THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of:	:	
PAUL S. HAAR,	:	Board Docket No. 17-BD-066
Respondent.	:	Disciplinary Docket Nos. 2012-D392 & 2013-D429
Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 368605)	:	

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

I. INTRODUCTION

The Specification of Charges ("Specification") in this matter relates to two cases, the representation of Mr. Ramiro Moya, Disciplinary Docket No. 2012-D392 ("Moya Complaint"), and the representation of Mr. Yalcin Burak Gur, Disciplinary Docket No. 2013-D429 ("Gur Complaint"), by Respondent in separate immigration matters. In both cases, the Specification asserts that Respondent commingled and misappropriated entrusted funds in violation of Rule 1.15(a) and Rule 1.15(e) of the District of Columbia Rules of Professional Conduct (the "Rules").[1]

Both matters involve Respondent's handling of flat fees paid in advance and deposited in Respondent's law firm operating account, and drawn down before the legal work was completed. Both raise questions left unresolved since *In re Mance*, 980 A.2d 1196 (D.C. 2009) ("*Mance*"), in which the Court clarified that under Rule 1.15(e) an advance payment of flat fees for legal services

[1] In August 2010, Rule 1.15(d) was re-numbered Rule 1.15(e). The Moya Complaint includes alleged violations that occurred before 2010, under what was then Rule 1.15(d); the Gur Complaint includes only alleged violations occurring after 2010 under what is now Rule 1.15(e).

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

remains a client's property.

In the Moya Complaint, the Hearing Committee must address the effect of *Mance* on a flat fee received before 2009 and deposited in an attorney's operating account, and not moved into a trust account until its refund in November 2012. In the Gur Complaint, the Hearing Committee must address whether members of the D.C. Bar had adequate information and guidance on how to conform their practice to *Mance* and, if not, whether that fact might justify a finding of no more than negligent misappropriation under Rule 1.15(e).

Based on clear and convincing evidence, the Hearing Committee concludes with respect to both complaints that Respondent committed commingling and misappropriation in violation of Rule 1.15(a) and Rule 1.15(e) and should be disbarred.

II. PROCEDURAL HISTORY

On July 31, 2017, Disciplinary Counsel filed a Specification against Respondent based on two separate complaints.

In Disciplinary Docket No. 2012-D392, Disciplinary Counsel alleges that Respondent violated the following rules in connection with his representations of Mr. Moya and his family members in an immigration matter:

- Rule 1.15(a), by failing to keep entrusted funds separate from his own property (commingling); and
- Rules 1.15(a), (d), and (e),[2] by engaging in the unauthorized use of entrusted funds (negligent, reckless, and/or intentional misappropriation).

In Disciplinary Docket No. 2013-D429, Disciplinary Counsel alleges that Respondent

[2] Part of the events at issue in the Moya Complaint occurred before Rule 1.15(d) was renumbered as Rule 1.15(e) in August 2010, and the Specification therefore alleges violations of both Rules. Because there is no substantive difference between the two Rules, our legal analysis below refers to Rule 1.15(e) only.

violated the same Rules (other than Rule 1.15(d)) in connection with his representation of Mr. Gur in a separate immigration matter.

Respondent filed his answer to the Specification ("Answer") on September 12, 2017.

A pre-hearing conference in these matters was held on October 10, 2017, in Courtroom II of the Historic Courthouse of the District of Columbia located at 430 E Street, N.W., Washington D.C. At that pre-hearing, and throughout this case, Disciplinary Counsel was represented by Assistant Disciplinary Counsel H. Clay Smith, III, Esquire. Respondent was represented by Daniel S. Schumack, Esquire.

On October 16, 2017, the Hearing Committee issued an order memorializing the pre-hearing conference and setting the hearing date and the dates for the exchange of stipulations. The parties' Joint Stipulations of Fact was admitted into evidence as JX 1.

The hearing in these matters was held on December 7-8, 2017, before a Hearing Committee comprised of Kathleen Wach, Esquire (Chair), Trevor Mitchell (public member), and Matthew Kelly, Esquire (attorney member). Disciplinary Counsel called no witnesses during the hearing. Respondent attended the hearing and testified on his own behalf, and Respondent's counsel called George R. Clark, Esquire, as an expert witness. Disciplinary Counsel's exhibits, numbered BX A-D, 1-18, 1AAA, and 1BBB, were admitted into evidence at the hearing without objection.[3] Respondent's exhibits, numbered RX 1-13 were admitted into evidence without objection.

On December 14, 2017, Disciplinary Counsel filed its exhibit numbered BX 3A without objection.

[3] By agreement of the parties, pages Bates labeled 195-202 have been removed from BX 7 because they contain the names of Respondent's clients who are not related to this disciplinary proceeding.

On December 20, 2017, Disciplinary Counsel filed its exhibit numbered BX 19 without objection.

On December 27, 2017, Respondent filed supplemental witness declarations from Mr. Felix Johnny Garcia Mocarro; Ms. Kalthoum Gouhis; Mr. Sabir Fettar; Ms. Viviane Zaho; and Mr. Kai-Chang "Calvin" Lin as Respondent's exhibits RX 14(a)-(e).

Disciplinary Counsel and Respondent filed post-hearing briefs on January 26 and February 23, 2018, respectively ("D.C. Br." and "R. Br."). Disciplinary Counsel filed a reply to Respondent's post-hearing brief on March 7, 2018 ("D.C. Reply").

III. FINDINGS OF FACT

The Hearing Committee finds that the following facts have been established by clear and convincing evidence based on the testimony and documentary evidence. *See* Board Rule 11.6.

A. Facts Related to Both Complaints

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on February 9, 1983, and assigned Bar number 368605. BX B, ¶ 1; BX C, ¶ 1. Respondent is also a member of the Maryland and New York State Bars. JX 1, ¶21; Tr. 29.[4]

2. Respondent earned his undergraduate degree at the University of Michigan. Tr. 35. He obtained his law degree from American University and later received a Fulbright Scholarship to obtain the equivalent of an LL.M. degree from the European Law Institute in Brussels, Belgium. Tr. 37.

[4] As used herein, "Tr." refers to the transcripts of the hearing held on December 7-8, 2017.

3. After practicing business and corporate law in Washington, D.C. as an associate in a Chicago-based firm for several years, Respondent launched his own immigration practice in 1993. R. Br. at 1; Tr. 43-45. Respondent handles immigration matters primarily on a flat fee basis. JX 1, ¶ 2.

4. From at least June 2008 until November 2012, it was Respondent's practice to deposit all prepaid legal fees/expenses from his clients into his commercial operating account ending in 1592 ("COA") at SunTrust Bank designated "Paul S. Haar Attorney At Law." JX 1, ¶ 2; BX C, ¶ 3. Respondent did not deposit legal fees into a trust account. JX 1, ¶ 2; BX C, ¶ 3.

5. Respondent's COA was nominally interest-bearing. The interest function required the bank to move funds each day from Respondent's COA into an overnight money market fund that the bank controlled. Respondent had no control over the fund's portfolio. This process caused Respondent's COA bank statements to show funds transferred out to the "sweep" account at the end of each banking day, causing a zero balance in the COA at the end of each banking day, with funds shown as being transferred back from the "sweep" account the next morning. There was no practical or functional difference between Respondent's COA and the overnight sweep account. Although Respondent's bank balance zeroed out at the end of every business day, the following morning the balance in Respondent's account contained at least as much as it did before the sweep. JX 1, ¶ 19.

6. The interest generated from the overnight sweep account, albeit nominal in amount, was credited to Respondent's COA. Respondent made no attempt to allocate the interest for the benefit of any client. BX C, ¶ 4.

7. Tax reporting data furnished by Respondent's bank indicated that he had received approximately $30 in total interest income upon his COA in aggregate for the full calendar years

2008 through 2013. JX 1, ¶ 22. On or about June 4, 2014, Respondent tendered a check for $50 payable to the D.C. Bar Foundation to compensate for interest that the Foundation might have received if Respondent had placed client payments in an IOLTA account. JX 1, ¶ 22.

8. On or about August 10, 2011, Respondent opened an Interest on Lawyer Trust Account at SunTrust Bank, titled "Paul S. Haar Attorney At Law IOLTA," account ending in 2788 ("IOLTA account"). Respondent's initial deposit into the IOLTA account was $100. BX C, ¶ 5.

9. The balance in Respondent's IOLTA account on October 31, 2012, was $100.02. BX 3B.

10. The balance in Respondent's IOLTA account on November 1, 2012, was $100.00. BX 3C. On November 6, 2012, $5,500.00 was credited to the IOLTA account. BX 3C. On November 13, 2012, the IOLTA account was debited in the amount of $181.96 for business checks, leaving a total balance of $5,418.04. BX 3C. On November 27, a check for $5,500.00 was drawn on the IOLTA account, resulting in an overdraft in the amount of $81.96. BX 3C. The closing balance in the IOLTA account on November 30, 2012, was in overdraft by $81.01. BX 3C.

11. Respondent testified at length about the circumstances of his childhood and education, about his desire to serve the immigrant community, about his interest in and devotion to the field of immigration law, and that he felt remorse over the charges against him. At the same time, Respondent had difficulty testifying to basic information, for example, the Bars of which he was a member or his dates of admission;[5] the CLE requirements of the Bars to which he belongs;[6]

[5] *Compare* JX 1, ¶ 21 (Respondent licensed only in D.C. and Maryland), *with* Tr. 29 (Respondent also licensed in New York), *and* Tr. 185 (unaware when he joined New York Bar).

[6] *Compare* Tr. 30 (New York lacks mandatory CLE), *with* R. Br. at 15 n.8 (New York adopted mandatory CLE in 1998 but exempts lawyers who do not practice in New York), *and* Tr. 185

the number of new clients he gets monthly or annually (Tr. 171); or why he opened an IOLTA account in 2011 (Tr. 192). At times Respondent's testimony appeared guarded, for example, when describing the advice he received from Alex Miller, his junior associate, as to how to respond to Mr. Moya's complaint. Tr. 59-60 (concern for how to "return" client's funds). While the Hearing Committee did not consider Respondent's testimony dishonest, we found his testimony less than transparent and forthcoming in response to every question.

B. Facts Related to the Moya Complaint

12. On June 25, 2008, Respondent agreed to represent Mr. Ramiro Moya in an immigration matter upon these stated terms:

> I agree to represent you in filing the documents for a PERM-based U.S. permanent residence as a Supervisor, Tile Setters with Ace Tile Company. My fee is $8,000 to be paid as follows: $5,000 at outset of case, $2,000 upon approval of labor certification by the U.S. Department of Labor ("USDOL"), and filing Form I-140 Immigration Petition for Alien Worker with U.S. Citizenship and Immigration Services ("USCIS"), and $1,000 upon filing a form I-485 Application to Adjust with USCIS. You are responsible for the $500 advertising fee and USCIS filing fees. My fee for your wife is $2,000 plus USCIS filing fees and for each child is $1,000 plus USCIS filing fees . . . .

JX 1, ¶ 3; BX 6.

13. Pursuant to their agreement, Mr. Moya paid Respondent $3,500 on July 28, 2008, which Respondent deposited into his COA on or about July 30, 2008. JX 1, ¶ 4; BX 4. Mr. Moya paid Respondent an additional $2,000 on August 15, 2008, which Respondent also deposited directly into his COA on August 19, 2008. JX 1, ¶ 4; BX 1(c). Between July 28, 2008, and November 12, 2012, Respondent deposited other funds into his COA. BX 1B-AAA. Respondent

(never practiced law in New York), *with* Tr. 186 (may have had a client who lived in New York but noting "it's just federal law").

asserts that as a sole proprietor, there was "no legal distinction between his practice and personal accounts." BX C, ¶ 24 n.4.

14. Respondent did not advise Mr. Moya about Respondent's practice of depositing flat fees paid in advance into his COA, and Mr. Moya did not provide express or informed consent to Respondent's intention to deposit Mr. Moya's funds into Respondent's COA before earning them. JX 1, ¶ 6.

15. Respondent testified that he was unaware before December 2012 of any ethical requirement to obtain client consent to spend a pre-paid flat fee before completing the associated work. Tr. 72.

16. Respondent performed substantial work of good quality on Mr. Moya's matter before August 19, 2008, but Respondent did not perform enough work to earn the full $5,500 by that date or at any time thereafter. JX 1, ¶ 5.

17. At some point after August 2008**,** Mr. Moya's intended sponsor withdrew its support of the immigration application. Tr. 51. Because Mr. Moya's matter required a sponsoring employer, no work could proceed unless Mr. Moya obtained a new sponsoring employer. Tr. 51. Respondent testified that Mr. Moya nonetheless agreed that the representation would continue while Mr. Moya sought a new sponsor. JX 1, ¶ 7; Tr. 51.

18. In November 2010, Mr. Moya still had not obtained a new sponsor and Mr. Moya's wife spoke with one of Respondent's non-lawyer staff to inquire about a refund. JX 1, ¶ 8. Respondent was never informed of this refund inquiry. Tr. 179. In September 2012, Mr. Moya retained another lawyer, who requested Mr. Moya's file from Respondent. JX 1, ¶ 9. Respondent delivered Mr. Moya's file to his new counsel on or about October 12, 2012. JX 1, ¶ 9; BX 5; Tr. 58-59.

19. Also on October 12, 2012, Mr. Moya filed a disciplinary complaint against Respondent for failure to deliver the files and for failure to refund the $5,500 that Mr. Moya had paid in advance to Respondent. JX 1, ¶ 10; BX 4.

20. On October 16, 2012, Respondent attempted to contact Mr. Moya to arrange a return of the legal fees paid, but was unable to do so. BX 5 at 172.

21. Disciplinary Counsel forwarded Mr. Moya's disciplinary complaint to Respondent on November 2, 2012. JX 1, ¶ 10; BX 5 at 172.

22. Respondent testified that after receiving Mr. Moya's disciplinary complaint he assigned Alex Miller, his junior associate, to make sure that Respondent "properly returned the funds" to Mr. Moya. Tr. 59. Mr. Miller researched the matter and advised Respondent "that the refund check should come from a trust account." Tr. 59-60.

23. On November 6, 2012, Respondent transferred $5,500 from his COA into his IOLTA account for the purpose of making a refund to the Moyas, bringing the balance in the IOLTA account to $5,600. JX 1, ¶ 11; BX 3(c).

24. On November 13, 2012, Respondent replied to Disciplinary Counsel, stating that Respondent had not received a written request for return of the legal fees from Mr. Moya other than the disciplinary complaint. BX 5 at 172. Respondent also stated that he had already delivered a copy of Mr. Moya's immigration file to Mr. Moya's new counsel. BX 5 at 172. On that same date, Respondent sent a refund check drawn on his IOLTA account for $5,500 to Mr. Moya by certified mail. BX 5 at 173; JX 1, ¶ 10; Tr. 60. The balance in Respondent's IOLTA account on that date was $5,418.04. BX 3(c).

25. Respondent testified that on or about December 16, 2012, the refund check that Respondent had sent by certified mail to Mr. Moya on November 13, 2012, was returned to Respondent's office as "unclaimed." RX 2; JX 1, ¶ 12; Tr. 61-62.

26. Though Respondent earned some portion of the $5,500 fee that Mr. Moya had paid, at least $1,000 of that amount was never earned. JX 1, ¶ 13. Between August 19, 2008, and November 6, 2012, the balance in Respondent's COA repeatedly fell below $1,000. JX 1, ¶ 14. For example, every day between August 26 and 31, 2008, the COA held less than $900; similarly, every day between November 1 and 5, 2012, the COA held less than $600. JX 1, ¶ 14.

C. Facts Related to the *Mance* Decision

27. When the D.C. Court of Appeals decided *Mance*, it announced for the first time that for purposes of then Rule 1.15(d), a flat fee paid in advance for legal services remains the client's property, and the attorney may not treat any portion of the money as his or her own until it is earned or unless the client has agreed otherwise. 980 A.2d at 1199.The Court concluded that the public is "better served by requiring that the lawyer keep flat fees in a trust or escrow account." *Id*. at 1203.

27. The Court in *Mance* found that then Rule 1.15(d)'s application to flat fees had not been clear on its face. *Id*. at 1206. It further accepted the testimony of experts that lawyers in certain practices commonly understood flat fees to belong to the lawyer upon receipt. *Id*. Given this, and because the Court's purpose was "not to discipline attorneys for inadvertent violations based on reasonable, but mistaken interpretations of the rules, but to make lawyers' obligations clear so that the interests of the public will be protected," the Court further decided that its interpretation of then Rule 1.15(d) would apply prospectively only. *Id*.

28. Immediately following the decision in *Mance*, the D.C. Bar took steps to inform members of the Bar and provide helpful guidance on how to conform their practice to the rule. In December 2009, *Washington Lawyer*, the monthly periodical of the D.C. Bar, published an article by Dolores Dorsainvil, an attorney in the D.C. Office of Bar Counsel, entitled "Bar Counsel: The Case of the Flat Fee: Whose Money Is It Anyway," which discussed a lawyer's obligations with respect to the handling of advanced fees in order to comply with the decision in *Mance*. BX 15.

29. In June 2010, the D.C. Bar Legal Ethics Committee issued Ethics Opinion 355, which explained a lawyer's obligations with respect to the handling of flat fees paid in advance in light of the decision in *Mance*. D.C. Bar Ethics Op. 355 (June 2010) ("Flat Fees and Trust Accounts: (a) must a lawyer deposit flat fees paid in advance of the conclusion of a representation in a trust account?; and (b) when are such funds earned so that a lawyer can transfer them to an operating account?").

30. In September 2010, the *Washington Lawyer* published an article by Saul Jay Singer, D.C. Bar Legal Ethics counsel, entitled "Speaking of Ethics: An E-Mance-ipation Proclamation," which discussed a lawyer's obligations with respect to the handling of advanced fees in order to comply with the decision in *Mance*. BX 16. Also in September 2010, the D.C. Bar offered a CLE class titled "Flat Fees After *In re Mance*." BX 19.

31. In 2011, *Washington Lawyer* published an article by Dolores Dorsainvil, an attorney in the D.C. Office of Bar Counsel, entitled "Bar Counsel: You Can't Get Around Mance," which discussed a lawyer's obligations with respect to the handling of advanced fees in order to comply with the decision in *Mance*, BX 17, and the D.C. Bar offered four CLE classes addressing ethics and trust accounts and ethical and practical guidance on fee agreements. BX 19.

32. From 2010 to 2013, the D.C. Bar offered a three-hour CLE course entitled "Ethics and Lawyer Trust Accounts" twice annually. BX 19. Respondent attended this course on May 21, 2013. JX 1, ¶ 21; Tr. 117; R. Br. at 35.

33. The D.C. Bar offered the CLE course entitled "Fee Agreements in the District of Columbia: Ethical and Practical Guidance" in March 2010 and twice each year in 2011, 2012, and 2013. BX 19.

34. Since 2013, the D.C. Bar has continued to offer several courses each year, touching on issues related to the rule in *Mance*. BX 19.

D. Facts Related to the Gur Complaint

35. On November 2, 2012, Respondent entered into an agreement to provide immigration services to Mr. Yalcin Burak Gur. JX 1, ¶ 15. Respondent's engagement agreement called for an initial payment of $10,000 of a total flat fee of $20,000. JX 1, ¶ 15. On November 9, 2012, Mr. Gur paid $10,000 to Respondent by check. JX 1, ¶ 15. On November 12, 2012, Respondent deposited this check directly into his COA (ending 1592). JX 1, ¶ 15.

36. Respondent did not advise Mr. Gur about Respondent's practice of depositing flat fees paid in advance into his COA, and Mr. Gur did not provide express or informed consent to Respondent's intention to deposit Mr. Gur's funds into Respondent's COA before earning them. JX 1, ¶ 16.

37. Respondent and his junior associate, Alex Miller, began good quality work for Mr. Gur as soon as the engagement began. JX 1, ¶ 17.

38. In December 2012, Respondent first learned of *Mance* after he became a client of the D.C. Bar's Practice Management Advisory Service in response to the Moya Complaint. JX 1, ¶ 20; Tr. 66-68.

39. In May 2013, Respondent attended the D.C. Bar's three-hour CLE entitled "Lawyer Trust Accounts," JX 1, ¶ 21, the first CLE he ever attended that mentioned *Mance*. Tr. 117.

40. Work on the Gur matter continued until August 2013, when Mr. Miller left Respondent's firm. JX 1, ¶ 17. Mr. Gur at that point terminated Respondent and retained Mr. Miller as successor counsel. JX 1, ¶ 17.

41. Respondent promptly delivered Mr. Gur's files to his new counsel. JX 1, ¶ 17. On or about November 26, 2013, Respondent refunded the amount of $8,000 to Mr. Gur through his new counsel, via check drawn on Respondent's COA. BX 8 at 205; JX 1, ¶ 17.

42. Though Respondent earned some portion of the $10,000 fee that Mr. Gur had paid, at least $1,000 was never earned by Respondent. JX 1, ¶ 18. Between November 12, 2012, and November 25, 2013, the balance in Respondent's COA repeatedly fell below $1,000, the minimum amount necessary to refund unearned fees to Mr. Gur. JX 1, ¶ 18. For example, between November 21 and November 25, 2012, the COA held less than $300; likewise, the account balance fell to $88.54 from December 5 to December 9, 2012. JX 1, ¶ 18.

IV. CONCLUSIONS OF LAW

Respondent is charged with violating the District of Columbia Rules of Professional Conduct 1.15(a), 1.15(d) and 1.15(e)[7] for commingling and misappropriating entrusted funds in connection with his representation of Mr. Ramiro Moya and Mr. Yalcin Gur in separate immigration matters.

With respect to the Moya Complaint, the Hearing Committee finds by clear and convincing evidence that Respondent commingled funds and committed reckless misappropriation in violation

[7] Because there is no difference between the pre-2010 Rule 1.15(d) and current Rule 1.15(e), and to avoid confusion, our analysis refers to Rule 1.15(e).

of Rule 1.15(a) and Rule 1.15(e).

With respect to the Gur Complaint, the Hearing Committee finds by clear and convincing evidence that Respondent commingled funds and committed intentional misappropriation in violation of Rule 1.15(a) and Rule 1.15(e). The Committee further finds that the D.C. Bar has undertaken a continuing effort to inform and guide its members on how to conform their practice to *Mance*, as the Court expressed confidence it would.

Pursuant to the rule of *In re Addams*, 579 A.2d 190 (D.C. 1990) (en banc), the Hearing Committee is compelled to recommend that Respondent be disbarred.

A. Standard of Review

Rule 1.15(a) provides that

> A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts . . . .

Rule 1.15(e) provides that

> 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 gives informed consent to a different arrangement.

Rule 1.15(a) prohibits the misappropriation of entrusted funds and the commingling of entrusted funds with a lawyer's own funds. Rule 1.15(e) further requires that advances of unearned fees be treated as entrusted funds until earned unless the client otherwise gives informed consent to a different arrangement. Together, Rules 1.15(a) and 1.15(e) prohibit the misappropriation of unearned advanced fees, and the commingling of advanced unearned fees with a lawyer's own funds.

Disciplinary Counsel bears the burden of establishing that Respondent violated the Rules of Professional Conduct by "clear and convincing" evidence. *See In re Anderson (Anderson I)*,

778 A.2d 330, 335 (D.C. 2001); *see also In re Anderson (Anderson II)*, 979 A.2d 1206, 1213 (D.C. 2009) (applying clear and convincing evidence standard to charge of misappropriation of funds); Board Rule 11.6. Clear and convincing evidence means more than a preponderance of the evidence. It requires "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (citations omitted). This "more stringent standard" expresses a preference for the attorney's interest "by allocating more of the risk of error to [Disciplinary] Counsel, who bears the burden of proof." *In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011) (citation and internal quotation marks omitted).

1. Commingling

Commingling occurs when an attorney fails to hold entrusted funds in an account separate from his own funds. *In re Moore*, 704 A.2d 1187, 1192 (D.C. 1997). Commingling is established "when a client's money is intermingled with that of his attorney and its separate identity is lost so that it may be used for the attorney's personal expenses or subjected to the claims of its creditors." *In re Hessler*, 549 A.2d 700, 707 (D.C. 1988).

2. Misappropriation

Misappropriation is the unauthorized use of entrusted funds by a lawyer regardless of whether the lawyer derives any personal gain or benefit therefrom. *In re Pleshaw*, 2 A.3d 169, 173 (D.C. 2010); *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983); *In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013). Misappropriation is essentially a *per se* offense that does not require proof of improper intent. *See Anderson I*, 778 A.2d at 335. Thus, for example, misappropriation may be found where the balance in a respondent's account falls below the amount owed to the respondent's client or clients. *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board

Report) (citing *In re Pels*, 653 A.2d 388, 394 (D.C. 1995)). As this suggests, the performance of compensable legal services also may not excuse the taking of a fee from funds that are not properly available for that purpose. *See, e.g., In re Bach*, 966 A.2d 350, 350-52 (D.C. 2009) (unauthorized use element satisfied where the respondent took estate funds to pay his fee without prior court approval, even though the probate court later approved the amounts); *In re Berryman*, 764 A.2d 760, 773-74 (D.C. 2000) (unauthorized use element satisfied even though the probate court ruled that the respondent had earned the fee she had taken without prior court approval).

Once Disciplinary Counsel has proved by clear and convincing evidence that the respondent took entrusted funds without authorization, Disciplinary Counsel must next establish whether the respondent acted intentionally, recklessly, or negligently. *Anderson I*, 778 A.2d at 336. This can be done by circumstantial evidence. *See In re Mabry*, 11 A.3d 1292, 1294 (D.C. 2011) (per curiam) (holding that the respondent's misappropriation was intentional where the respondent did not participate at any stage of the disciplinary proceeding and where "much of the evidence [wa]s circumstantial").

Intentional misappropriation most obviously occurs when an attorney handles entrusted funds in a way "that reveals . . . an intent to treat the funds as the attorney's own." *Anderson I*, 778 A.2d at 339. Reckless misappropriation may be found where an attorney handles entrusted funds in a way that reveals a conscious indifference to the consequences of his or her actions for the security of the funds. *Id.* Recklessness requires a conscious choice of a course of action, "either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person." *Id.* (quoting 57 Am. Jur. 2d Negligence § 302 (1989)). The hallmarks of reckless misappropriation 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 the disregard of inquiries concerning the status of funds. *Ahaghotu*, 75 A.3d at 256 (quoting *Anderson I*, 778 A.2d at 338).

Negligent misappropriation occurs where "the unauthorized use was inadvertent or the result of simple negligence." *Anderson I*, 778 A.2d at 339. The hallmarks of negligent misappropriation 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); *Anderson I*, 778 A.2d at 339 (negligent misappropriation occurs where unauthorized use was "inadvertent or the result of simple negligence"). When Disciplinary Counsel fails to establish that a misappropriation was otherwise intentional or reckless, then Disciplinary Counsel "proved no more than simple negligence." *Anderson I*, 778 A.2d at 338 (quoting *In re Ray*, 675 A.2d 1381, 1388 (D.C. 1996)).

B. Moya Complaint

1. Respondent Violated Rule 1.15(a) and Rule 1.15(e)

The Hearing Committee finds by clear and convincing evidence that Respondent committed commingling and misappropriation in violation of Rules 1.15(a) and 1.15(e) by holding Mr. Moya's funds in Respondent's COA and by using Mr. Moya's funds without authorization for over three years after *Mance*, from October 2009 until November 2012.

Respondent admits that he received flat fee advances from Mr. Moya in July and August 2008, totaling $5500, which Respondent admits he deposited and held in his COA from 2008 until November 2012. JX 1, ¶¶ 4, 11. Respondent admits that he did not advise Mr. Moya about

Respondent's banking practices, JX 1, ¶ 6, and that though he completed substantial work on Mr. Moya's matter, he did not earn at least $1,000 of the funds advanced by Mr. Moya. JX 1, ¶¶ 5, 13. The record shows and Respondent admits that the balance in his COA repeatedly fell below $1,000 in the time it held Mr. Moya's funds. JX 1, ¶ 14. The record also shows that throughout the time Respondent held Mr. Moya's funds, Respondent held other funds in his COA. BX 1B-AAA.

Because Respondent received Mr. Moya's payment more than a year before the Court decided *Mance*, Disciplinary Counsel and Respondent agree that whether the payment constituted an "advance" under Rule 1.15(e) remains "a disputed legal issue." JX 1, ¶ 6 n.1;[8] R. Br. at 3 ("tougher issue" is whether Respondent may be prosecuted and sanctioned for non-compliance with *Mance* as to pre-*Mance* deposits). With respect to Mr. Moya's complaint, the Hearing Committee must therefore first determine the effect, if any, of *Mance* on the unearned amount of Mr. Moya's funds that Respondent continued to hold in his COA from October 2009 through November 2012.[9]

Disciplinary Counsel argues that Respondent engaged in commingling by failing to hold Mr. Moya's fees in an escrow account after *Mance* issued. D.C. Br. at 10; BX B, ¶ 25. Though Respondent denies this, BX C, ¶¶ 25(a), 25(b), he does not directly address the charges in the Moya Complaint, suggesting instead that *Mance* does not apply to advances of fees received before

[8] The parties dispute whether Mr. Moya's advice or consent was required for Respondent to deposit Mr. Moya's funds into Respondent's operating account for the same reason. JX 1, ¶ 6 n.1.

[9] Disciplinary Counsel and Respondent stipulated that both complainants agreed to pay Respondent a flat fee in advance for the work Respondent was to perform on their behalf. JX 1, ¶ 2 (Respondent received flat fees from complainants Moya and Gur); *see also* D.C. Br. at 10 ("advanced legal fees"); R. Br. at 2 ("prepaid flat fees"). The parties also stipulate regardless of the work Respondent actually performed for each client, at least $1000 of the amounts Respondent received from each client was never earned, and that on several occasions the amount in Respondent's operating account fell below this amount. Tr. 8.

it issued when, Respondent claims, flat fees became an attorney's property upon receipt, R. Br. at 30 (under D.C. law, all prepayments were property of the lawyer upon receipt); Tr. 17 (same), 19 (same); R. Br. at 40 ("assuming, *arguendo*, that it is possible to prosecute the Moya docket").

As an initial matter, the Hearing Committee rejects Respondent's assumption that before September 2009, prepayments of flat fees became an attorney's "property" upon receipt. It is true that as proposed in 1986 and as adopted in 1991, then Rule 1.15(d) provided that "[a]dvances of legal fees and costs become the property of the lawyer upon receipt." R. Br. at 30-31.[10] Yet as even Respondent concedes, R. Br. at 32, the rule was amended in January 2000 "to reverse" the original version and to instead provide that "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client…" R. Br. at 32.[11] The Court soon after explained that one reason for doing so was to eliminate "an unexpected technical defense" to misappropriation. *In re Arneja*, 790 A.2d 552, 555 (D.C. 2002). Thus, well before Respondent received Mr. Moya's first payment in July 2008, the Court had announced that the prepayment of legal fees and costs would no longer be considered the property of the lawyer on receipt.

The Board on Professional Responsibility argued a view similar to Respondent's in *Mance*, which the Court rejected. Agreeing with Disciplinary Counsel (then known as Bar Counsel) instead, the Court found that advances of flat fees paid in 2004 had remained the client's property, notwithstanding Mr. Mance's good faith but mistaken contrary view. *See Mance*, 980 A.2d at

[10] The 1991 version of Rule 1.15(d) further provided that "[a]ny unearned amount of prepaid fees must be returned to the client" upon termination of the lawyer's services in accordance with Rule 1.16(d). Rule 1.15(d) was further amended in 2008 to add the provision for client consent to treat advances of unearned fees as other than the client's property. *See* R. Br. at 33.

[11] The amendment did not affect an attorney's obligation to return the unearned amount of advanced legal fees and unincurred costs in accordance with Rule 1.16(d) upon termination of the lawyer's services.

1199. But because Mr. Mance's mistaken view was reasonable and widespread, the Court made its holding prospective so as not to "discipline attorneys for inadvertent violations based on reasonable, but mistaken interpretation of the rules." *Id*. at 1206 (citing *In re Haar* (*Haar II*), 698 A.2d 412, 424 (D.C. 1997)).[12] Based on the Court's reasoning in *Mance*, the Hearing Committee concludes that any legal fees and unincurred costs that Mr. Moya may have advanced to Respondent in July and August 2008, for future work to be performed on his behalf, did not thereby become Respondent's property. Based on this conclusion, the Committee must next consider whether or how *Mance* affected Respondent's handling of the unearned amount of Mr. Moya's funds.

Respondent does not deny that he deposited Mr. Moya's fees in his COA or that the balance of Respondent's COA repeatedly fell below the amount that Respondent had not yet earned. BX C, ¶¶ 9, 11, 24. Respondent argues that because *Mance*'s holding was prospective, it does not apply to advances of fees and costs received by an attorney before then, regardless whether the attorney continued to hold them thereafter.[13] R. Br. at 2 (Court indicated its holding in *Mance* would apply prospectively only), 3 (Respondent cannot be prosecuted for misappropriating Mr. Moya's prepayments prior to October 2009). The Hearing Committee disagrees.

The Court in *Mance* explained that its purpose was "to make lawyers' obligations clear so that the interest of the public will be protected," not to "discipline attorneys for inadvertent

[12] The Court nevertheless sanctioned Mr. Mance for holding a portion of the advanced fees in that case in a client trust account, notwithstanding his belief that the funds were his property.

[13] Respondent stipulated that he never earned at least $1,000 of the $5,500 paid by Mr. Moya and that he retained the unearned amount for several years after the decision in *Mance*. JX 1 ¶¶ 5, 12-13. Had Respondent spent the entire sum advanced by Mr. Moya, including any unearned amount, *before* the Court's decision in *Mance*, he would still have remained responsible under Rule 1.16(d) for the return of any unearned amount upon termination of Mr. Moya's representation.

violations based on reasonable, but mistaken interpretation of the rules." 980 A.2d at 1206 (citing *Haar II*, 698 A.2d at 424). The Committee understands the prospective nature of *Mance*'s holding as intended to limit the risk of *retrospective* sanction under Rule 1.15(e), not the scope of an attorney's obligations in the future, even with respect to client funds already held.[14] Doing so could undermine *Mance's* goal of protecting the public interest, for example, by exempting from the rule advances of fees received on the day before it issued. For these reasons, the Committee concludes that *Mance* should apply to Respondent's handling of the unearned amount of Mr. Moya's advance of fees after *Mance* was announced.

The Hearing Committee rejects Respondent's suggestion that the rule in *Mance* would only apply once Respondent had received notice of the Court's decision. R. Br. at 36 (D.C. Bar leadership never sent certified letter to membership giving direct/actual notice of *Mance*). That would do little to ensure protection of the public interest and would be inconsistent with the principle that attorneys are held to be on notice when the Court clarifies a disciplinary rule. *See In re Devaney*, 870 A.2d 53, 57 (D.C. 2005) (attorneys presumed to know the ethical rules governing their behavior); *Harrison*, 461 A.2d at 1036 n.3 ("practitioners in the District [of Columbia] are subject to this jurisdiction's code of professional ethics whether or not they are aware of each prohibition"); *Buckley*, 535 A.2d at 867 (characterizing the decisions announcing a new rule as "our notice to the Bar"); *see also Haar II*, 698 A.2d at 429 (dissent); *Attorney Grievance Comm'n of Maryland v. Stein*, 373 Md. 531, 542-43 (2003) (rejecting defense of ignorance of disciplinary rule and holding that members of the Maryland Bar are "deemed to know the Rules of Professional

[14] The Court has held that sanctions imposed pursuant to disciplinary proceedings are not punishment for past transgressions, but "in effect, a judgment of an attorney's continued fitness to practice his profession." *In re Buckley*, 535 A.2d 863, 867 (D.C. 1987) (considering retrospective application of disciplinary rule).

Conduct and have the obligation to act in conformity with those standards"); *Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct v. Torgerson*, 585 N.W.2d 213, 214 (1998) (imposition of lesser sanction due to lack of guidance for handling advance fee payments under Iowa Rule 1.15(d) "should not be understood as precedent for future similar misconduct when attorneys will have the guidance of these holdings").

While *Mance* did not discuss how to treat unearned advances of fees already held by attorneys as their own funds, R. Br. at 3-4, prospectively applying its rule to such funds does not appear inconsistent with the Court's understanding that the D.C. Bar Board of Governors, Bar Sections, Board of Professional Responsibility, and Disciplinary Counsel would take steps to inform its membership of the rule it announced and provide attorneys guidance on conforming their practice to the rule it announced, *Mance*, 980 A.2d at 1206, steps the Bar undertook. *See supra*, § III.C, ¶¶ 28-34. The Court's understanding does suggest that, as a practical matter, the Court did not foresee instantaneous compliance, which would in any event have been inconsistent with its purpose of not disciplining attorneys for inadvertent violations and which would have imposed a nearly impossible burden to achieve. *See In re Gray*, Board Docket No. 16-BD-045, at 14-15 (BPR Jul. 31, 2018) (discussing timing and method for removing fees as earned from unearned advances held in trust account), *review pending*, D.C. App. No. 18-BG-818. This also suggests that responsibility for the later misappropriation of unearned advances of fees received before *Mance* must depend on the specific circumstances of each case.

The Hearing Committee concludes that Rule 1.15(e) as clarified by *Mance* applies to the unearned amount of Mr. Moya's advance of fees that Respondent held in his COA from October 2009 to November 2012. The Hearing Committee further finds by clear and convincing evidence that Respondent deposited the unearned amount of Mr. Moya's fees into Respondent's COA; that

Respondent's COA held other funds belonging to Respondent; that between October 2009 and November 2012, Respondent treated the unearned amount of Mr. Moya's advance as Respondent's own funds; and that between October 2009 and November 2012, the balance of Respondent's COA repeatedly fell below the unearned amount of Mr. Moya's fees it held, including every day between November 1 and 5, 2012. JX 1, ¶ 14. Based on these findings, the Hearing Committee concludes that Respondent committed commingling and misappropriation in violation of Rule 1.15(a) and Rule 1.15(e). *In re Edwards*, 990 A.2d 501, 518 (D.C. 2010); *Chang*, 694 A.2d at 880 (citing *Pels*, 653 A.2d at 394).

2. Respondent's Culpability

Because the Hearing Committee has concluded that Respondent misappropriated Mr. Moya's funds, it must determine whether Respondent did so intentionally, recklessly, or negligently. *Anderson I*, 778 A.2d at 336. The Court has rejected further gradations of fault such as "gross negligence, short of recklessness," because it would "unnecessarily complicate the already difficult task of deciding whether misappropriation is 'merely negligent' or instead intentional/reckless." *Id.* at 338 n.4 (internal quotes omitted). In virtually all cases of misappropriation, disbarment is the only appropriate sanction unless it appears that the misconduct resulted "from nothing more than simple negligence." *Addams*, 579 A.2d at 191.

Respondent concedes that the balance in his COA repeatedly fell below the minimum amount necessary to refund unearned fees to Mr. Moya, JX 1, ¶ 14, but he does not address his culpability with respect to the charges in the Moya Complaint. Respondent's omission appears to derive from the view that *Mance* does not apply to unearned advances received before it issued, regardless of whether they continue to be held thereafter. *See* R. Br. at 40; Tr. 22. Having concluded that *Mance* should apply prospectively to the unearned amount of fee advances

regardless when received, the Hearing Committee will consider Respondent's arguments for culpability offered with respect to the Gur Complaint as if also offered here.

Disciplinary Counsel argues that Respondent acted intentionally or recklessly by deliberately and intentionally using the fees advanced by Mr. Moya as if they were Respondent's own. D.C. Br. at 12. The Hearing Committee does not agree that Respondent's misappropriation of Mr. Moya's funds was intentional. Respondent did not handle *entrusted* funds in a way that revealed an intent to treat them as his own. *See Anderson I*, 778 A.2d at 339. The Committee credits Respondent's testimony that he believed that client advances of fees became a lawyer's property upon receipt, consistent with the understanding of many D.C. Bar members before *Mance*. The Committee further concludes that the evidence does not clearly or convincingly demonstrate that Respondent actually learned of the rule in *Mance* before Mr. Moya terminated Respondent or before Respondent refunded the unearned amount of Mr. Moya's prepaid fees. The Committee notes, however, that the record could support a contrary inference.

Respondent states he learned of Mr. Moya's complaint around November 2, 2012. Tr. 57-58. When asked what he did "to figure out what [Respondent's] obligations were with respect to a refund," Respondent stated that he sought to assure himself that he "properly returned the funds." Tr. 59. While Respondent did not explain what he meant by "properly returned," he acknowledged that he tasked Alex Miller, a junior associate at his practice, with "making sure that we did so properly." Tr. 59. After conducting legal research, Mr. Miller advised Respondent that the refund "had to come from a trust account." Tr. 60. The Committee interprets Mr. Miller's advice as addressing the account in which Mr. Moya's funds ought to be *held*. Respondent's subsequent actions support such an inference. Based on Mr. Miller's advice, Respondent transferred Mr. Moya's refund amount from Respondent's COA to his IOLTA account on November 6, 2012.

JX 1, ¶ 11; Tr. 60.[15] If it was "proper" to *refund* Mr. Moya's funds from the IOLTA account, it must also have been proper to *hold* them there as client funds. As such, it would have been improper to hold Mr. Moya's funds in Respondent's COA. But the record contains no further evidence to show why Respondent transferred the funds from the COA to the IOLTA, and the Committee did not press the issue further, leaving the precise reason for doing so unclear. In any event, the Hearing Committee finds that Respondent's transfer of Mr. Moya's refund from Respondent's COA to this IOLTA demonstrates that as of November 6, 2012, Respondent's good-faith beliefs concerning his professional responsibilities had changed, an issue the Committee takes up below.[16] R. Br. at 48 n.34 (his consistency in handling prepaid flat fees between October 2009 and December 2012 "in accordance with the standards of prior law is what helps Respondent prove the truth of his [mistaken] beliefs," concerning the application of Rule 1.15(e)).

Having concluded that Respondent did not intentionally misappropriate Mr. Moya's funds, the Hearing Committee must determine whether he did so negligently or recklessly. Negligent misappropriation generally involves single or discrete, inadvertent or negligent acts. *In re Carlson*, 802 A.2d 341, 351, n.12 (D.C. 2002). The Court most recently defined it as an attorney's "non-

[15] The Hearing Committee notes that as soon Respondent transferred Mr. Moya's refund to the IOLTA account, the balance in the IOLTA account fell below the amount to be refunded, where it remained even after Mr. Moya ultimately cashed his refund check. BX 3C.

[16] As discussed below, the November 6, 2012 transfer of Mr. Moya's funds to the IOLTA account occurred *before* Respondent deposited Mr. Gur's payment of advance of flat fees into his COA on November 12, 2012. JX 1, ¶ 15. The Hearing Committee also notes that the transfer of Mr. Moya's refund from the COA to the IOLTA account could have placed Respondent on the horns of the same dilemma faced by Mr. Mance. Portions of the advance of unearned fees at issue in *Mance* had been deposited into an operating account and an escrow account. *See In re Mance*, Bar Docket No. 241-04, ¶ 12 (BPR Jul. 28, 2006). While the Court did not sanction Mr. Mance for treating client funds as his own property, it nevertheless sanctioned him for commingling by depositing the funds he considered his own into the escrow account. *Mance* at 1208-09. By the same token, if Respondent transferred funds he considered his own property into his IOLTA account, it could potentially have resulted in commingling.

intentional, non-deliberate, non-reckless" misuse or failure to retain the proper balance of entrusted funds. *Abbey*, 169 A.3d at 872. The hallmarks of negligent misappropriation include a good-faith, genuine, or sincere but mistaken belief that entrusted funds have properly been paid, and an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded. *Id*. (citing *In re Choroszej*, 624 A.2d 434, 435–37 (D.C. 1992); *Ray*, 675 A.2d at 1387; *In re Reed*, 679 A.2d 506, 507–08 (D.C. 1996); *Chang*, 694 A.2d at 877). Misappropriation may be found negligent if based on a mistaken belief that is "objectively reasonable." *In re Pierson*, 690 A.2d 941, 949 (D.C. 1997) (citing *In re Evans*, 578 A.2d 1141 (D.C. 1990)).

The central issue in whether a misappropriation is reckless "is *how* the attorney handles entrusted funds, whether in a way that suggests the unauthorized use was inadvertent or the result of simple negligence, or in a way that reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his behavior for the security of the funds." *Anderson I*, 778 A.2d at 339 (emphasis in original) (citing 57 AM. JUR. 2d Negligence § 302 (1989)) ("[R]eckless misconduct requires conscious choice of action either with knowledge of the serious danger to others involved or of facts that would disclose the danger to any reasonable person."); *Pleshaw*, 2 A.3d at 173.

Reckless misappropriation "does not require proof that the attorney acted intentionally or deliberately." *Anderson I*, 778 A.2d at 338. To warrant disbarment under *Addams*, the evidence need only demonstrate that the misappropriation "reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds." *Id.*; *Ahaghotu*, 75 A.3d at 256. The hallmarks of such misconduct… include the indiscriminate commingling of entrusted and personal funds; a complete failure to track settlement proceeds; 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 the disregard of inquiries concerning the status of funds. *Anderson I*, 778 A.2d at 338. Not all of these must be present to find reckless misappropriation. *See, e.g.*, *Ahaghotu*, 75 A.3d at 255 (three of five hallmarks); *Pleshaw*, 2 A.3d at 174-75 (no discussion of the hallmarks in probate matter); *Pels*, 653 A.2d at 396-97 (three of five hallmarks).

Respondent concedes he treated Mr. Moya's funds as his own based on his mistaken belief that an advance of unearned fees became an attorney's property upon receipt. He suggests however that any misappropriation that occurred resulted from a good-faith but negligent mistake of law, which he claims is a "special form" of negligence, R. Br. at 35, 42 (citing *Haar II*, 698 A.2d at 422), that Respondent calls "mistake of law" misappropriation. *See, e.g.*, R. Br. at 47. If his mistake was objectively reasonable, Respondent argues, it should not even be considered negligent. R. Br. at 34 (citing *Haar II*, 698 A.2d at 426 (dissent)); s*ee also* R. Br. at 37 (Respondent's mistake "so reasonable that it cannot be prosecuted and/or sanctioned"). Indeed, even if it is "objectively unreasonable," Respondent continues, the Hearing Committee must find Respondent's mistaken belief "true" if it does not result from willful negligence. R. Br.at 34 (citing *Haar II*, 698 A.2d at 421-22, 426 (dissent)). Disciplinary Counsel argues that any mistake Respondent made about the applicability of Rule 1.15 cannot excuse or mitigate his misconduct. D.C. Br. at 15 (citing *In re Smith*, 817 A.2d 196 (D.C. 2003)). At issue is whether Respondent's misappropriation of Mr. Moya's funds was negligent or reckless.

The Hearing Committee notes at the outset that Respondent takes inconsistent positions as to what his mistake consisted of. On the one hand, Respondent disclaims any knowledge of *Mance* before December 2012, R. Br. at 29, ¶ 49, 35; Tr. 22 ("unaware of the so-called 'Mance rule'"), 68 ("That's the first time I had heard about *Mance*."), 121 (sought meeting to tell Disciplinary Counsel that Respondent "honestly did not understand about *Mance*" once he learned of it). With

respect to its application to flat fees, Respondent claims that before *Mance*, then Rule 1.15(d) was "not clear on its face." R. Br. at 34. At the same time, Respondent claims he lacked any knowledge of the version of the Rule that *Mance* clarified which, as Respondent also concedes, had been in effect for over nine years. *See* R. Br. 29, ¶ 49 (Respondent "was not aware that Rule 1.15(d) changed in 2000"); R. Br. 27, n. 18 ("Respondent's unique circumstances include…not being aware of the 2000 amendment to Rule 1.15(d) or the subsequent *Mance* decision interpreting that Rule.").[17] Respondent also claims that he sincerely believed that the disciplinary rules in effect when he joined the D.C. Bar in 1983 remained in effect without change through December 2012. *See* Tr. 17 (understanding of how to treat client advances of fees dates to 1983), 21 (unaware of any rule requiring him to discuss banking arrangements with clients), 72 (unaware that the rule he knew from when he started practicing had changed), 194, 205-06 (admitting he never kept up-to-date on rules of professional responsibility); *see also* Tr. 125 (after December 2012 became aware that lawyers may be disbarred in misappropriation cases). Either way, the Hearing Committee concludes that it was not objectively reasonable for Respondent to rely on a belief that the Rules had not changed in so long a time without even checking to see if they had.

The Hearing Committee rejects Respondent's attempt to hold the D.C. Bar responsible for his lack of knowledge of *Mance*. Disciplinary Counsel demonstrated by clear and convincing evidence that the D.C. Bar began offering guidance and instruction on *Mance* within two months of the decision, and has continued to do so ever since. The Committee concludes that Respondent chose not to avail himself of any of the proffered resources until it was too late. *See, e.g.*, Tr. 119 (acknowledging awareness of *Washington Lawyer* magazine, admitting he did not read it), 206

[17] As Respondent correctly notes, Rule 1.15(d) was amended again in 2008 to include the "informed consent" provisions. R. Br. at 33.

(admitting he did not read magazine's reports on latest disciplinary actions); *see also* R. Br. at 38 (conceding that Respondent could have learned about *Mance* by reading the D.C. Bar magazine). The Committee also concludes that the D.C. Bar acted in accordance with the Court's expectation in *Mance* and disagrees with Respondent and his expert that still more is required, for example, mandatory CLE. Tr. 205, 256. As described below, even after attending a CLE on the handling of client funds, Respondent failed to implement the rule of *Mance. See* JX 1, ¶¶ 17, 21; Tr. 117. For the same reason, the Committee rejects Respondent's claim that "nobody is able, to this day, to divine the holding in *Mance* solely by looking at Rule 1.15(d) or the Comments to Rule 1.15", R. Br. at 38; that *Mance* remains "simply too new and too widely misunderstood," R. Br. at 40; or that *Mance* remained unclear to Respondent even after he learned of it. R. Br. at 36.[18]

The Hearing Committee next rejects Respondent's claim that he reasonably relied on the disciplinary rules in effect in 1983 to guide his actions through 2012 based on the unrefuted evidence of Respondent's education and experience and a successful career spanning over 20 years in otherwise complex practice area. *See* Tr. 35 (full scholarship to University of Michigan undergraduate), 37 (J.D. from American University; Fulbright Scholarship to obtain equivalent of LL.M. at European Law Institute in Brussels), 44 (first job in D.C. as associate of Chicago-based firm practicing business and corporate law), 75, 134 (complexity of immigration law); *see also Atty. Grievance Comm'n. of Maryland v. Berry*, 437 Md. 152, 177 (2014) (rejecting claim of ignorance based on attorney's length of experience, expertise in his field, and nature of professional contacts); *Harrison*, 461 A.2d at 1036 n.3 ("It strains common sense to think that a

[18] The Hearing Committee further finds such claims to be inconsistent with Respondent's insistence that he would have complied with *Mance* before the disciplinary complaints in these matters had he known of it. Tr. 123-24.

practitioner with 20 years' experience would be unaware of the prohibition against commingling.").

The Hearing Committee also finds Respondent's claim of good-faith mistake not credible in light of his prior discipline, which also involved a mistaken interpretation of a different disciplinary rule that is now found in Rule 1.15(e). *In re Haar* (*Haar I*), 667 A.2d 1350 (D.C. 1995); *Haar II*, 698 A.2d 412.[19] Despite that previous discipline, which resulted in sanction, Respondent claims he took no steps to keep apprised of the Rules or of their interpretation by the Court in the ensuing fifteen years. *See, e.g.*, Tr. 119-120 (took no CLE course in 15 years), 21 ("not aware that [there] was some ethics rule out there that required him to have a banking discussion with the client," *i.e.*, Rule 1.15(e)), 204-05 (keeping informed of changes in ethics rules "wasn't on my radar"), 119 (aware of D.C. Bar magazine but generally did not read it). Instead the Hearing Committee finds that as a member of the D.C. Bar, Respondent was on constructive notice of the Rules, of amendments to the Rules, and of any clarification of the Rules by the Court, a critical point Respondent ignores but which both the dissent and the majority in *Haar II* stressed:

> Once we have clarified the requirements of a Rule, as we did in *Haar I*, attorneys are well on notice of their obligations and must conform their conduct accordingly, on pain of sanction.

Haar II, 698 A.2d at 429 (dissent); *see also id.* at 425 n.13 ("Nor do we believe there is any sound reason why a mistake of law, even concerning a rule not yet definitively interpreted, should generate less culpability than a mistake of fact when the D.C. Bar's Legal Ethics Committee is available to give opinions on difficult legal issues, as a protective measure"). For the same reason, the Hearing Committee rejects Respondent's attempt to claim that the meaning of Rule 1.15(e)

[19] The Court's decision in *Haar II*, which expressly notes the adoption of the Rules in 1991, contradicts Respondent's claim he relied in good faith on the rules in effect in 1983 when he became a member of the Bar.

remained unclear after *Mance*, or that the mistaken interpretation on which Respondent here relies had yet to be "brief[ed] and argu[ed] by the parties and conference[d] among the judges." R. Br. at 37 (quoting *Haar II*, 698 A.2d at 426 (dissent)). The Committee finds that Respondent's claim of good-faith mistake ultimately conflicts with his independent responsibility to comply with the Rules of Professional Responsibility and seek assistance when it is unclear how to do so. *Devaney*, 870 A.2d at 57 ("an attorney is presumed to know the ethical rules governing his behavior, and ignorance neither excuses nor mitigates a violation") (citing *Harrison*, 461 A.2d at 1036 n.3)); *see also Berry*, 437 Md. 152 (claimed ignorance of ethical duties is not a defense in disciplinary proceedings in Maryland); *In re Eisenberg*, 75 N.J. 454, 456 n.1 (1978) (lack of familiarity with rules does not diminish responsibility for conduct in violation of rules).

The Hearing Committee agrees with Disciplinary Counsel that Respondent's purported mistake cannot excuse or mitigate misconduct where the rule violated is "fundamental to governance of the legal profession." *See* D.C. Br. at 13-14 (quoting *In re Smith*, 817 A.2d 196, 202 (D.C. 2003)). The Committee rejects the claim that "there is nothing 'fundamental' about Rule 1.15(d)," R. Br. at 39, or that the "core purpose" behind the 2000 amendment of Rule 1.15(d) was to protect "*lawyers* from being whip-sawed by the contrary prepayment standards in our neighboring jurisdictions." R. Br. at 40 (emphasis in original).[20] Such argument is directly contradicted by *Mance*, which states that the purpose of Rule 1.15(d)'s amendment was to clarify attorneys' obligations "so that the interest of the public will be protected." *Mance*, 980 A.2d at 1206. The principle at stake is retaining "client confidence in the inviolability of funds entrusted to lawyers" and the "sanctity of client funds in a lawyer's possession." *Haar II,* 698 A.2d at 424,

[20] It is also difficult to square Respondent's contrary view with his stated concern to provide aid to those seeking access to justice. *See, e.g.*, Tr. 25, 137-146.

425. In weighing the competing interests of clients and attorneys, *Mance* unequivocally concluded that "the client's interest in protecting the funds override that of the lawyer's in immediate access to them, and that the public is ultimately better served by requiring that the lawyer keep flat fees in a trust or escrow account." *Mance*, 980 A.2d at 1203.

But the Hearing Committee finds a more significant problem with Respondent's argument that Rule 1.15(e) is not fundamental to the governance of the profession. Respondent provides a detailed examination of the Rule's evolution in his post-hearing brief. *See* R. Br. at 30-34. Respondent explains that when he became a member of the Bar in 1983, the disciplinary rules in effect required him to hold prepaid fees in his operating account. Tr. 17, 72; R. Br. at 30. When the D.C. Bar adopted the Rules of Professional Conduct in 1991, new Rule 1.15(d) added language to the effect that advances of legal fees and costs became the property of the lawyer upon receipt, and did so to clarify Rule 1.15(a)'s requirement that client funds be held separate from a lawyer's own. *See* R. Br. at 30-31 (citing *Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia* at 115 (Nov. 19, 1986)); *see also Hessler*, 549 A.2d at 700 (noting requirement of previous DR 9-103(A) that all client funds paid to a lawyer "other than advances for costs and expenses" to be deposited in accounts separate from attorney's own). Only later did the Rules of Professional Conduct Review Committee propose amending the Rule to require attorneys to treat such advances "as property of the client." R. Br. at 32. This eventually occurred in January 2000. *Arneja*, 790 A.2d at 552. Respondent accurately explains that one reason for the amendment was to avoid "a potential trap for the unwary" attorney by making Rule 1.15(d) consistent with the disciplinary rules in neighboring

jurisdictions, which treated advances as client property. *In re Mance* (*Mance BPR*), Board Docket No. 241-04, at 17 (BPR Jul. 28, 2006); *see also* R. Br. at 32 (accord). That conflict exposed members of the D.C. Bar who also belonged to the Virginia or Maryland Bars to risk by requiring them to handle the same types of fees differently. *Mance BPR* at 17; *see also id*. at 30-31 (dissent). As a member of the Maryland Bar, Tr. 186; JX 1, ¶ 21; RX 3, Respondent presumably had notice of the "potential trap for the unwary" he now complains of.

The Hearing Committee concludes that Respondent's failure to maintain the proper balance of Mr. Moya's funds could not reasonably have resulted from a good-faith but mistaken belief that Respondent could treat Mr. Moya's advance of fees as Respondent's own property. Even if Respondent's mistake was objectively reasonable, it would not excuse Respondent's misappropriation, since "practitioners in the District [of Columbia] are subject to this jurisdiction's code of professional ethics whether or not they are aware of each prohibition" or not. *Harrison*, 461 A.2d at 1036 n.3 (rejecting claim of unawareness of prohibition against commingling); *Devaney*, 870 A.2d at 57. To find otherwise "would encourage and reward indifference to the ethics code and the cases interpreting it, a pernicious outcome." *In re Siderits*, 345 Wis. 2d 89, 103 (2013); *Florida Bar v. Dubow*, 636 So.2d 1287, 1288 (Fla. 1994) (ignorance no excuse particularly for attorneys "who are charged with notice of the rules and the standards of ethical and professional conduct").

The Hearing Committee concludes that based on *Mance*'s clarification of Rule 1.15(d), Respondent had constructive notice that his understanding either of Rule 1.15(d) or of the rules in effect before then were mistaken no later than October 2009. The Hearing Committee therefore also finds that Respondent's misappropriation of Mr. Moya's funds was not negligent, because it resulted from Respondent's conceded failure over many years to stay apprised of his professional

obligations to his clients and their property, "a pattern or course of conduct demonstrating an unacceptable disregard for the welfare of entrusted funds." *Anderson I*, 778 A.2d at 339. As noted, Respondent admits he took no steps to stay informed of his professional responsibilities, despite his prior discipline and or the "potential trap for the unwary" created by the conflicting rules of the Maryland Bar, to which he belongs. *See, e.g.*, Tr. 119-120 (took no CLE course in 15 years), 21 ("not aware that [there] was some ethics rule out there that required him to have a banking discussion with the client," *i.e.*, Rule 1.15(e)), 204-05 (keeping informed of changes in ethics rules "wasn't on my radar"), 119 (aware of D.C. Bar magazine but did generally did not read it). In light also of his learning and experience, the Committee can only conclude that Respondent neglected his responsibilities "with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person." *Anderson I*, 778 A.2d at 339 (quoting 57 AM. JUR. 2d Negligence § 302 (1989)). By ignoring Rule 1.15(e), either as amended in 2000 or as clarified by *Mance* in 2009, Respondent indirectly revealed an implicit and continuing disregard for the status of accounts in which entrusted funds were to be placed, resulting in repeated deficiencies in the unearned amount of Mr. Moya's advance of funds between October 2009 and December 2012. JX 1, ¶¶ 13-15; *Ahaghotu*, 75 A.3d at 256; *Anderson I*, 778 A.2d at 338.

C. Gur Complaint

1. Respondent Violated Rule 1.15(a) and Rule 1.15(e)

The Hearing Committee finds by clear and convincing evidence that Respondent committed commingling and misappropriation in violation of Rules 1.15(a) and 1.15(e) by holding Mr. Gur's funds in Respondent's COA and by using Mr. Gur's funds without authorization between November 12, 2012, and November 26, 2013.

Respondent admits that he received an initial payment of $10,000 toward a total flat fee of $20,000 from Mr. Gur on November 2, 2012, and that he deposited it in his COA on November 12, 2012. JX 1, ¶ 15. Respondent admits he did not inform Mr. Gur of his banking practices. JX 1, ¶ 16; BX B, ¶ 28; BX C, ¶ 28. Respondent admits that though he began good quality work for Mr. Gur as soon the engagement commenced, Respondent did not earn at least $1,000 of the funds paid by Mr. Gur. JX 1, ¶¶ 17-18. Respondent admits that the balance in his COA repeatedly fell below $1,000 during the time it held Mr. Gur's funds, including every day between November 21 and November 25, 2012. JX 1, ¶ 18; BX B, ¶ 36; BX C, ¶ 36. In November of 2013, Respondent tendered a refund of $8,000 to Mr. Gur, the amount demanded by Mr. Gur's new attorney based on that attorney's assessment of the work completed by Respondent's firm. JX 1, ¶ 17; BX B, ¶¶ 32, 35; BX C, ¶¶ 32, 35.

Disciplinary Counsel argues that Respondent committed commingling and misappropriation of Mr. Gur's funds. D.C. Br. at 10-11; BX B, ¶ 37. Respondent has stipulated that he held Mr. Gur's funds in his COA and that between November 12, 2012, and November 25, 2013, the balance in the COA repeatedly fell below "the minimum amount necessary to refund unearned fees to Mr. Gur." JX 1, ¶¶ 15, 18. Respondent does not dispute these facts or otherwise withdraw his stipulations. Thus, though he denies that he commingled or misappropriated Mr. Gur's funds, he admits that *Mance* "may yield a different result, unless distinguished, modified, or over-turned." BX C, ¶¶ 37(a), 37(b). Respondent's denials rest on the implicit claim that Respondent could treat Mr. Gur's November 2012 payment as Respondent's own property once received. But *Mance* precluded such claims over three years earlier. Thus the Hearing Committee finds that *Mance*, which has not yet been "distinguished, modified, or over-turned," does indeed yield a different result. Based on Respondent's own admissions, the Hearing Committee finds that

Respondent committed commingling and misappropriation in violation of Rules 1.15(a) and 1.15(e) when he deposited and held Mr. Gur's advance of unearned fees in Respondent's COA and when the balance in Respondent's COA fell below the amount due to Mr. Gur.

2. Respondent's Culpability

Having determined that Respondent misappropriated Mr. Gur's funds, the Hearing Committee must next determine whether Respondent did so intentionally, recklessly, or negligently. *Anderson I*, 778 A.2d at 336.

The Hearing Committee begins by rejecting the claim that Respondent's misappropriation of Mr. Gur's funds resulted from no more than negligence based on a good-faith mistake of what Rule 1.15(e) required. As explained above, Respondent was on notice of his mistake once *Mance* issued in 2009. The D.C. Bar undertook repeated and continuing steps to inform its members of *Mance* and to provide guidance on conforming their practice to *Mance*'s holding over the next several years, opportunities Respondent ignored. Respondent did so despite his prior discipline; despite his substantial learning and experience; and despite being a member of the Maryland Bar, with whose conflicting rule *Mance* sought to conform. Any claim by Respondent of good-faith mistake in his understanding of Rule 1.15(e) is belied by his transfer of Mr. Moya's funds from Respondent's COA to his IOLTA on November 6, 2012. JX 1, ¶ 11. The transfer of Mr. Moya's funds occurred *after* Respondent had already entered into a retainer agreement with Mr. Gur, and less than a week before Respondent deposited Mr. Gur's payment into Respondent's COA. JX 1, ¶ 15. As if that were not enough, Respondent had actual notice of *Mance* within a month of receiving Mr. Gur's payment, and sought guidance on its implementation. JX 1, ¶ 20; Tr. 66-68. Several months later, Respondent attended a CLE offered by the D.C. Bar on how to handle client funds. JX 1, ¶ 21. Despite his changed understanding of Rule 1.15(e) (as evidenced by his transfer

of Mr. Moya's funds), despite learning of *Mance* in December 2012, and despite enrolling in a CLE on lawyer trust accounts in May 2013, Respondent never moved the unearned amount of Mr. Gur's advance of fees into Respondent's IOLTA.

The Hearing Committee rejects Respondent's attempt to argue that any misappropriation that occurred resulted from his good-faith mistake of law based on the additional claim that any misappropriation of Mr. Gur's funds occurred ("was complete") *before* Respondent learned of *Mance*. R. Br. at 38. Respondent stipulated that between November 12, 2012, and November 25, 2013, the balance in Respondent's COA "*repeatedly* fell below $1,000 -- the minimum amount necessary to refund unearned fees to Mr. Gur." JX 1, ¶ 18 (emphasis added). Any misunderstanding of the law before December 2012 would not have excused Respondent's handling of Mr. Gur's funds once Respondent learned of *Mance* in December 2012, and certainly not after May 2013, once he attended a CLE on lawyer trust accounts that discussed *Mance*.

The Hearing Committee next rejects Respondent's excuse that even after he became aware of *Mance*, he remained ignorant of how it worked. Tr. 121. Respondent had ample opportunity to seek guidance on *Mance* when he consulted with the D.C. Practice Management Advisory Service in December 2012, and later when he enrolled in a CLE on lawyer trust accounts in May 2013. Tr. 66-68, 72; *see also* Tr. 117; JX 1, ¶ 21. Throughout this time, Respondent also had access to the D.C. Bar's Legal Ethics Committee, which is available to give opinions on difficult ethical issues, as Respondent well knows. *See Haar II*, 698 A.2d at 425 n.13. The Committee finds Respondent's claim that he could not figure out how *Mance* worked simply not credible, for reasons already explained. Given Respondent's significant experience and training, the Committee instead credits his testimony to the effect that he would have complied with *Mance* had he but known of it before the Disciplinary complaints here:

A: I honestly didn't understand the *Mance* case. Had I done that, I would have complied immediately once I knew about it. I care about my --

Q: You mean before the Bar complaints?

A: Pardon me?

Q: You mean if you would have known before the Bar complaints, that you would have been in compliance.

A: Of course.

Tr. 123-24.

Consistent with that assertion, Respondent testified to the effect that he gave due consideration to the advice he received from the D.C. Bar. He testified he "implemented some *Mance* compliance methods, protocols" after meeting with the D.C. Practice Management Advisory Service in December 2012. Tr. 99-100. Even then Respondent did not review his existing accounts for compliance with *Mance*. Tr. 100. When asked why, Respondent answered that "[m]ost of the work had been completed." Tr. 100. To the extent this suggested that more work remained to be done, Respondent effectively conceded that some of Mr. Gur's funds remained unearned. When asked whether he believed he had "any kind of duty to do a compliance audit retroactively," Respondent did not answer, stating instead that "I thought what I had to do was move that forward for new cases." Tr. 100. Respondent did not say whether he considered Mr. Gur's matter, which he had opened just a few weeks before learning of *Mance*, "new" or "old." Either way, the Hearing Committee finds that the evidence clearly and convincingly demonstrates that Respondent did nothing to conform his handling of Mr. Gur's funds to *Mance* once he learned of it.

The second problem with Respondent's claim is its lack of objective reasonableness in light of Respondent's previous actions. Mr. Gur made his initial payment of $10,000 to Respondent by check dated November 9, 2012, which Respondent deposited into his COA. JX 1, ¶ 15. Just

three days earlier, Respondent had transferred Mr. Moya's funds *out of* the COA based on the research and advice of Alex Miller, Respondent's junior associate. JX 1, ¶ 11; Tr. 59-60 (describing research). It is worth noting again that Respondent requested Mr. Miller's research and advice after receiving a copy of Mr. Moya's complaint. JX 1, ¶ 10; Tr. 58-59. Respondent's transfer of Mr. Moya's funds from his COA to his IOLTA demonstrates that Respondent no longer maintained a good-faith but mistaken belief that a client's advance of flat fees became his property upon receipt thereafter. R. Br. at 48 n.34.

Disciplinary Counsel argues that Respondent's actions were intentional or reckless for his having deliberately and intentionally used the fees advanced to him by Mr. Gur as if they were his own even after Respondent learned of his obligations under *Mance*. D.C. Br. at 12-13. Respondent counters that though he "merits some kind of sanction," it should be mitigated for his "honest, sincere, and good-faith but negligent failure" to handle Mr. Gur's funds in accordance with *Mance*. R. Br. at 41 (emphasis omitted). Respondent suggests that his "good-faith but negligent failure" consisted of a "mistake of law." R. Br. at 42. Based on the evidence already discussed, the Hearing Committee does not find Respondent's claim of good-faith mistake credible.

The Hearing Committee concludes that Respondent's misappropriation of Mr. Gur's funds was at minimum reckless. Respondent deposited Mr. Gur's funds in his COA despite previously concluding that Mr. Moya's funds should be held in Respondent's IOLTA account. Respondent continued to maintain Mr. Gur's funds in his COA after learning of *Mance* in December 2012 and after attending a CLE on client trust accounts in May 2013. Notwithstanding his purported confusion over how to implement *Mance*, the record does not demonstrate that Respondent sought further guidance or advice. Instead he continued to hold Mr. Gur's funds in his COA and to treat

them as his own through November 2013, during which time Respondent concedes the balance of the COA repeatedly fell below what was owed to Mr. Gur.

The Hearing Committee concludes that the evidence clearly and convincingly shows that Respondent committed intentional misappropriation of Mr. Gur's funds. In the alternative, the Hearing Committee concludes that Respondent committed reckless misappropriation by handling Mr. Gur's funds in a way that revealed a conscious indifference to the consequences of his actions for the security of the funds. *Anderson I*, 778 A.2d at 339. Notwithstanding his purported confusion over how to implement *Mance*, Respondent consciously chose a course of action "with knowledge of the serious danger to others involved" *and* "with knowledge of facts that would disclose this danger to any reasonable person." *Id.* (citing 57 AM. JUR. 2d Negligence § 302 (1989)). Because of this course of action, Respondent indiscriminately commingled entrusted and personal funds in his COA and disregarded the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition. *Ahaghotu*, 75 A.3d at 256; *Anderson I*, 778 A.2d at 338.

V. RECOMMENDED SANCTION

A. Standard for Imposing Sanction

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

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *Berryman*, 764 A.2d at 766.

In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client, which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *Elgin*, 918 A.2d at 376). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

In addition, in determining the appropriate sanction in a commingling case, the Hearing Committee must also consider "whether the commingling was: (1) inadvertent or knowing; (2) an isolated instance or protracted; (3) with or without injury to the client; (4) negligent or unintentional misappropriation; (5) with or without adequate record keeping; or (6) by experienced or inexperienced counsel." *In re Osbourne*, 713 A.2d 312, 313 n.2 (D.C. 1998).

B. Presumptive Sanction of Disbarment for Intentional or Reckless Misappropriation

The law regarding misappropriation is clear and consistent: absent "extraordinary circumstances," disbarment is the presumptive sanction for intentional or reckless misappropriation. *Addams*, 579 A.2d at 191; *In re Hewett,* 11 A.3d 279, 286 (D.C. 2011); *see also In re Mayers*, 114 A.3d 1274, 1279 (D.C. 2015). The Court further held that "it is appropriate . . .

to consider the surrounding circumstances regarding the misconduct and to evaluate whether the mitigating factors are highly significant and [whether] they substantially outweigh any aggravating factors such that the presumption of disbarment is rebutted." *Addams*, 579 A.2d at 195. The Court in *Addams* recognized that extraordinary circumstances are present when a respondent is entitled to mitigation under *In re Kersey*, 520 A.2d 321, 326 (D.C. 1987), but the Court warned that "mitigating factors of the usual sort" are not sufficient to rebut the presumptive sanction of disbarment, and "[o]nly the most stringent of extenuating circumstances would justify a lesser disciplinary sanction." 579 A.2d at 191, 193. Accordingly, once misappropriation involving more than simple negligence has been established, the inquiry turns to whether sufficient mitigating factors rebut the presumption of disbarment. *Anderson I*, 778 A.2d at 337-38 (citing *Addams*, 579 A.2d at 191).

With respect to both the Moya Complaint and the Gur Complaint, Disciplinary Counsel has proved by clear and convincing evidence that Respondent committed commingling and misappropriation by far more than simple negligence. The Hearing Committee finds no merit in Respondent's claim that *Addams* does not govern sanctions here. R. Br. at 41. Respondent claims that an advance of flat fees governed by *Mance* "is simply not an 'entrustment' within the meaning of *Addams*." R. Br. at 41. According to Respondent, the Court in *Addams* "never would have imagined that a prepayment could be placed into a trust account." R. Br. at 41. The Court's amendment of Rule 1.15(d) in 2000, not to mention its clarification of that Rule in *Mance*, are evidence enough of the scope of the Court's imagination. The Court's actions also demonstrate the obvious fact – also discussed in *Mance* – that under the Rules in effect before 2000, an advance of fees was considered as the lawyer's property upon receipt. What Respondent's argument omits,

just as Respondent himself omitted, is the recognition that the Court may clarify or change the Rules and that when it does so, the Bar is deemed on notice thereof.

Having rejected Respondent's claims of mistake of law, the Hearing Committee must also reject Respondent's request "to be creative in fashioning a non-suspension sanction." R. Br. at 50. Having concluded that the Respondent committed reckless misappropriation with respect to the Moya Complaint and intentional misappropriation with respect to the Gur Complaint, the Hearing Committee is compelled to recommend disbarment, there being no extraordinary circumstances or other mitigating factors warranting departure from that presumptive sanction.

VI. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated Rule 1.15(a) and Rule 1.15(e) with respect to both Complaints and should receive the sanction of disbarment. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

AD HOC HEARING COMMITTEE

Kathleen Wach

Kathleen Wach, Chair

Trevor Mitchell

Trevor Mitchell, Public Member

M Kelly

Matthew Kelly, Attorney Member