THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
June 24, 2019

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

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

Before 2009, many criminal defense lawyers in the District of Columbia accepted flat fees from their clients. A client would pay a set amount – in advance – and the lawyer would take the case. The client knew how much the case would cost. The lawyer knew he or she would be paid before entering an appearance in the case. The accepted thinking was that if the lawyer was able to get the case dismissed early – or work out a favorable plea that the client would accept – both the client and the lawyer would benefit: the client would benefit from that result and the lawyer would have to put less work in on the case, increasing the hourly return from the representation, provided the fee was reasonable for the number of hours worked. If the case turned out to be very complicated or went to trial, requiring many more hours of work, the lawyer had assumed that risk when he or she negotiated the flat fee at the start of the case and the client did not have to come up with more money.

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* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) for more information about this case.

Another advantage of this practice – from the lawyer's point of view – is that the administrative burdens of the pre-2009 treatment of flat fees are few. Criminal defense lawyers who took flat fees deposited them directly into their operating account; they were treated as earned when received. These lawyers often did not have trust accounts and did not spend the resources necessary to reconcile these accounts. They did not need to have systems to keep their funds separate from client funds because, as a certain portion of D.C.'s criminal defense bar understood it, they simply did not have any client funds that they needed to keep separate from their own.

In 2009, in *In re Mance*, 980 A.2d 1196, 1205-06, the Court of Appeals made it clear that this practice does not comply with the D.C. Rules of Professional Conduct. As the Court explained, the practice of treating flat fees as earned when received harms clients when the attorney-client relationship breaks down. If the client wants to fire the lawyer – as is the client's right (assuming the court approves, if required) – the client ought to be able to get his or her money back in order to hire another lawyer. A client who scrapes together a flat fee to pay a lawyer is unable to switch to other counsel if the attorney-client relationship sours. This is particularly unfair to clients if it happens at the very start of a representation where the lawyer has done little work.

As a result, in *Mance*, the Court of Appeals held that a flat fee must be held in a lawyer's trust account until it is earned.[1] A failure to do so violates Rule 1.15, because the lawyer will have failed to safeguard client property – the unearned fee – and can lead to a violation of Rule 1.16, because the lawyer may be unable to meet his or her obligation to refund the unearned portion of the fee to the client so the client can hire another lawyer.

The Court was clear that it was not holding that flat fees are impermissible in the District of Columbia. Flat fees are permissible and, indeed, can confer a great benefit on clients, particularly those of limited means who want certainty about the cost of legal services. In the wake of *Mance*, in order to charge a flat fee, a lawyer has a number of options: (1) she could collect the flat fee and hold the entire amount in escrow until the end of the case; (2) she could simply bill the client at the end of the case and collect the money after issuing the bill, in which case, she would not need an escrow account at all (though she may face a significant challenge in collecting the fee, particularly if the client is incarcerated as a result of the case); (3) she could agree with the client, in advance, that the flat fee would be earned when specific milestones in the case happen, or at the very end of the case; or (4) she could secure the client's informed consent to waive the right to have the unearned portion

[1] The expert testimony offered by the respondent during the evidentiary hearing in *In re Haar*, Board Docket No. 17-BD-066, credibly demonstrated that a significant number of attorneys remain ignorant of the *Mance* holding. In his brief to the Board, the respondent in that matter suggested actions to remedy that problem. We commend one of those suggestions – adding a *Mance*-specific comment to Rule 1.15 – to the D.C. Bar's Rules of Professional Conduct Review Committee.

of the flat fee safeguarded and to agree that the fee could be immediately placed in the lawyer's operating account.

It is this last option that is the heart of this case. Respondent sought the informed consent of two clients – Ms. Armstrong and Mr. Young – to allow their flat fees which were provided to the Respondent at the start of their cases to be placed in his operating account.

Informed consent can only come 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). Helpfully, *Mance* sets out five things a lawyer must communicate in order for a client to give informed consent to waive the lawyer's duty to escrow the flat fee:

> (i) the attorney will treat the funds as the attorney's property upon receipt;
>
> (ii) the attorney can keep the fee only by providing a benefit or providing a service for which the client has contracted;
>
> (iii) the terms of the benefit to be conferred upon the client by waiving the right to have his money held in escrow;
>
> (iv) 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; and
>
> (v) 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.

980 A.2d at 1206-07.

In this case, Respondent took a flat fee from two clients at the start of his representation of each. Neither was put in escrow. In each case, Respondent

attempted to have his clients execute a waiver to avoid the obligation to have the funds held in his trust account. By his own admission in these proceedings, Respondent's waiver was not sufficient to comply with *Mance*.

As to the representation of both Mr. Young and Ms. Armstrong, the Hearing Committee found that, by failing to comply fully with *Mance* in obtaining his clients' informed consent to use their respective entrusted funds, that unauthorized use constituted reckless misappropriation in violation of D.C. Rule 1.15(a) and (e) and Virginia Rule 1.15(b)(5). As discussed below, we reach a different conclusion.

Mr. Young's case also presents another problem.

As *Mance* recognized, allowing flat fees to be earned when received creates an additional problem beyond whether they should be held in an IOLTA account under Rule 1.15 – that a client cannot use that flat fee to hire subsequent counsel if the lawyer does not represent the client throughout the scope of the representation. If the client hires the lawyer for a case, and then, shortly after hiring the lawyer, the representation ends – because of the decision of the lawyer, the client, or other circumstances – the client is unable to hire a different lawyer to help with the case.

This problem was present in *Mance* and animated much of the discussion. There, the respondent was hired by a man to represent his son and was paid $7,500. The lawyer was fired soon after, before he could perform any meaningful work on the case. The client's father was unable to get his money back and, as a result, was unable to hire new counsel for his son for a period of time. The lawyer was held to have violated Rule 1.15(a), in addition to Rule 1.16(d), which requires a lawyer to

return unearned portions of a fee in a timely manner to allow a client to hire new counsel.

Here, Respondent entered into an engagement agreement to represent Mr. Young in connection with criminal charges that both he and the client knew were coming. As it happened, the charges against the client turned out to be much more complicated than Respondent or the client anticipated. The language defining the scope of the representation in his engagement agreement, however, covered these more complicated charges. Respondent took a $20,000 flat fee before the client was charged. He began work on the case. Contrary to the language in the engagement agreement, when the charges came, Respondent told the client that the case that was brought against the client was not covered by the engagement agreement and the client needed to pay him more money to represent him. When the client refused, Respondent refused to enter an appearance in the case and told the client that he would keep the $20,000.

The Hearing Committee determined that Respondent intentionally neglected the client because he did not enter an appearance in the case after he agreed to do so and that Disciplinary Counsel had not proven that the $20,000 fee was not reasonable in light of the amount of work that Respondent did and his lost opportunities. In essence, the Hearing Committee determined that Respondent was required to enter an appearance in the case, but did not err in keeping the money when he did not.

We reach a different conclusion. We recognize that Rule 1.16 allows a lawyer to withdraw from a representation when it will not prejudice the client under certain

circumstances. Respondent here could properly have elected not to represent the client. But, when the scope of the engagement agreement was to represent a client in a criminal case, Respondent could not keep the retainer merely because he had done *some* work; the amount of a flat fee that a lawyer earned is determined with reference to the scope of the representation associated with the flat fee.

As a result, we determine that Respondent charged a fee that was not earned and was, therefore, unreasonable, and that Respondent failed to return unearned fees in a timely manner. We disagree with the Hearing Committee's finding that Respondent intentionally failed to seek the lawful objectives of the client.

II. FACTUAL BACKGROUND[2]

A. Respondent's Engagement Agreement and Records of Funds Received

Respondent is a long-time criminal defense lawyer in the District of Columbia. He offers his clients a choice of either a flat fee or an agreement to bill them by the hour. He testified that in the majority of his cases, the clients elected a flat fee. FF 10. Before 2009, when he received a flat fee he treated those funds as earned on receipt. In the wake of *Mance* he amended his engagement agreement but not his practice. He added language that read:

> Due to the size of The Ponds Law Firm, Client/Client's Representative understands and acknowledges that this firm accepts a limited number of cases. By agreeing to take on this case it will be necessary for the Firm to forego other cases. Consequently, the Client/Client's Representative agrees that the entire fee is non-refundable.

[2] We adopt the findings of fact in the Hearing Committee report and make additional findings of fact, supported by clear and convincing evidence, pursuant to Board Rule 13.7.

> Client/Client's Representative agree that all legal fees paid to Attorney for representation described in this document are the exclusive property of the Attorney, and Client/Client's Representative expressly waive any claim of property interest in these monies. **Furthermore, consistent with the above-noted term, Client/Client's Representative hereby waive placing any and all payments remitted pursuant to this Retainer Agreement and this account into The Ponds Law Firm's Escrow Account and consents to placing all or part of the legal fee paid in connection with this Retainer Agreement into The Ponds Law Firm's operating account.**

DX 57-8 – DX 57-9 (emphasis present in original).[3]

Respondent explained to his clients that if they elected to pay for his services at an hourly rate, the funds would go into an escrow account, and could only be withdrawn after being earned. FF 16-17. In contrast, as he explained, if the clients elected to pay a flat fee amount, they "waive[d] all rights in the property . . . and waive[d] . . . it being placed in an escrow account." FF 16. He did not advise his clients that he had an obligation to maintain flat fees in escrow until they are earned. HC Rpt. at 45. Additionally, Respondent did not tell his clients that he had an obligation to return any unearned portion of the advance fee. FF 17; HC Rpt. at 44. Finally, although the agreement mentions that the client waives having the payments placed in his escrow account and that they will be placed into the firm's operating account instead, Respondent failed to explain both the protections an escrow account would provide the client and the risks of placing the funds in his operating account.

[3] In one engagement agreement at issue, Respondent cut off part of this language by mistake. In light of our proposed resolution of this case, we do not discuss the impact of this error. *See* DX 5-5 – DX 5-12.

HC Rpt. at 44.[4] Indeed, he failed to explain the fundamental concept of what an escrow account is.

Consistent with Respondent's concession, we have little trouble concluding that his purported waiver fails to comply with *Mance.* We, therefore, must determine whether Respondent's failure to comply with *Mance* was merely negligent, on one hand, or reckless on the other. [5]

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[4] Disciplinary Counsel took the position, and the Hearing Committee found, that "*Mance* requires that [the requisite disclosures] be explained both orally and in writing." HC Rpt. at 45; *see also* ODC Br. at 15 ("Informed consent under *Mance* requires that an attorney must expressly communicate [the required disclosures] to the client *orally and in writing* . . . ." (emphasis present in original)); ODC Br. at 16 ("Without conveying these principles *in writing* Respondent could not have obtained informed consent."). Ethics Opinion 355 advised the Bar to the contrary. It stated (in footnote ten) that

> Some language in *Mance* arguably could be read to impose a writing requirement. The Court quotes, with agreement, a paragraph from *Sather* outlining a number of requirements for client consent imposed by the Supreme Court of Colorado. Among the requirements set by the Colorado court is the obligation to communicate with the client "in writing." *See* 980 A.2d at 1206-07. However, the Court in *Mance* then goes on to analyze the disclosures made by the respondent and reviews the contents of the "conversation" between the respondent and the complainant. *See id*. at 1207. The result, in our view, is an ambiguity that does not overcome the Rules drafters' decision not to include a writing requirement in Rule 1.15(e).

https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion355.cfm

The Board appreciates the importance of this issue. Our opinion, though, is that the conclusion of Opinion 355 is right. If there is no clear requirement in Rule 1.15 or in *Mance* that the disclosures be in writing, it is not appropriate to discipline a lawyer for failing to do so, even if that would be the better practice. Lawyers should be disciplined for violating Rules, not preferred suggested practices. That said, resolution of the issue is not required here. Respondent concedes that he did not provide all of the disclosures required under *Mance*, *either* orally or in writing. Thus, he violated this Rule.

[5] While Disciplinary Counsel seemed to argue that Respondent's misappropriation was intentional, the Hearing Committee determined that it was reckless. Nonetheless, at oral argument Disciplinary Counsel told the Board that it is not asking the Board to find the misappropriation to be intentional. Accordingly, we only discuss whether Respondent's misappropriation was reckless or negligent.

To resolve this question, it is appropriate to review the record evidence in this matter that would explain *how* Respondent came to believe that his engagement agreement complied with *Mance*. *See In re Haar*, 698 A.2d 412, 421 (D.C. 1997) ("It is important [] to understand exactly what good faith, negligent mistake of law [the respondent] made.").

Respondent's unrebutted testimony was that he reviewed the *Mance* decision and developed his engagement retainer after discussions with other attorneys and after reviewing their retainer agreements. Tr. 603. He viewed himself as having drafted the agreement in "plain English" that would "make it as clear as possible for the clients to understand." Tr. 603-04. He understood *Mance* to stand for the proposition that payments made under hourly-rate agreements with his clients must be held in escrow and only withdrawn after being earned, but that flat fee payments could be nonrefundable, subject to limited exceptions, and treated as his funds so long as the clients waived their interests in the payments. In other words, he believed that by providing his client with these two options, "the client had been informed" and "consented to the arrangement." Tr. 611. Respondent's engagement agreement reflected this misunderstanding.[6] While a more careful reading of *Mance* could have revealed his misunderstanding of its teachings, that does not render his conduct reckless. *See Haar*, 698 A.2d at 421-22 (finding negligent misappropriation where

[6] Indeed, it was clear that, even by the time of the hearing, Respondent still did not understand *Mance*. When asked if the funds received from his clients were entrusted funds, he replied, "No, they were not client funds. These were flat fee nonrefundables. They were not advance fees or availability fees of any type." Tr. 702.

the respondent misunderstood the law of accord and satisfaction, even though "careful analysis of [the] known legal doctrine would have revealed" his mistake). As a baseline, we conclude that Respondent's failure to comply with *Mance* in his written disclosures was the result of negligence, and was neither reckless nor intentional.

Turning to the specific allegations before the Hearing Committee, Disciplinary Counsel presented charges relating to the representation of two clients: Joseph Young and Iesha Armstrong.

B. The Representation of Mr. Young (Count I)

Joseph Young was stopped by the police on March 5, 2011, with half a kilogram of cocaine in his pants. He was not arrested, but the drugs were confiscated.

A few days later, Mr. Young hired Respondent. He told Respondent that he had not been dealing drugs, was not involved in drug distribution activity, and did not know the person who provided him with the cocaine. Respondent was skeptical of that story and told Mr. Young so. Nonetheless, they entered into an engagement agreement whereby Mr. Young would pay Respondent $20,000 and, in exchange, Respondent would represent him "in connection with any state or federal charges filed against Client, including but not limited to, possession with intent to distribute[] a controlled substance, distribution, conspiracy regarding the seizure on March 5, 2011 of five hundred (500) grams of a controlled substance." FF 24.

Over the next few weeks, Mr. Young paid $20,000 to Respondent. While Respondent did have an account that was called an escrow account, it was not an

IOLTA account and was not used to hold client funds. In essence, as soon as he received the $20,000, Respondent treated it as his own. Consistent with his view that the funds were not entrusted funds, Respondent maintained no accounting records as to his handling of the funds, aside from filing copies of receipts issued for payments received. FF 83.

Respondent met with Mr. Young and advised him to collect character letters. He talked to Mr. Young about the sentencing guidelines that would apply to his case. He discussed challenging a prior conviction that Mr. Young had to prepare him for when he is charged. FF 41; Tr. 534, 539-41.

A few months later, Mr. Young was charged in a 17-defendant drug conspiracy case in federal court in the District of Columbia. One of the overt acts in the conspiracy involved the March 5, 2011 stop that is referred to in Respondent's engagement agreement with Mr. Young. However, instead of entering an appearance to represent Mr. Young, Respondent demanded an additional $30,000. When Mr. Young did not pay it, Respondent refused to represent him in the case. Ultimately, Mr. Young was represented by court-appointed counsel, not the lawyer he had chosen and paid to represent him.

Mr. Young entered a guilty plea in the case. In his plea agreement, he acknowledged being involved in a drug conspiracy that was broader than just the March 5, 2011 incident; as he had denied to Respondent but as Respondent had suspected. Mr. Young filed a petition with the D.C. Bar's Attorney Client Arbitration Board (ACAB), challenging Respondent's fee. Although Respondent filed some

papers in that proceeding, shortly before the hearing he asked to have it rescheduled because he was sick with the flu. The Chair of the ACAB proceeding declined to reschedule the hearing. An award of $20,000 was entered against him, which he appealed to the D.C. Superior Court. That appeal was dismissed as untimely and criticized on the merits. As of the day of oral argument before the Board, Respondent had still not repaid the $20,000 to Mr. Young.

C. The Representation of Ms. Armstrong (Count II)

Iesha Armstrong was serving a sentence in the federal facility in Danbury Connecticut. She was also on probation in Virginia. Because she was on probation, the federal Bureau of Prisons would not let her spend part of her prison sentence in a halfway house. Ms. Armstrong hired Respondent to file a motion to terminate her probation early.

Respondent was not licensed to practice in Virginia, but entered into an engagement agreement that specified he would work with local counsel. The agreement set the fee at $4,500, which Ms. Armstrong paid, and Respondent deposited into the account he labeled a "trust" account that was not an IOLTA account. The agreement contained the language purporting to waive Ms. Armstrong's right to have her funds safeguarded set out above.[7] Again, Respondent

[7] As discussed below, there is little record evidence as to what, if anything, Respondent did in drafting this agreement to ensure that it complied with applicable Virginia law or whether Respondent was even aware that his representation would be governed by the Virginia disciplinary rules.

spent the funds before earning them and failed to maintain the requisite account records.

After substantial delay, Respondent ultimately did file a motion to terminate Ms. Armstrong's probation early through local counsel. The motion was rejected by the court, however, because Ms. Armstrong had a bench warrant out for her arrest. *See* Tr. 876-78 (Local counsel filed the motion but the court declined to place the motion on the docket or to hold a hearing due to Ms. Armstrong's outstanding bench warrant.).

Ms. Armstrong complained to Respondent about the fee and asked for her money back, but Respondent did not return the money.

III. RELEVANT PROCEDURAL POSTURE

Disciplinary Counsel originally filed an eight-count Specification of Charges, charging Respondent with a broad range of Rule violations in connection with his representation of eight different clients spanning a period of approximately fifteen years. With the agreement of the parties, the Chair of the Hearing Committee filed a novel request with the Chair of the Board on Professional Responsibility seeking permission to sever consideration of the first two counts listed in the Specification of Charges from the remaining six counts. The first two counts alleged misappropriation of client funds in violation of Rule 1.15(a) while the remaining counts alleged a total of 66 other less serious Rule violations. The Board Chair granted the Hearing Committee's request and the hearing proceeded on the first two counts alone.

IV. HEARING COMMITTEE FINDINGS

The Hearing Committee found that Respondent violated D.C. Rules 1.15(a) and (e) (reckless misappropriation); 1.3(b)(1) (intentional failure to seek lawful objectives of a client); 1.15(a) (failure to maintain records of entrusted funds); and 1.16(d) (failure to return unearned fees or protect client interests following termination). The Hearing Committee also found that Respondent violated Virginia Rules 1.15(b)(5) (reckless misappropriation) and 1.5(a) (unreasonable fee). Respondent takes exception to each of these findings.

The Committee also determined that Disciplinary Counsel did not meet its burden to prove that Respondent violated D.C. Rules 1.5(a) (unreasonable fee); 1.15(a) (commingling); 8.4(c) (dishonesty); or 8.4(d) (serious interference with the administration of justice). Finally, the Hearing Committee determined that Respondent did not violate any Virginia Rule by failing to deposit entrusted funds into an IOLTA account, as Virginia does not require its attorneys to do so.[8]

Disciplinary Counsel argues that the Hearing Committee erred in applying the Virginia Rules to Respondent's misconduct in the Armstrong matter, and takes exception to the Committee's findings that it failed to meet its burden as to the violations of D.C. Rules 1.5(a) and 8.4(d). Disciplinary Counsel does not take exception to the Hearing Committee's finding that it did not meet its burden in proving that Respondent commingled personal funds with entrusted funds in

[8] Disciplinary Counsel did not take exception to this finding. Thus, we adopt the Hearing Committee's conclusion that Respondent's failure to deposit entrusted funds into an IOLTA account did not violate any disciplinary rule.

violation of D.C. Rule 1.15(a) or engaged in dishonesty in violation of D.C. Rule 8.4(c), and we adopt that finding for the reasons set forth in the Hearing Committee Report.

As set out below, we agree with the Hearing Committee that Respondent violated D.C. Rules 1.15(a) and (e) and Virginia Rule 1.15(b)(5) in that he engaged in misappropriation, but we find that this violation was negligent. We also agree that Respondent failed to maintain records of entrusted funds, as required by D.C. Rule 1.15(a) and Virginia Rule 1.15(c)[9]; that he failed to return unearned fees, in violation of D.C. Rule 1.16(d); and that Disciplinary Counsel did not establish that Respondent seriously interfered with the administration of justice, in violation of Rule 8.4(d), by failing to pay the ACAB Award. We disagree with the Hearing Committee's conclusions that Respondent did not charge an unreasonable fee in the Young matter, in violation of D.C. Rule 1.5(a); that he intentionally neglected his client in the Young matter, in violation of D.C. Rule 1.3(b)(1); and that he charged an unreasonable fee in the Armstrong matter, in violation of Virginia Rule 1.5(a).

[9] The Hearing Committee found that the recordkeeping requirements of D.C. Rule 1.15(a) applied to both Counts under Rule 8.5, which governs choice of law. As explained below, we find that the Virginia Rules apply to the entirety of Count II (Armstrong), and thus the recordkeeping issue is governed by Virginia Rule 1.15(c).

V. RULE VIOLATIONS

A. The Young Matter

i. D.C. Rule 1.15(a) – Misappropriation

Respondent concedes that the engagement agreement's waiver language does not conform to *Mance*. He failed to explain the protections that an escrow account would provide the client and to explain the risks of placing the funds into his operating account. Nor did he explain his obligation to refund advanced funds if the fee was not earned. Because there was no informed waiver of his duty to comply with Rule 1.15, Respondent was required to safeguard his client's funds and failed to do so. He took his client's property – his unearned fees – as his own. In a word, he misappropriated his client's money.

The question, then, is what level of intent Respondent had when he misappropriated the funds. If it was negligent, then the presumptive sanction is a six-month suspension. If it was reckless or intentional, disbarment is the presumptive sanction. As the Court recently reminded all participants in the disciplinary system, Disciplinary Counsel maintains the burden of proof. *See In re Nave*, 197 A.3d 511, 518 (D.C. 2018) (per curiam).

"Negligent misappropriation is an 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), as amended (Oct. 19, 2017). *In re Haar* recognizes that a "special form of misappropriation [may exist] based on a lawyer's good faith, negligent mistake of established law," even though it "was a mistake that careful analysis of a known legal doctrine would have revealed." 698 A.2d 412, 421-22 (D.C. 1997) (thirty-day suspension for negligent misappropriation in light of mitigating factors).

In contrast, "[r]eckless 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." *Abbey*, 169 A.3d at 872 (alteration in original) (citation omitted).

In determining that Respondent engaged in reckless misappropriation, the Hearing Committee relied, at least in part, on the hallmarks of recklessness developed by the Court of Appeals in cases where attorneys have misappropriated funds due to flawed – or nonexistent – accounting procedures. *See In re Anderson*, 778 A.2d 330, 338-39 (D.C. 2001). These are simply not applicable here. The misappropriation in this case resulted not from poor accounting practices, but from

Respondent's legal error. Accordingly, we find the Court's familiar guideposts not applicable to these facts.

The question at the root of whether the misappropriation was reckless or negligent is whether the respondent was honestly trying to get the right answer or acting with "an unacceptable disregard" as to whether misappropriation would happen. *Abbey*, 169 A.3d at 872. So, here, we must decide if Respondent thought his waiver was adequate or, instead, if he was reckless in researching what *Mance* requires when he inserted this waiver of his obligation to keep unearned advance fees in trust. The Hearing Committee did find that Respondent mistakenly believed his waiver language was sufficient. FF 15. Disciplinary Counsel's argument, in essence, is that Respondent's waiver was so deficient it must have been reckless. In its brief to the Board, Disciplinary Counsel contends that the Hearing Committee found that Respondent tried to "wriggle around [*Mance*] in his retainer agreements" and it argues that his failure to make the proper disclosures was "an affirmative act to help himself to entrusted funds without being obligated to provide the legal services he had agreed to." ODC Br. at 19. Its brief fails to point to specific evidence in support of that assertion. When pressed at oral argument, Disciplinary Counsel acknowledged that it has no other basis to determine that Respondent was reckless, other than the agreement itself.

On the other hand, Respondent's unrebutted testimony demonstrates that he made efforts to comply with *Mance*, which efforts we conclude amounted to a good-faith negligent mistake in his comprehension of the opinion. After the *Mance*

decision was issued, Respondent consulted with other attorneys about appropriate engagement agreement language and even reviewed the engagement agreements that they were using. In Respondent's view, his agreement reduced *Mance* to language that his clients would understand by including "unambiguous language in bold text." Resp. Br. at 17. Additionally, he argues that "[i]n large part, his disclosures complied with the language from [] *Mance*." *Id*. He also testified that he was trying to accomplish the laudable, but difficult task of explaining complex issues of an attorney's obligations in language that a relatively unsophisticated client could understand.[10]

Based on this evidence, it is hard to conclude that Respondent's error was anything more than negligent. He did not comply with each portion of *Mance* – to be sure – but there is simply nothing in the record to show that this is more than a poor bit of lawyering. Perhaps Respondent had a corrupt intent, as Disciplinary Counsel alleges, but Disciplinary Counsel has given no evidence to support that conclusion.

For that reason, we agree with the Hearing Committee that Respondent misappropriated Mr. Young's money, but we find that his misappropriation was negligent.

[10] The challenge of disclosing the contours of *Mance* to a lay client is real and raises meaningful concerns about the practical viability of waiving a client's right to have unearned flat fees held in trust. Indeed, as this case shows, some members of the Bar have difficulty understanding *Mance*. We note that some confusion can be found on all fronts. Indeed, as discussed in footnote 4 above, Disciplinary Counsel's statements of what *Mance* requires do not reflect the finding in D.C. Ethics Opinion 355 or the language of Rule 1.15.

ii. D.C. Rule 1.15(a) – Failure to Maintain Records of Mr. Young's Funds

Rule 1.15(a) required Respondent to maintain "[c]omplete records of [client] account funds and other property . . . for a period of five years after termination of the representation." Respondent concedes that he did not maintain such records. Resp. Br. at 26. Although he asserts that this was because he believed the funds received from Mr. Young were his own funds, he plainly violated the Rule.

iii. D.C. Rule 1.3(b)(1) – Intentional Neglect of Mr. Young's Case

Respondent entered into an engagement agreement with Mr. Young that had a broad scope: he would represent Mr. Young in any case arising out of the March 5, 2011 stop, whether in federal or state court and for any related charges, specifically including distribution and conspiracy. Mr. Young was charged with conspiracy in federal court based, at least in part, on the March 5, 2011 stop.

The Hearing Committee found that Respondent believed that the engagement agreement he drafted did not obligate him to represent Mr. Young when he was charged. *See* HC Rpt. at 11, 31-32. In Respondent's view, the engagement agreement required him to represent Mr. Young in a criminal matter related solely to the "five hundred (500) grams of a controlled substance" and the subsequent "seventeen-count, multi-defendant indictment . . . exceeded the limited scope of the retainer agreement." Resp. Br. at 22 (citation and quotation marks omitted). Thus, Respondent believed that he had a legitimate dispute with his client regarding the scope of the representation. *Id*. at 23. For us, that ends the inquiry into whether Respondent intentionally neglected Mr. Young's case in violation of Rule 1.3(b)(1).

For Respondent to have violated Rule 1.3(b)(1), he must have been aware of a duty to protect his client's lawful interests and intentionally neglected that duty. *In re Reback*, 487 A.2d 235, 240 (D.C. 1985) (per curiam), *vacated but adopted and incorporated in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc); *see In re Ukwu*, 926 A.2d 1106, 1116 (D.C. 2007); *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report). Whether Respondent's conduct was intentional is a question of ultimate fact for the Board to determine. *Ukwu*, 926 A.2d at 1138 (appended Board report). Here, Respondent was simply not aware that he had a duty to represent Mr. Young. As a result, he could not have intentionally neglected that duty; a person cannot intentionally neglect something about which he or she is unaware.

As a result, we do not find that Disciplinary Counsel has proven a violation of Rule 1.3(b)(1) by clear and convincing evidence.

iv. D.C. Rule 1.5(a) – Unreasonable Fee

The Hearing Committee determined that Disciplinary Counsel did not provide sufficient evidence to meet its burden of establishing a violation of Rule 1.5. We disagree. Disciplinary Counsel offers two independent grounds in support of this charged Rule violation. We discuss each in turn below.

(a) Insufficient Work Performed

Disciplinary Counsel argues that Respondent's fee was unreasonable in light of the total amount of work that Respondent performed for Mr. Young. Put another way, Disciplinary Counsel argues that at the end of the representation, Respondent's

work simply was not worth $20,000. The Hearing Committee rejected this argument, and determined that there was not enough factual support to prove a violation of Rule 1.5(a) because Respondent performed some work for Mr. Young and Disciplinary Counsel did not provide sufficient evidence about the value of that work.

In fairness, Respondent did do some work for Mr. Young. He met with him to discuss the federal sentencing guidelines and how they may apply to Mr. Young's case. Respondent discussed Mr. Young's criminal history with him, and how that could affect his prospects for release if he came to be arrested. Respondent researched and discussed filing a post-conviction petition to set aside one of Mr. Young's convictions to improve his odds of being released.

The Hearing Committee found that it is possible that the amount of work Respondent performed could be worth $20,000. Perhaps so, in the abstract. But, here, the question is whether Respondent earned the $20,000 in light of the scope of the engagement agreement. *See In re Mance*, 980 A.2d 1196, 1205 (D.C. 2009) (Determining what portion of a flat fee has been earned should be done "in light of the scope of the representation.").

Respondent contracted to represent Mr. Young in a criminal case until a trial date was set for $20,000. He did not do that. Perhaps the work Respondent performed was only 10% of the work he agreed to do; perhaps it was slightly more or slightly less. Regardless, it was not all of the work. As a result, there was some portion of the fee that was unearned. Whatever that portion, Respondent took it. And an

unearned fee is *per se* unreasonable. *In re Cleaver-Bascombe*, 892 A.2d 396, 403 (D.C. 2006) ("charging *any* fee for work that has not been performed is *per se* unreasonable") (emphasis in original); *see also In re Hallmark*, 831 A.2d 366, 372 (D.C. 2003) (respondent's retention of entire flat fee was unjustified, and in violation of Rule 1.16(d), when she had only performed part of the work for which she had been retained).

It is difficult to pinpoint exactly what percentage of the $20,000 Respondent earned. Both *Mance* and Opinion 355 recommend that attorneys put in place milestones in their engagement agreements to avoid precisely this problem. Indeed, it is possible that if Respondent had put in place milestones that are set with reference to an hourly rate, which is endorsed by Opinion 355 ("A lawyer and client could agree on withdrawals based on the application of an hourly rate to the lawyer's efforts."), he may have been able to earn the full flat fee before the end of the case. But Respondent's engagement agreement contained no such language. As a result, we are confident that some portion of the $20,000 fee was not earned by Respondent. Accordingly, we find that Respondent violated Rule 1.5(a) by charging an unreasonable fee.

(b) Labeling the Fee "Nonrefundable" in the Engagement Agreement

Disciplinary Counsel also argues that Respondent separately violated Rule 1.5(a) when he labeled Mr. Young's fee "nonrefundable" in his engagement agreement. Because we determine that Respondent violated Rule 1.5(a) by charging the full $20,000 for not doing all of the work he agreed to do in the engagement

agreement, we do not need to reach this issue. However, because the resolution of this question would be useful to members of the Bar, we do address it. Unlike our colleagues in dissent, we conclude that it is not a *per se* violation of Rule 1.5(a) to label a fee "nonrefundable" when it is not.[11]

The Hearing Committee also rejected this argument, both because it seems a particularly formal rule that is not contained in the Court's opinion in *Mance*, and because it may have other implications for other members of the Bar. *See* HC Rpt. at 39 n.41. We are sympathetic to the Hearing Committee's concern about unintended consequences for members of the Bar who may use other non-hourly billing arrangements. Innovation in how legal services are provided, and how lawyers charge clients for those fees, should generally be encouraged, provided, of course, that clients and their assets are appropriately protected. There may be arrangements between sophisticated clients and counsel that would be prohibited by a *per se* rule that the use of the term "nonrefundable" in an engagement agreement is a violation of Rule 1.5(a).

But, more fundamentally, we decline to find describing a fee as nonrefundable violates Rule 1.5(a) because such a reading is not found in the language of *Mance*, nor is it found in the language of Rule 1.5. Like the Hearing Committee, we find the dissent's view a particularly formal reading of Rule 1.5(a). It is counterintuitive to think that a lawyer could label a flat fee "nonrefundable" in an engagement

[11] Four members of the Board have filed the attached Separate Statement in Dissent in which they disagree with the majority's conclusion that Respondent's acceptance of a fee labeled "nonrefundable" is not, in of itself, a violation of Rule 1.5(a).

agreement, receive the flat fee and properly deposit it in her IOLTA account, represent the client ably to the full scope of the agreement, then transfer the agreed-upon flat fee after completing the agreed-upon work into her operating account, yet still have charged an unreasonable fee under Rule 1.5(a).

To be sure, in *Mance*, the Court recognized that legal fees must be reasonable, and that "an attorney earns fees only by conferring a benefit on or performing a legal service for the client." 980 A.2d at 1202 (citation and quotation marks omitted). Flat fees belong to the client until earned, absent consent to a different arrangement. In reaching this conclusion the Court emphasized that a client's unfettered right to discharge counsel preserves the fiduciary relationship between lawyer and client, and thus, if the fee remained client property until earned through the performance of services for the client, "the client will not risk forfeiting fees for work to be performed in the future if the client chooses to discharge his attorney." *Id.* at 1203. The Court concluded, "[a] fee arrangement that 'substantially alter[s] and economically chill[s] the client's unbridled prerogative to walk away from the lawyer' strikes at the 'core of the fiduciary relationship.'" *Id.* at 1203-04 (quoting *In re Cooperman*, 633 N.E.2d 1069, 1072 (N.Y. 1994)). These concerns are a good reason why, for policy reasons, a lawyer should not describe a flat fee as nonrefundable when it is not – it could discourage a client from seeking a refund when the client would otherwise be entitled to do so.

In other words:

> "It simply makes no sense to permit lawyers to enter into fee agreements with clients stating that an advance payment such as a flat

> fee is earned upon receipt, when such payments are subject to being refunded to the extent unearned." Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where Should it be Deposited?*, 1 FLA. COASTAL L.J. 293, 347 (1999). Such a fee is earned "only to the degree that the attorney actually performs the agreed-upon services." *Id.* at 346.

Id. at 1202.

Respondent's acceptance of a flat fee that was described as "non-refundable" posed precisely the danger *Mance* intended to eliminate: his client, unaware of the protections afforded by Rule 1.16(d) and a lawyer's obligation to refund an unearned flat fee, might hesitate to exercise his right to discharge Respondent for fear that Respondent might keep the nonrefundable flat fee. *See Mance* at 1204. As *Mance* observed, "[t]o answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters." *Id.* (citation and quotation marks omitted).

Yet, at the same time, *Mance* did not address whether Rule 1.5(a) permits a lawyer to charge a nonrefundable flat fee, and Rule 1.5 itself does not discuss nonrefundable fees, other than to note in Comment [4] that "[a] lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(d)." We have not located any Court opinions or Board reports directly addressing this issue.[12]

[12] In *In re Grigsby*, an Ad Hoc Hearing Committee concluded that the respondent violated Rule 1.5(a) when he charged a nonrefundable flat fee and the client did not provide informed consent to treat the funds as his own. *In re Grigsby*, Board Docket Nos. 14-BD-103, *et al.*, at 72 (HC Rpt. June 20, 2016). The Hearing Committee did not clearly state that charging a nonrefundable flat fee, by itself, violated Rule 1.5(a). *Id.* The respondent did not participate before the Board, which

We read the language in *Mance* above as saying that describing a flat fee as "nonrefundable" is something that lawyers should not do. But the Court did not hold that it violates any Rule.

Rule 1.5(a) says, simply, "[a] lawyer's fee shall be reasonable." In at least one case, the Court has determined that Rule 1.5(a) can be violated when the lawyer submits a request for payment of a fee that is unreasonable. As the Court held in *Cleaver-Bascombe*, "Rule 1.5(a) can be violated by the act of charging an unreasonable fee without regard to whether the fee is collected." *In re Cleaver-Bascombe*, 892 A.2d 396, 403 (D.C. 2006) (quoting Board Report). Submitting an invoice for an unreasonable fee would run afoul of *Cleaver-Bascombe* and, therefore, Rule 1.5(a). The question, then, is whether an engagement agreement is the functional equivalent of an invoice. We do not believe that it is.

Our colleagues argue that it violates Rule 1.5(a) to describe a flat fee as nonrefundable. One substantial concern that appears to motivate their view, is that clients will be deterred from seeking a return of any unearned portion of a flat fee if

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adopted the Hearing Committee report without substantive discussion of the Hearing Committee's conclusions, other than that Respondent had engaged in intentional misappropriation. *In re Grigsby*, Board Docket Nos. 14-BD-103, *et al.*, at 2 (BPR Nov. 14, 2016). Neither the respondent nor Disciplinary Counsel excepted to the Board's recommendations, and the Court adopted the Board's conclusion that Respondent be disbarred for intentional misappropriation without substantively addressing the Hearing Committee's consideration of the Rule 1.5(a) issue. *In re Grigsby*, 167 A.3d 551 (D.C. 2017) (per curiam).

In *In re Schlemmer*, Disc. Docket No. 2017-D143 (Letter of Informal Admonition Oct. 6, 2017), Disciplinary Counsel relied on *Mance* in issuing an Informal Admonition to a respondent whose engagement letter provided that his flat fee was "nonrefundable." The Respondent in that case accepted the Informal Admonition.

they are told the flat fee is nonrefundable, and a lawyer could escape discipline for hoodwinking her clients into not asking for the unearned portion of a flat fee back. We believe this concern is overstated; a lawyer who keeps an unearned portion of a flat fee would still be subject to discipline, even on this reading of Rule 1.5(a).

First, any lawyer who describes a flat fee as nonrefundable will have to put that fee in her trust account, under Rule 1.15 and *Mance*. As we discuss above, a *Mance* waiver that describes a flat fee as nonrefundable is not an effective waiver of a client's right to have his property safeguarded. So, if a lawyer describes a flat fee as nonrefundable and places the flat fee in her operating account, she is subject to discipline and has violated Rule 1.15.

Our colleagues' concern, then, arises from a lawyer who describes a flat fee as "nonrefundable" and places the flat fee in escrow, but the representation ends before the flat fee is earned. Perhaps the client terminates the lawyer, perhaps an unanticipated conflict of interest requires the lawyer to withdraw. Regardless, at that moment there are portions of the flat fee that are in escrow and have not been earned.

At that point, one of two things will happen. First, the lawyer could transfer the unearned portion of the fee into her operating account. If so, she then charges an unreasonable fee at that moment, and, at that moment, violates Rule 1.5(a). So that lawyer is subject to discipline.

In the second scenario, the lawyer could properly refund the amount of the flat fee that is unearned. It is the fate of this second lawyer that is the largest

difference between the dissent and the majority in this case.[13] The dissent argues that such a lawyer should be disciplined for the false statement in her engagement agreement, even though she returned the funds and those funds never touched her operating account. We do not believe that this lawyer violated Rule 1.5(a). The only fee she charged or earned were the funds transferred to her operating account for the portion of the work that she did. The unearned amount was properly held in her escrow account, just as it would have been had she asked for a retainer and billed against it hourly. This lawyer has complied with what Comment [4] of Rule 1.5 requires: she has returned the unearned portion of the flat fee. To find that this lawyer violates Rule 1.5(a) would be to mangle what "a lawyer's fee" means in the Rule.

Nonetheless, for the reasons articulated in *Mance* and many others, it is not good to misinform clients about their rights in an engagement agreement. A client who reads that his fee is nonrefundable may be chilled from firing his lawyer and hiring a new one, believing that his lawyer will not refund the only money available to hire the new lawyer, even though if the lawyer does not return the money she violates Rule 1.5 at that point.[14] But we do not believe that this policy concern

[13] We also disagree with the dissent that a lawyer who enters into a flat fee agreement for a reasonable fee and ably completes all of the work under that agreement – and who, therefore, charges, earns, and receives a fee that everyone agrees is reasonable – should be subject to discipline under Rule 1.5(a) merely because she inaccurately described her flat fee as "nonrefundable" in the engagement agreement at the start of the representation.

[14] The dissent appears to argue that a lawyer who describes a flat fee as "nonrefundable" charges an unreasonable fee under Rule 1.16(d). But Rule 1.16(d) does not address unreasonable fees, particularly not at the start of a representation. Rather, 1.16(d) deals with the termination of an attorney-client relationship.

overrides the plain language of Rule 1.5(a). D.C. Rule 1.5(a) says "A lawyer's fee shall be reasonable." The words in Rules should mean what they say. "A lawyer's fee" is the amount that a lawyer charges or collects. The phrase cannot reasonably be read to include an amount that a lawyer returns to a client, or the amount that a lawyer says she will later charge to a client.[15]

This is not to say that lawyers have *carte blanche* to inaccurately describe their obligations – or their clients' rights – under the Rules of Professional Conduct in an engagement agreement. To do so may violate a lawyer's duties under other

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We take the dissent's argument to be that the policy reasons behind Rule 1.16(d) should be read into Rule 1.5(a). The dissent's approach is not how we should determine the meaning of a Rule. Lawyers should be held responsible for violating the Rules as written, expanded on by the comments, and interpreted by the Court of Appeals. Policy issues are best left for the rulemaking process.

[15] The ABA Model Rule 1.5(a) has different language, which would compel a different result. The ABA Rule says "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." This is also the rule in other jurisdictions, for example, our neighboring state of Maryland and in Colorado, which decided *In re Sather* – which the Court relied on in *Mance*.

Under the ABA Rule, describing a flat fee as "nonrefundable" when it would be unreasonable to charge a nonrefundable flat fee would be a violation; it would be "an agreement for . . . an unreasonable fee."

The dissent relies, in part, on cases from three jurisdictions – Iowa, Indiana, and New Mexico – that conclude that the ABA Rule should be interpreted literally, though in each case the client ultimately paid the nonrefundable fee. We agree that is the correct interpretation of the ABA Rule. But our job is to interpret the D.C. Rule, and the D.C. Rule contains no language that supports the dissent's position.

We have been unable to locate any legislative history that suggests that the difference between the ABA Rule and the D.C. Rule was the result of a difference over this issue, or even that this issue arose in any discussion of the D.C. Rule.

Regardless, the D.C. Rule says what it says. We should interpret the Rule that we have, rather than the Rule that other jurisdictions have adopted.

Rules and may create additional legal problems for the lawyer. We have found no cases addressing whether an error of law about the Rules of Professional Conduct in an engagement agreement is a violation itself of the Rules of Professional Conduct; it does not appear that this issue has been presented before. Regardless, because we restrict our analysis to whether there is a violation of the Rules that are charged here, we ought not consider whether this conduct is otherwise problematic.

In any event, lawyers should be exceptionally careful to accurately describe the law in their engagement agreements. Our determination is limited; we do not conclude that to misdescribe a retainer as nonrefundable in an engagement violates Rule 1.5(a), even if the lawyer ultimately charges a reasonable fee. Nonetheless a lawyer who misdescribes her obligations or a client's rights in an engagement agreement puts herself at a heightened risk of a disciplinary violation. We determine only that we do not believe that an erroneous statement about a Rule of Professional Conduct in an engagement agreement is a *per se* violation of that Rule.

Finally, if the Court disagrees with this determination, and decides that it does violate Rule 1.5(a) to describe a retainer as "nonrefundable" in an engagement agreement, we recommend that the Court apply this new rule prospectively only, as it did when it held that flat fees may not be deposited into an operating account until earned in *Mance*.

v. D.C. Rule 1.16(d) – Failure to Protect Client Interests Following Termination

A lawyer violates Rule 1.16(d) if she fails to transfer any unearned portion of a fee at the end of a representation; this prejudices the client's ability to hire new

counsel. In finding a violation of Rule 1.5(a), we determined that Respondent did not earn the entire $20,000 fee. As a result, he had unearned fees from Mr. Young when he terminated the representation. It was a violation of Rule 1.16(d) to not refund those fees to Mr. Young.

Because we find that some portion of the $20,000 Respondent charged to Mr. Young was unearned, we find that he violated Rule 1.16(d) when he did not refund that portion of the fee.

vi. D.C. Rule 8.4(d) – Serious Interference with the Administration of Justice

Disciplinary Counsel charged Respondent with violating Rule 8.4(d) for appealing the ACAB award against him because the ACAB had refused to grant him a continuance and went forward with the hearing when he could not be present.[16] Rule 8.4(d) prohibits a lawyer from seriously interfering with the administration of justice.

The Hearing Committee did not find a violation of Rule 8.4(d), noting that the statute specifically allows a challenge to an ACAB ruling based on a failure to continue a hearing. HC Rpt. at 52. Thus, even though the appeal was untimely and the Court expressed grave skepticism about the merits of Respondent's challenge, the Hearing Committee concluded that this appeal was not a serious interference with the administration of justice.

[16] If there was any doubt from the pleadings as to which proceeding was the focus of this inquiry, Disciplinary Counsel clarified in oral argument that it was the Superior Court appeal of the ACAB determination.

We agree. It appears that Respondent made an untimely losing argument, which he would have had a right to assert if he had made it timely. He would have lost, but if he had filed his appeal timely, he would have had the right to try. We cannot find an 8.4(d) violation based on these facts.

We are troubled that Respondent has still not returned the $20,000 to Mr. Young or his wife, as the ACAB ordered him to do. Clearly Respondent needs to comply with the ACAB's judgment. But our task here is to determine if there was a violation of Rule 8.4(d) on these grounds, and we cannot find such a violation.

B. Ms. Armstrong

Disciplinary Counsel charged Respondent with similar violations of the Rules for how Respondent handled funds from Ms. Armstrong.

i. Choice of Law

Ms. Armstrong's case was in Virginia.[17] Rule 8.5 says that "conduct in connection with a matter pending before a tribunal" should be decided based on the rules applicable to that tribunal. Respondent's representation of Ms. Armstrong was unambiguously a representation "in connection with" a proceeding before a Virginia court. Therefore, the Hearing Committee found that the Virginia Rules of Professional Conduct applied as to all charges, except those related to Respondent's

[17] Although Iesha Armstrong was Respondent's client, her mother, Betty Briggs, paid Respondent's fees for the representation. HC Rpt. at 19.

handling of his escrow account (commingling and recordkeeping). The Hearing Committee's reasoning was as follows:

> The charges relating to Ms. Armstrong allege violations that are connected to Respondent's efforts to assist her in obtaining relief from a Virginia probation. The motion for that relief was filed in a Virginia Circuit Court. The Committee concludes that the ethical rules of the Virginia Rules of Professional Conduct control with respect to those claims. . . .
>
> Determining whether the District's or Virginia's rules apply to Respondent's handling of his escrow account, including the commingling claim, is a closer question. Those charges are, in part, related to his handling of Ms. Briggs['s] funds. On balance, however, the Committee reads the charges as addressing Respondent's management of his escrow account in general rather than solely his treatment of Ms. Briggs'[s] funds. Given the presumption under Rule 8.5 and lacking any compelling reason why the Virginia Rules should apply, the Committee concludes that the Rule 1.15(a) & (b) charges relating to his management of the escrow account are controlled by the District of Columbia Rules.

HC Rpt. at 55-56.

For a variety of policy reasons, Disciplinary Counsel challenges the Hearing Committee's choice of law decision and argues that the D.C. Rules should apply. ODC Br. at 26-28.[18] Respondent takes no position on the issue.

[18] Disciplinary Counsel cites *In re Pelkey*, Board Docket No. 67-03 (BPR July 31, 2006) to support its contention that the Virginia Rules should not apply because Respondent was not admitted *pro hac vice* in the Virginia proceeding and did not otherwise enter an appearance. ODC Br. at 27. However, the version of Rule 8.5(b) at issue in *Pelkey* was different than the current Rule, and provided that

> [f]or 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 . . . [but] [f]or any other conduct, [i]f the lawyer is licensed to practice in this and

Whether Disciplinary Counsel's policy arguments make sense or not, our job is to apply Rule 8.5 as written. We conclude that the language in Rule 8.5 is clear and broad. Respondent's representation of Ms. Young was "in connection with" a Virginia proceeding, based on the plain language of the Rule.

The Hearing Committee generally agreed, but carved out an exception to Rule 8.5's language for charges involving Respondent's escrow account. We read no such limitation into the broad language "in connection with" contained in this Rule. One can see why it could make sense to require D.C. lawyers to comply with only D.C. rules about the safeguarding of client property and fee agreements, but that simply is not what Rule 8.5 says. The fees received by Respondent were necessarily paid and received "in connection with" the representation in Virginia. Accordingly, Virginia's Rules apply.

As a result, we will apply the Virginia rules to all conduct in connection with the representation of Ms. Armstrong.

> another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices . . . .

Pelkey, Board Docket No. 67-03, at 34-35. The Rule was substantively amended to its current form, as of February 1, 2007, providing that "[f]or conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise . . . ." The *Pelkey* Court agreed with the Board's choice of law analysis without any discussion.

We recognize that the Court's *Pelkey* opinion quotes the post-amendment language of Rule 8.5(b) in a footnote; however, given the lack of any substantive discussion of the choice of law issue, we understand *Pelkey* to hold only that the Board correctly applied the pre-amendment version of Rule 8.5. *In re Pelkey*, 962 A.2d 268, 277 n.16 (D.C. 2008). Thus, we do not believe *Pelkey* is relevant to our analysis of the post-amendment Rule 8.5.

ii. Virginia Rule 1.5(a) – Unreasonable Fee

Virginia Rule 1.5(a) provides, in pertinent part, that "[a] lawyer's fee shall be reasonable." Under Virginia law, "any fee arrangement involving advanced legal fees and providing for a non-refundable or minimum fee violates the Disciplinary Rules . . . ." Va. Legal Ethics Op. (LEO) 1606 (1994), approved Nov. 2, 2016 (Va. Sup. Ct.). The text of the rule does not address this issue, but the Legal Ethics Opinion does. Based on this, the Hearing Committee determined that Respondent's use of the term "nonrefundable" in describing his fee was in of itself a violation of this rule.

In response, Respondent argues that, while the Virginia Ethics Opinion was published in 1994, it was not adopted by the Virginia Supreme Court until November 2, 2016 – after the events involved in this case. Resp. Br. at 27. Thus, he asserts, it was advisory only; it did not have the force of law and should not be considered in cases where the actions predate its adoption. Respondent further argues that, notwithstanding his use of the term "nonrefundable," the record evidence establishes that his client understood that Respondent needed to earn the fees in order to keep them and that finding a violation under these circumstances would "place form over substance." Resp. Br. at 28.

The question is whether labeling a fee "nonrefundable" in an engagement agreement is a violation of Rule 1.5(a) in Virginia.

We note the odd posture in which we are answering this question. First, we are a District of Columbia Board interpreting a Virginia Rule. Second, the question

is unlikely to be presented again because the Virginia Supreme Court has now provided the answer by adopting the ethics opinion. Third, in light of our discussion of the sanction, below, how we answer this question is unlikely to affect the ultimate sanction we recommend for Respondent.

We find *Mance* a useful precedent in resolving this issue. The Virginia Supreme Court adopted a prospective rule by adopting Virginia Ethics Opinion 1606, as the Court of Appeals did in *Mance*. Accordingly, given this uncertainty regarding the import of Opinion 1606 prior to adoption by the Virginia Supreme Court, and that Disciplinary Counsel has not argued that we should rely on Opinion 1606 to find a violation of Virginia Rule 1.5(a), we decline to do so.[19]

iii. Virginia Rule 1.15(b)(5) – Misappropriation

Virginia Rule 1.15(b)(5) prohibits a lawyer from disbursing "funds or us[ing] property of a client or of a third party . . . without their consent . . . , except as directed by a tribunal." "If the fee is an advance payment for legal services, . . . it continues

[19] As Respondent points out, Legal Ethics Opinions, like LEO 1606, are not binding on any judicial or administrative tribunal until approved or modified by the Virginia Supreme Court. *See* Rules of the Supreme Court of Virginia Part 6, § IV, Paragraph 10-4. However, we note that even before the Virginia Supreme Court adopted LEO 1606, Virginia disciplinary decisions relied on LEO 1606 in finding that nonrefundable fee agreements violated Rule 1.5. *See, e.g.*, *In re Currin*, VSB Docket Nos. 03-033-3310 and 04-033-3665 (Virginia State Bar District Subcommittee 2005) (determining that the nonrefundable fee provision in a retainer agreement was prohibited by Rule 1.5 and Legal Ethics Opinion 1606); *In re Allen*, VSB Docket No. 98-070-1810 (Virginia State Bar District Subcommittee 2001) ("fee agreement violated Legal Ethics Opinion 1606 in that it stated that the fee was non-refundable"); *In re Kennedy*, VSB Docket Nos. 12-070-090804, 14-070-096518, 15-070-100785, 15-070-102529, and 15-070-102703 (Virginia State Bar Disciplinary Board 2017) (The respondent stipulated that the "provision of the Fee Agreement providing that the advance legal fees paid to Respondent are non-refundable violates Virginia Rule of Professional Conduct (RPC) 1.5 (a) in that such a fee is not reasonable as is defined and explained by Comment 4 to RPC 1.5 and Virginia Legal Ethics Opinion 1606.").

to be the property of the client. The fee must be deposited in a trust account and may only be paid over to the lawyer when and if it is earned." Va. LEO 1606. The Hearing Committee found that Virginia does not have a *Mance*-equivalent exception to this rule that would allow a client to consent not to have funds in escrow. Thus, it found that "Respondent was required, under the Virginia Rules, to keep [the] fee in his escrow account until earned or [his client] consented [to the specific taking of a fee, rather than taking unearned fees from a trust account]." HC Rpt. at 60. The Hearing Committee found that Respondent failed to comply with this rule, and thus engaged in misappropriation.

Respondent does not dispute that he violated Virginia Rule 1.15(b)(5). Rather, he again contends that his failure to comply was based on a good-faith mistake of law. Here, Disciplinary Counsel has not provided any evidence that Respondent's failure to recognize that Virginia law differs from D.C. law on this point resulted from anything more than negligence. *In re Anderson*, 778 A.2d 330, 332 (D.C. 2001) ("[T]he burden of proving misappropriation 'result[ing] from more than simple negligence,' . . . remains always with [Disciplinary] Counsel." (quoting *In re Addams*, 579 A.2d 190, 191 (D.C. 1991) (en banc))).

As the Hearing Committee correctly determined, District of Columbia precedent controls the appropriate sanction, even in cases subject to the substantive disciplinary rules of another jurisdiction. So we look to our cases as to the appropriate sanction for misappropriation. As discussed above at some length, the question is whether Respondent's misappropriation was negligent or reckless. *See*

In re Deak, 174 A.3d 867, 868 (D.C. 2017) (per curiam); *In re Prado*, 785 A.2d 295, 296 (D.C. 2001) (per curiam) (Mem); *cf In re Zilberberg*, 612 A.2d 832, 834 (D.C. 1992). For the reasons set out above, we find that it was negligent. *In re Anderson*, 778 A.2d 330, 332 (D.C. 2001).

iv. Virginia Rule 1.15(c) – Failure to Maintain Records of Ms. Armstrong's Funds

Respondent essentially concedes that he failed to maintain records of Ms. Armstrong's funds in violation of Virginia Rule 1.15(c).[20] Consistent with his

[20] Virginia Rule 1.15(c) provides, in pertinent part, that:

> A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:
>
> > (1) Cash receipts and disbursements journals for each trust account, including entries for receipts, disbursements, and transfers, and also including, at a minimum: an identification of the client matter; the date of the transaction; the name of the payor or payee; and the manner in which trust funds were received, disbursed, or transferred from an account.
> >
> > (2) A subsidiary ledger containing a separate entry for each client, other person, or entity from whom money has been received in trust.
>
> The ledger should clearly identify:
>
> > (i) the client or matter, including the date of the transaction and the payor or payee and the means or methods by which trust funds were received, disbursed or transferred; and
> >
> > (ii) any unexpended balance.
>
> (3) In the case of funds or property held by a lawyer as a fiduciary, the required books and records shall include an annual summary of all receipts and disbursements and changes in assets comparable in detail to an accounting that would be required of a court supervised fiduciary in the same or similar capacity; including all source documents sufficient to substantiate the annual summary.
>
> (4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

position in the Young matter, he asserts that he "believed the funds . . . became his property upon receipt" and that attorneys are not required to keep records of their funds or property. Resp. Br. at 26. Because his belief that the funds were his property was erroneous, he had an obligation to maintain the records delineated in the Rule concerning his client's funds and his failure to do so violated the rule.

VI. SANCTION

As the Court and the Board have observed, the determination of the appropriate sanction is among the more difficult tasks in a disciplinary case and the choice of sanction is "not an exact science." *In re Speights*, 173 A.3d 96, 102 (D.C. 2017) (per curiam); *In re Edwards*, 870 A.2d 90, 94 (D.C. 2005). Under D.C. Bar R. XI, § 9(h), we are required to recommend a consistent sanction for comparable misconduct. *In re White*, 11 A.3d 1226, 1249 (D.C. 2011) (per curiam) (appended Board Report). "To ensure that we reach consistent dispositions, we necessarily compare the instant case with prior cases in terms of the misconduct at issue, the attorney's disciplinary history, and any legitimate mitigating or aggravating circumstances." *Edwards*, 870 A.2d at 94. More specifically, we consider: (1) the seriousness of the conduct; (2) prejudice to the client; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) previous disciplinary history; (6) whether or not the attorney acknowledged his or her wrongful conduct; and (7) circumstances in mitigation of the misconduct. *See In re Vohra*, 68 A.3d 766, 784 (D.C. 2013) (appended Board Report) (citing *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987)

(en banc)); *see In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007).

"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." *Edwards*, 870 A.2d at 94. However, where there are aggravating circumstances, longer suspensions have been imposed. *In re Robinson*, 74 A.3d 688, 697 (D.C. 2013); *In re Boykins*, 999 A.2d 166 (D.C. 2010); *In re Bailey*, 883 A.2d 106 (D.C. 2005).

In *Robinson*, the Court deferred to the Board in finding that a seven-month suspension was appropriate where, despite several mitigating factors, those factors were unavailing when balanced against, among other violations, the misappropriation and failure to supervise a less experienced attorney adequately. 74 A.3d at 697. In *Boykins*, the Court found that a two-year suspension was appropriate where the attorney, among other actions, negligently misappropriated entrusted client funds, failed to maintain records, failed to promptly notify and pay medical providers from the settlement proceeds, and engaged in reckless dishonesty. 999 A.2d at 171-72, 177. In *Bailey*, the respondent received a nine-month suspension where he engaged in negligent misappropriation, commingling, and failure to promptly pay a medical provider. 883 A.2d at 123.

Here, Respondent's misconduct was serious. First, we are very troubled by Respondent's failure to return Mr. Armstrong's funds, despite an ACAB decision

six years ago directing him to do so. Respondent has had a continuing obligation to return those funds, but he has ignored this obligation. As we describe above, he did not earn those fees, and, as a result, he violated Rules 1.16(d) and 1.5(a). His failure to return these unearned fees is particularly troubling in a representation that involves a vulnerable and incarcerated client. *See, e.g.*, *In re Askew*, 96 A.3d 52 (D.C. 2014) (per curiam) (six-month suspension for respondent who, among other things, failed to protect the interests of her vulnerable and incarcerated client following her termination, in violation of Rule 1.16(d)).[21] Respondent's misconduct prejudiced Mr. Young and revealed a great lack of regard for a client who had been recently indicted and had an exigent need for counsel, but could no longer afford to retain counsel of his choice once Respondent refused to refund the unearned portion of his fee.

Second, misappropriation – even negligent misappropriation – is a serious violation of the Rules. Here, the respondent misappropriated the funds of two different clients. While we appreciate that it was based on a negligent reading of *Mance*, and that *Mance* itself does not appear to be universally understood in all of its contours, *see, e.g.*, note 4 *supra*, Respondent nevertheless misappropriated.

Respondent has also been subject to prior discipline. *See In re Ponds*, 888 A.2d 234 (D.C. 2005) (30-day suspension for a case involving conflict of interest);

[21] While the respondent in *Askew* was appointed to represent her client under the Criminal Justice Act ("CJA"), we do not read the Court's rationale to be limited to matters solely involving CJA clients.

In re Ponds, 876 A.2d 636 (D.C. 2005) (per curiam) (public censure for disclosing confidential client information in a motion to withdraw as defense counsel).

There are no mitigating factors here that would offset the aggravating factors listed above. We do, however, have sympathy for Respondent for having to face the disciplinary charges in a separate matter, Board Docket No. 18-BD-072, which appear to have been based on false testimony. When the perjured testimony was uncovered, Disciplinary Counsel informed the Hearing Committee that it would not present any further evidence and asked the Hearing Committee to recommend that these charges against Respondent be dismissed by this Board. The Hearing Committee so recommended. The Board adopted the Hearing Committee's recommendation and dismissed the charges against Respondent. *See* Order, *In re Ponds*, Board Docket No. 18-BD-072 (BPR June 24, 2019). And, despite Disciplinary Counsel's correct – and admirable – decision not to go forward with the case when it realized the testimony was false, Respondent nonetheless had to endure the considerable stress and toil of a disciplinary proceeding on those charges.

Respondent's misconduct is not as serious as that involved in *Boykins*, as he did not engage in reckless dishonesty. However, his misconduct is more serious than that involved in *Robinson*, given the harm to Mr. Young. The facts of this case seem closest to the misconduct at issue in *Bailey* and we find that a sanction of a nine-month suspension would not "foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted." D.C. Bar R. XI, § 9 (h)(1).

As a result, in light of the above, we recommend a sanction of a nine-month suspension and that Respondent be required to pay restitution to Mr. Young and to complete a CLE course concerning *In re Mance*.

VII. CONCLUSION

For the reasons set forth herein, the Board recommends that the Court find that Respondent violated D.C. Rules 1.15(a) and (e) and Virginia Rule 1.15(b)(5) (negligent misappropriation); D.C. Rule 1.15(a) and Virginia Rule 1.15(c) (recordkeeping); D.C. Rule 1.16(d) (failure to return unearned fees); and D.C. Rule 1.5(a) (unreasonable fee). The Board further recommends that Respondent be suspended for nine months, and that he be required to pay restitution to Mr. Young as a condition of reinstatement and complete a CLE course concerning *In re Mance*. *See* D.C. Bar R. XI, § 3(b).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Matthew G. Kaiser
Vice Chair

All Board members concur in this Report and Recommendation except Mr. Bernius, Ms. Pittman, Mr. Hora, and Ms. Sargeant, who have filed the attached Separate Statement in Dissent disagreeing with the conclusion in Section V(A)(iv)(b) that Respondent's acceptance of a fee labeled "nonrefundable" is not, in of itself, a violation of Rule 1.5(a).

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

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

SEPARATE STATEMENT IN DISSENT

We join in the Board's well-reasoned decision, with one exception: Respondent violated Rule 1.5(a) when he charged and received a purported "non-refundable" flat fee. Under Respondent's terms of engagement, clients who paid a flat fee for his services were not entitled to a refund once he began work. It was unreasonable for Respondent to charge and accept a purported "non-refundable" flat fee, because doing so undeniably constrained his clients' freedom to terminate his services.

Discussion

Respondent required all of his clients to pay in advance and offered two payment options.

Clients could choose to pay Respondent's hourly rate, in which case fees earned by the hour would be deducted from the client's advance, which was to be replenished from time to time as needed. The total cost of the representation would depend on the total amount of time Respondent expended on the case, and could

exceed the cost of the flat fee option. Clients who chose to pay Respondent's hourly rate were due a refund of any unearned advances at the end of the representation. *See* Tr. 604 (Respondent explained to his clients that "payments will be nonrefundable because it's a flat fee versus an hourly rate.").

Alternatively, clients could opt to pay a flat fee, which would cover all services described in the engagement letter. For example, Mr. Young paid a flat fee for representation arising out of the traffic stop. His fee agreement explicitly provided that the flat fee was a "non-refundable retainer." Respondent reiterated that when he explained the flat fee arrangement he placed a "particular focus on . . . non-refundability." Tr. 604.

Despite this clear language, Respondent testified that if he did no work on the case, he would refund the fee (Tr. 715); however, if he undertook any work on the project and the client terminated the representation, Respondent would not refund any of his fee "unless it was something [Respondent] did to sabotage the relationship." Tr. 716, 722-23. In Respondent's view, the nonrefundability of a flat fee payment distinguished that type of arrangement from an hourly fee engagement. Tr. 722-23. In other words, the refundability of an unearned advance fee in an hourly representation was an "advantage" not available to those who paid a flat fee:

> [W]ell, the advantage is -- by them paying by the hour is that if they became at any point they wanted to stop paying me, then any balance in the account would be returned to them. Versus the difficulties in

> terms of once you sign a nonrefundable agreement, they had agreed that they would not get -- that that money would not be returned.

Tr. 672. In short, Respondent's "non-refundable" flat fee agreements were intended to allow him to keep flat fees even if he did not earn them.

The Board recognizes that the core characteristic of Respondent's arrangements – that the unearned portion of his flat fees need not be returned – was fundamentally flawed because Rule 1.16(d) requires that a lawyer "refund[] any advance payment of fee or expense that has not been earned or incurred." Thus, Respondent violated Rule 1.16(d) in Mr. Young's case when he failed to return the unearned portion of his fee following the termination of the representation. However, the Board concludes that it was not unreasonable for Respondent to charge and accept a purported "non-refundable" flat fee in the first instance, finding that an engagement letter is not the "functional equivalent of an invoice." We disagree.

In *Mance*, the Court emphasized that legal fees must be reasonable, and that '"an attorney earns fees only by conferring a benefit on or performing a legal service for the client."' 980 A.2d 1196, 1202 (D.C. 2009) (quoting *In re Sather*, 3 P.3d 403, 410 (Colo. 2000). Flat fees are advance fees and belong to the client until earned. *Id*. In reaching this conclusion the Court emphasized that a client's unfettered right to discharge counsel preserves the fiduciary relationship between lawyer and client, and thus, if a flat fee remains client property until earned, '"the client will not risk forfeiting fees for work to be performed in the future if the client chooses to discharge his attorney."' *Id.* at 1203 (quoting *Sather*, 3 P.3d at 410). The Court concluded that: "A fee arrangement that 'substantially alter[s] and economically

chill[s] the client's unbridled prerogative to walk away from the lawyer' strikes at the 'core of the fiduciary relationship.'" *Id.* at 1203-04 (quoting *In re Cooperman*, 633 N.E.2d 1069, 1072 (N.Y. 1994)). In other words:

> "It simply *makes no sense to permit lawyers to enter into fee agreements with clients stating that an advance payment such as a flat fee is earned upon receipt, when such payments are subject to being refunded to the extent unearned*." Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where Should it be Deposited?*, 1 FLA. COASTAL L.J. 293, 347 (1999). Such a fee is earned "only to the degree that the attorney actually performs the agreed-upon services." *Id*. at 346.

Mance, 980 A.2d at 1202 (emphasis added).

When they signed Respondent's engagement letters, Respondent charged, and his clients paid in advance a flat fee. Respondent accepted those flat fees under the false rubric of "non-refundability," triggering the problems that *Mance* aimed to eliminate. His clients would inevitably hesitate to exercise their right to discharge Respondent because their engagement letters explicitly declared that he would never return any of their advance payments. *See Mance*, 980 A.2d at 1203-04. As *Mance* observed, "[t]o answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters." *Id*. at 1204 (quoting *Cooperman*, 633 N.E.2d at 1072).

Indeed, falsely characterizing a flat fee as "non-refundable" materially undercuts all of the protections afforded clients by *Mance*: after all, a client who tenders a "non-refundable" payment hardly cares whether or not a flat fee is placed

in escrow. From the client's perspective, the money is gone, and it matters little where it went.

As the Board's decision notes, we have not located any Court opinions or Board reports directly addressing this issue. However, courts in other jurisdictions have held that charging a nonrefundable fee constitutes an unreasonable fee. *See, e.g.*, *In re O'Farrell*, 942 N.E.2d 799, 806 (Ind. 2011) (per curiam) (a nonrefundable fee "could chill the right of a client to terminate Respondent's services," and was unreasonable); *see also In re Currin*, VSB Docket Nos. 03-033-3310, et al., at 1 (3d Dist. Sec III Subcommittee, June 29, 2005); *In re Dellett*, 324 P.3d 1033, 1041, 1045 (Kan. 2014) (per curiam) ("nonrefundable fees are *per se* unreasonable"); *In re Montclare*, 376 P.3d 811, 814 (N.M. 2016) (nonrefundable unearned fees are unreasonable); *In re Dawson*, 8 P.3d 856, 859 (N.M. 2000) (per curiam) (same); *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Frerichs*, 671 N.W.2d 470, 477 (Iowa 2003) (nonrefundable fee agreement violated DR 2-106(A)).[1] Other jurisdictions have found that charging a nonrefundable fee violated Rule 1.16

[1] Rule 1.5(a) in Virginia and Kansas contains the same language as the D.C. Rule 1.5(a), providing that "[a] lawyer's fee shall be reasonable." The corresponding Rules in Indiana, Iowa, and New Mexico track the language of the American Bar Association ("ABA") Model Rule 1.5(a) prohibiting attorneys from "mak[ing] an agreement for, charg[ing], or collect[ing] an unreasonable fee." Until the 2002 amendment of Model Rule 1.5(a), this sentence in D.C. Rule 1.5(a) tracked the language of Model Rule 1.5(a). The legislative history of Model Rule 1.5(a) did not identify this as a substantive change to the Rule. *See generally*, A. Garwin, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* 97 (2013). In 2005, the District of Columbia conducted a review of the 2002 amendments to ABA Model Rule 1.5 and did not identify this modified language as a substantive change. *See generally* District of Columbia Bar Rules of Professional Conduct Review Committee – Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations, at 27 (revised Oct. 6, 2005).

because it impaired the client's ability to discharge counsel. *Sather*, 3 P.3d at 409-10 and *Cooperman*, 633 N.E.2d at 1071-73.[2]

As the Hearing Committee and our colleagues intimate, it may be appropriate to charge a "non-refundable" fee in other contexts. For example, as described in *Mance*, an "engagement retainer is a nonrefundable payment to assure the availability of the attorney whether services are performed or not[]. Engagement retainers are earned when received, but it may become necessary to refund even a portion of a retainer if the lawyer withdraws or is discharged prematurely." *Mance*, 980 A.2d at 1202. We do not need to canvass and resolve other such circumstances. We need only conclude that charging and receiving a "non-refundable" flat fee is unreasonable. When he did so, Respondent violated Rule 1.5(a).

We agree with the Board's decision that if the Court adopts this view it should be applied prospectively only, similar to the holding in *Mance*.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Robert C. Bernius
Chair

Ms. Pittman, Mr. Hora, and Ms. Sargeant concur in this Separate Statement.

[2] Disciplinary Counsel did not allege that Respondent's receipt of a nonrefundable fee violated Rule 1.16.