid through client protection funds, in each case saving substantial sums of money.

Apland, 577 N.W. 2d at 56, quoting, Lester Brickman & Lawrence A. Cunningham, Nonrefundable Retainers Revisited, 72 N.C. L. Rev. 1, 42 (1993). Segregation of funds stems from the truism that a lawyer is a fiduciary. "As a fiduciary to the client, one of an attorney's primary responsibilities is to safeguard the interests and property of the client over which the attorney has control." *Id*. This fiduciary principle is embedded within D.C. Rule 1.15. Rule 1.15, comments [1], [6].

In this case, the record demonstrates that Respondent did use the fees paid by Mr. Saunders as a means to satisfy creditors, D.C. taxing authorities. This case was also initiated by Mr. Saunders because of Respondent's failure to refund the fees (although he did try to withdraw his complaint at a later time). Respondent was unable to refund immediately because of his use of the fees. D.C. disciplinary case law does not evidence any exception from the empirical data rule.

Second, segregation of funds protects the client's right to discharge an attorney. Clients have an absolute right to discharge an attorney with or without cause. The exercise of that right should not be influenced by a client's fear of a loss of available funds. An untimely return of unearned fees could very well disable a client with limited financial resources from obtaining alternative counsel. *Sather*, 3 P.3d at 409-410.

In this case, Respondent knew that Mr. Saunders needed a new attorney for his son as soon as possible and understood that Mr. Saunders wanted his money back to hire a new attorney. Tr. 40-41. That he was able to find an attorney in the meantime is, in my view, irrelevant. We simply do not know what arrangements were made with the replacement counsel, the fee charged by that counsel, or Mr. Saunders' ability to pay

replacement counsel without the expectation that Respondent would refund the fees at some point.

Third, the deposit of advance fees, including flat fees, "enables the client to realistically dispute a fee where the funds are already in the lawyer's possession by disallowing a self-help resolution by the lawyer and instead preserving the disputed funds intact until the dispute is resolved." *Apland*, 577 N.W. 2d at 56, quoting, Brickman, The Advance Fee Payment Dilemma, 10 Cardozo L. Rev. 647, 667 (1989). A similar factual scenario was addressed by the Court in *In re Haar*, 698 A.2d 412 (D.C. 1997). In that case, the Court held that the respondent could not withdraw any amount from his trust account in payment of fees when the client had given notice that she disputed his total fee calculation. The Court criticized the notion that attorneys should feel entitled to take "self help" actions to enable even partial payment of owed fees.

One of the underlying assumptions of the Majority appears to be that these purposes are equally served by Rule 1.16 requirement that lawyers timely refund unearned fees upon termination of the representation. The purposes of Rule 1.16 and Rule 1.15 clearly overlap. Yet, in a practical and important respect, the effectiveness of Rule 1.16 is directly related to the attorney's financial ability to timely comply. The interrelationship of the two Rules is recognized in the comments to both. Rule 1.15, comment [2], Rule 1.16, comment [12].

Indeed, in this case, Respondent could not timely return any of the flat fee paid by Mr. Saunders because he had used all of the fee for personal purposes. In my view, Rule 1.15(d) facilitates the requirements of Rule 1.16.

As noted, acceptance of the Majority's interpretation of Rule 1.15(d) in essence will produce the perverse result that clients with financial concerns and constraints – as opposed to those who can afford reduction of their advances by high hourly rates – receive less protection against attorney misuse of fees, less protection of their absolute right to choose counsel and less protection of their right to dispute fees. In my opinion, this is not an acceptable result. "Regardless of a lawyer's reasons for requiring an advance payment of a flat fee from a particular type of client, however, these clients are still entitled to the same protections afforded to other members of the public under the Rules Governing Discipline and the Rules of Professional Conduct." *Dawson*, 8 P.3d at 860. *See also In re Clower*, 831 A.2d 1030 (D.C. 2003) (per curiam) (ethics Rules must be given common sense interpretation consistent with their purposes).

B. Consent

As an alternative holding, the Majority concludes that Respondent's client did consent to a "different arrangement", *i.e.*, that it was Mr. Saunders understanding that "'it was Mance's money to do with as he wanted.'" Majority at 16. While the Majority acknowledges that there was no discussion of fee segregation versus a "different arrangement", it concludes that, because of Mr. Saunders' understanding, "Bar Counsel's position [on Rule 1.15(d)'s consent requirement] accords more formality to the concept of consent than is warranted by the Rules." *Id*. at 21.

With all respect to the Majority, informed consent is not a mere "formality" under D.C. Rules and was not obtained by Respondent from his client in this case. There is nothing in the record that indicates that Mr. Saunders understood that there was an option under Rule 1.15(d) to either have his fee payment segregated or agree to a "different

arrangement." *See* Tr. at 33-34 ("I just figured I paid him the fee and he was going to do the job. And what he did with it, you know, I just figured was what a lawyer normally do with the money when you paid him"). There is nothing in the record that remotely suggests that Mr. Saunders ever heard of Rule 1.15(d) at least before the initiation of this disciplinary matter. Whatever Mr. Saunders understood, his understanding was not based upon complete information and, under our Rules, he was entitled to that information in order to make an informed decision. *See In re Schlemmer*, 870 A.2d 76, 79 (D.C. 2005) (attorneys obligated to assure that client's understand fee agreements). *See also* Tr. 149 (expert acknowledging that it is attorney's responsibility to make it clear to client how fees are to be handled).

D.C. Rules define consent as requiring advanced consultation concerning the matter with the client, and define consultation as a communication "of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." There is only one definition of consent under D.C. Rules, and that definition controls the interpretation of every Rule in which that term is used. *Compare* Rule 1.7, comment [12] ("Disclosure and consent are not mere formalities"). The Majority is clearly correct that consent is also aimed at avoiding the coercion of a client, but it is also aimed at allowing the client to weigh for himself the advantages and disadvantages of any particular decision (*id*.) and it is undeniable that under Rule 1.15(d) the client's decision on the handling of the funds during the course of a representation controls. What a client may silently believe is "what a lawyer normally do [sic] with the money when you paid him" is not consent, nor a mark of sophistication in dealing with lawyers. Agreements between lawyers and clients are not made on a level playing field. *Cf.* Rule 1.8, comment

[1]. (recognizing the advantage of attorney in entering into a business transaction with a client).

It is undisputed that there was no prior discussion between Respondent and Mr. Saunders regarding the Rule 1.15(d) options. In my view, no client can be deemed to have consented to a "different arrangement" under Rule 1.15(d) without knowing that fee segregation and its attendant benefits to his/her interests was an option. The determination of whether consent exists in any case should not depend on some after-the-fact conclusion that a "meeting of the minds" existed on something that was never on the table.

Finally, the Majority's suggestion that consent should be implied by the mere fact that Mr. Saunders signed a contract for legal services would neuter the Rule 1.15(d) consent requirement and, indeed, reduce the consent requirement in every Rule in which it appears. The Majority's analysis, in essence, is the black hole that swallows the disclosure and consent Rules. The fee agreement is in this case is woefully brief and wholly silent on the handling of fees – it is tantamount to a simple receipt. BX1 at 2. At best, to the extent that there are terms, they are ambiguous. Yet, under such circumstances – where the terms of the contract are not subject to "one definite interpretation" – the contract will be "strongly construed" against the drafter. *In re Bailey*, 883 A.2d 106, 118 (D.C. 2005). Under the Majority's theory, a client's mere signature on a contract would carry with it a presumption of disclosure and informed consent, directly contrary to the Rule 1.15(d) default rule and contrary to the principle that a contract is construed against its drafter.

C. Sanction

This is a case of first impression in the District of Columbia. At the least, the disagreement between the Majority and me demonstrates that there can be differences of opinion on the proper handling of flat fees by lawyers, although the Majority does acknowledge that the "best practice" would be to either deposit fees in a trust account or obtain consent. Majority at 15. While consent appears to be required in the majority of jurisdictions, either by judicial gloss or under specific rules (such as our own), the cases are not uniform across the country and not every jurisdiction has had the opportunity to address the issue.

The courts in *Sather*, *Dawson* and *Apland* all acknowledged that an interpretation of the phrase "advances of unearned fees" to include flat fee arrangements was not necessarily an obvious one for attorneys. In recognition of this, these courts did not impose the sanction on the respondents in those cases that might otherwise have ensued in a case involving safekeeping of client property. Albeit in other circumstances, the Court has followed a similar flexible approach to determining the sanction to be imposed upon a respondent in a case of first impression. *Haar*, *supra*. *See also In re Evans*, 578 A.2d 1141 (D.C. 1990) (per curiam); *In re Confidential*, 670 A.2d 1343 (D.C. 1996).

During oral argument before the Board, Respondent's counsel made a very impassioned and, in my view, persuasive argument that there are "two nations" of attorneys practicing in the District of Columbia. This argument had two prongs: (1) that solo practitioners do not have the same resources and time to devote to contract and accounting matters, and (2) that Respondent's handling of the flat fee was reasonable in light of the practice and practical realities of "crime street"; that, in other words, his

understanding of the requirements of Rule 1.15(d) reflects the interpretation of those engaged in that particular type of practice area.

I am very sympathetic to the resource and time constraints of solo and small firm practitioners. It is obvious to me that a lawyer in Respondent's position has less time to undertake the management activities associated with a law practice for the very reasons detailed in Respondent's brief. Respondent's Brief at 20-21. While the Board, somewhat incongruously, recognized time constraint, *i.e*, the "busy lawyer", in a case involving a lawyer in a large firm (*In re Romansky*, 825 A.2d 311 (D.C. 2003)), it has steadfastly refused to consider the constraints on solo or small firm practice as a mitigating circumstance in fashioning a sanction. The respondent in *Romansky* certainly had at his disposal more resource and staff to assist him in, for example, evaluating the various fee agreements to determine whether the new "success" fee policy of his firm applied in each instance. Respondent, who was equally busy, if not busier, handling hundreds of cases, clearly did not have such a well-layered "bench." Moreover, fee and fee accounting abuse is not the sole province of solo or small practitioners. Incidents of fee abuse in larger firms is apparently becoming more common. Lerman, Lisa G., Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers, 12 Geo. J. Legal Ethics 205 (Winter 1999). These large firm fee abuse incidents are not the product of firm management being at the bottom of the inbox or even of a lawyer's immediate cash flow needs; they are a product of abject greed. In my view, these types of abuses cast a far more negative shadow over the integrity of the Bar, which is a factor in considering the appropriate sanction.

Nonetheless, despite my sympathies, the Court, to my knowledge, has never considered the difference between small firm and large firm practitioners in the determination of sanction and Respondent points to no decision to the contrary.

Respondent's second assertion carries much greater weight; indeed, in my view, determinative weight. Two lawyers with different types of practice can reasonably interpret undefined terms in our Rules in a different manner. Each will bring their own practice experience to the task of interpretation. The expert in this case testified that the "norm" among crime street lawyers was to treat flat fees as the property of the lawyer. Tr. 61, 161. This "norm" was also recognized in cases like *Dawson*. It was also recognized in cases relied upon by the Majority to a degree. *In re Kendall*, 804 N.E. 2d 1152 (Ind. 2004). That this interpretive norm existed indicates an ambiguity in Rule 1.15(d) for "crime street" lawyers and Respondent should not be punished for that ambiguity. The purpose of discipline is not punishment. *In re Goffe*, 641 A.2d 458 (D.C. 1994) (per curiam).

OBC suggests, however, that Respondent should have known (1) because D.C. Rule 1.15(d) was adopted in 2000 to conform, in particular, to the Rules requirements in Maryland and Virginia, and (2) because Maryland treats flat fee contracts as advances of unearned fees. Respondent is also licensed in Maryland.

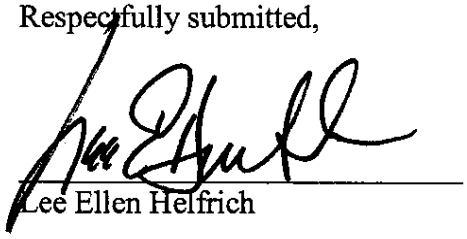
The cases relied upon by OBC regarding Maryland's interpretation are not as clear as it suggests. In *Milliken*, the Maryland court raised the flat fee issue but did not decide it. *Attorney Grievance Comm'n v. Milliken*, 704 A.2d 1225 (Md. 1998). *Duvall* did not involve a flat fee arrangement, but an advance against which hours were billed. *Attorney Grievance Comm'n v. Duvall*, 819 A.2d 343 (Md. 2003). There is simply

insufficient discussion of the facts in *Briscoe* to conclude anything with regard to the details of the fee agreement. *Attorney Grievance Comm'n v. Briscoe*, 745 A.2d 1037 (Md. 2000). Thus even assuming that Respondent should have looked to Maryland case law for an interpretation of a novel question under D.C. law, the answer would not have been self-evident. As noted above, however, Maryland law on the treatment of flat fees as property of the client is now clear. *Zuckerman, supra.*

Typically, a suspensory sanction would be the norm for a violation of an attorney's obligation to safe-keep client property. In my view, to impose such a sanction in this case would be to punish Respondent for misinterpreting a very ambiguous Rule. What will serve the public is not to penalize this Respondent. What will serve the public is an interpretation of Rule 1.15(d) that insures that, in the future, the interests of all "flat fee" clients, whether on crime street or not, are protected in a manner consistent with the fiduciary principles underlying D.C.'s ethical Rules. *See In re Hessler*, 549 A.2d 700, 703 (D.C. 1988) (case imposing lesser sanction should however serve "to alert the Bar" of greater sanctions for future violations of same nature); *In re Hines*, 482 A.2d 378, 386-87 (D.C. 1984) (per curiam) (adopting lesser sanction for misappropriation but serving notice on Bar that disbarment will be the norm in future). While a public censure could be viewed as a light sanction, even for a commingling violation (*In re Harkins*, 899 A.2d 755 (D.C. 2006)), Respondent has taken the appropriate remedial courses on his trust fund obligations and his testimony clearly demonstrated both his remorse and his understanding of those obligations.

For the aforementioned reasons, I concur with the Majority that, in this case only, the appropriate sanction is a public censure, but dissent from its interpretation of Rule 1.15(b).

Respectfully submitted,



Lee Ellen Helfrich

Dated: JUL 28 2006