DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
June 30, 2023

In the Matter of:	:	
	:	
MICHAEL ALEXEI,	:	
	:	
Respondent.	:	Board Docket No. 20-BD-018
	:	Disc. Docket No. 2016-D375
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 999055)	:	

ORDER OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

Respondent, Michael Alexei, was charged with violating D.C. Rules of Professional Conduct 1.1(a) (competence), 1.1(b) (skill and care), 1.5(a) (unreasonable fee), 1.15(a) (intentional or reckless misappropriation), 1.15(b) and (e) (failure to deposit entrusted funds in approved depository without client consent)[1], and 8.1(a) (knowingly false statement to disciplinary authority), arising from his representation of Maria Victoria Dijamco in an immigration case between 2014 and 2016. An Ad Hoc Hearing Committee found that Disciplinary Counsel failed to prove any charged Rule violation by clear and convincing evidence and recommended that the case be dismissed. Disciplinary Counsel only takes exception to the Hearing Committee's conclusion that it failed to prove a violation of Rule

[1] On June 13, 2023, the D.C. Bar's Board of Governors voted to approve clarifying amendments to Rule 1.15(e) and the comments to Rules 1.5 and 1.15. Its proposal was transmitted to the Court on June 22, 2023.

1.15(a) and contends that Respondent should be disbarred for intentional or reckless misappropriation. Respondent supports the Hearing Committee's recommendation of dismissal.

For the reasons set forth below, the Board finds that Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent engaged in reckless or intentional misappropriation, in violation of Rule 1.15(a). The Board also agrees with the Hearing Committee's uncontested conclusions that Disciplinary Counsel failed to prove violations of Rules 1.1(a) and 1.1(b), 1.5(a), 1.15(b) and (e), and 8.1(a) by clear and convincing evidence. Accordingly, the charges are hereby dismissed.[2]

II. KEY FINDINGS OF FACT[3]

On March 27, 2014, Respondent met with Maria Victoria Dijamco at Respondent's house to discuss her desire to adjust her visa status. Hearing Committee Finding of Fact ("FF") 6. Following that initial consultation, Respondent agreed to conduct legal research over the next month in order to choose a legal strategy for Ms. Dijamco. *Id.*

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[2] Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any prior or subsequent decisions in this case. *See* D.C. Bar R. XI, § 9(f) ("If the Board . . . dismisses the petition, the attorney or Disciplinary Counsel, or both, may file with the Court exceptions to the Board's decision within twenty days from the date of service of a copy thereof.").

[3] In summarizing the Committee's Findings of Fact, we make several additional findings of fact by clear and convincing evidence, supported by citations to the record. *See* Board Rule 13.7.

On April 19, 2014, Respondent met with Ms. Dijamco and offered two fee agreements. FF 7. Pursuant to the first agreement, Respondent would:

> [P]erform legal services related to the United States immigration matter(s): (1.) Preparing the letter to Former Attorney and the formal State Bar Complaint against Former Attorney – no legal fee. (2.) Preparing and filing the letter to former Attorney and Fee Dispute Resolution Complaint at the legal contingency fee of 1/3 of the outcome.

FF 8; Disciplinary Counsel Exhibit ("DCX") 6 at 33 (quotation marks omitted).

Pursuant to the second agreement, Respondent would:

> [P]erform legal services related to the United States immigration matter(s): (1.) I-485 [green card application] with attached forms and evidence, including Supplement A under INA 245, for legal fee of $1,500; (2.) Nunc Pro Tunc Humanitarian Reinstatement of I-130 Request, legal fee $750; (3.) I-290B Motion [appealing USCIS decision] including the law brief for legal fee of $2,750. . . at a total legal fee of $5,000.

FF 9; DCX 5 at 21 (quotation marks omitted). The second agreement provided that Ms. Dijamco would make an initial payment of $2,500, plus a second payment of $2,500 "upon the filing forms [sic] with USCIS, DOL, EOIR, or DOS." *Id.* The agreements were separately signed and executed on April 19, 2014. DCX 5 at 21; DCX 6 at 33. Also on April 19, 2014, Ms. Dijamco paid the initial deposit listed in the second fee agreement ($2,500), which Respondent deposited into his firm's trust account that evening.[4] FF 9-12.

[4] Because April 19, 2014 was a Saturday, the bank did not process the check until the following Monday, April 21, 2014. FF 12.

On April 24, 2014, Respondent withdrew $1,900 from his trust account, leaving a balance of $2,010.98. That amount was $489.02 below the amount of the initial deposit. FF 16. The Hearing Committee found that the balance in Respondent's trust account did not fall below the amount Respondent was required to hold in trust for Ms. Dijamco because, given the number of hours he had spent on the matter and his typical hourly rate at the time, he had earned between $1,500 and $2,800. FF 14-16. On April 26, 2014, Ms. Dijamco decided to proceed only with the second fee agreement, and Respondent voided the first agreement. FF 17.

On May 21, 2014, the balance in Respondent's trust account fell to $738.98, an amount $1,761.02 below the $2,500 Respondent initially held in trust on behalf of Ms. Dijamco. FF 23. It was unclear exactly how much Respondent had earned by that point. However, because he may have earned up to $2,800 a month earlier (*see* FF 15), the Hearing Committee concluded that Disciplinary Counsel failed to establish that Respondent's trust account fell below the amount he was required to hold in trust for Ms. Dijamco. FF 23.

On July 5, 2014, Respondent and Ms. Dijamco modified the second agreement to add the following addendum:

> Client agrees to compensate the Attorney for additional work as:
>
> (1) Preparing and filing two Bar Complaints against former attorneys, including review of record of proceedings – Legal fee $1,000;
>
> (2) Preparing and filing a new I-864 Affidavit of Support, with additional evidence – Legal fee $850;
>
> (3) Part "(2)" of the Main Agreement was modified as follows: Nunc pro tunc adjustment of status Request Cover Letter to USCIS with detailed legal arguments, – legal fee $900.

NOTE: Retainer Agreement dated 4/19/2014 with "$00" fee is voided.

FF 25; DCX 13 at 534 (quotation marks omitted).

On January 21, 2015, Ms. Dijamco made the second payment of $2,500, which Respondent deposited into his personal bank account on January 25, 2015. FF 30-31. On January 28, 2015, Respondent paid a credit card bill from his personal bank account, leaving a resulting balance of $1,075.22. DCX 22 at 618; *see also* DCX 2 at 7. The Hearing Committee found that, despite not having filed all of the forms he had prepared, Respondent had earned the full fee before Ms. Dijamco paid it because he had completed five tasks set forth in the second fee agreement and addendum, totaling $5,000. FF 31, 34. Specifically, from the original agreement, Respondent completed:

> (1) I-485 with attached forms and evidence including "Supplement A" under INA 245(i) for a legal fee of $1,500; [and] (2) *Nunc Pro Tunc* humanitarian reinstatement of I-130 Request for a legal fee of $750;

FF 34. From the July 5, 2014 Addendum, Respondent completed:

> (3) $1,000 to prepare and file two bar complaints against her former attorneys and review the record of her immigration proceedings; (4) $850 to prepare and file a new I-864 affidavit of support with additional evidence; and (5) $900 to prepare a *nunc pro tunc* adjustment of status request cover letter to USCIS with detailed legal arguments.

Id. The Hearing Committee found that because the second $2,500 payment consisted of earned fees, the subsequent withdrawals from Respondent's operating account were irrelevant. FF 36.

USCIS ultimately denied Ms. Dijamco's green card application, citing deficiencies that included the absence of a properly filed request for reinstatement

of the I-130 petition and a form seeking waiver of grounds for inadmissibility. FF 40-41, 43. Ms. Dijamco's former attorneys had filed the waiver form but were unsuccessful with that legal strategy, and Respondent chose to pursue a different strategy.[5] FF 40, 44. Ms. Dijamco subsequently hired new counsel and filed a disciplinary complaint against Respondent. FF 49-50. Shortly before filing the complaint, Ms. Dijamco emailed Respondent to let him know that it was "not personal" but that the complaint was "just something that is necessary in order to re-open my case," and thanked him for his help with her case. FF 49. The complaint focused on Respondent's failure to advance Ms. Dijamco's case and did not mention Respondent's handling of advance fees. DCX 5 at 19-20.

In November 2016, in a response to an inquiry from Disciplinary Counsel, Respondent asserted in a footnote that he had drafted a complaint against Ms. Dijamco's former lawyers at no charge, even though the July 2014 addendum lists a $1,000 fee for that task. FF 28. The Committee, pointing in part to Respondent's testimony, explained that drafting the complaint was initially part of the first (contingency fee) agreement, which was later voided, and that the $1,000 fee was designed to compensate him for work he had already performed. *Id.* In January 2020, after Disciplinary Counsel had provided Respondent with a draft of the Specification of Charges, he submitted a "draft" response stating, *inter alia*, that he

[5] The Hearing Committee rejected Disciplinary Counsel's expert's opinion that Respondent's failure to re-file the waiver form, leading to denial of the green card application, fell below the standard of care of a reasonable immigration lawyer. FF 44, 48.

had earned the first $2,500 installment before he received it, but that he was forced to deposit it in his trust account because Ms. Dijamco had addressed the check to his firm. FF 51.

The Hearing Committee found that Respondent's testimony was credible and that he had not lied to Disciplinary Counsel during its investigation. FF 3, 28, 51, 53. By contrast, it found that Disciplinary Counsel's expert misunderstood Respondent's fee agreements, which explained some of the inconsistencies between her testimony and Respondent's. *See* FF 48, 53.

III. CONCLUSIONS OF LAW

The Board may make its own findings of fact, but it "'must accept the Hearing Committee's evidentiary findings, including credibility findings, if they are supported by substantial evidence in the record."' *See In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam) (quoting *In re Bradley*, 70 A.3d 1189, 1193 (D.C. 2013) (per curiam)); *see also In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam) (defining "substantial evidence" as "enough evidence for a reasonable mind to find sufficient to support the conclusion reached"). The Board reviews *de novo* its legal conclusions and its determinations of ultimate fact. *See Klayman*, 228 A.3d at 717; *Bradley*, 70 A.3d at 1194 (Board owes "no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus are reviewed *de novo*").

Disciplinary Counsel must establish a violation of the Rules of Professional Conduct by clear and convincing evidence. *See, e.g.*, *In re Anderson*, 778 A.2d 330,

335, 337-38 (D.C. 2001). Clear and convincing evidence requires a degree of persuasion higher than a mere preponderance of the evidence; it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (citation and internal quotation marks omitted). In *In re Nave*, 197 A.3d 511 (D.C. 2018) (per curiam), the Court reiterated that "[t]his stringent standard 'expresses a preference for the attorney's interests by allocating more of the risk' of an erroneous conclusion to Disciplinary Counsel." 197 A.3d at 518 (quoting *In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011)).

A. Rule 1.15(a) (Reckless or Intentional Misappropriation)

Disciplinary Counsel contends that the Hearing Committee erred in concluding that Respondent had earned portions of the flat fee before he took them for himself, despite not having "completed" any of the itemized tasks set forth in the fee agreements. *See* ODC Br. at 7-9. In its submissions pertaining to this matter, Disciplinary Counsel interprets *Mance* as creating a "default rule for up-front payment of advance fees . . . that the fees are not earned until the agreed-upon services are complete" and thus concludes that Respondent "was not permitted to take fees simply because he believed he had done enough work to earn them." *See* ODC Reply Br. at 3-4.[6] In its reply brief, Disciplinary Counsel contends that, even

[6] This argument is inconsistent with Disciplinary Counsel's current position in the Court of Appeals in *In re Brown*, D.C. App. No. 20-BG-589, *review pending*. In *Brown*, the respondent had been retained "to 'endeavor to get [his client's] sales tax liability settled."' Board Docket No. 19-BD-032, at 10 (BPR Oct. 7, 2020) (quoting FF 11). He charged a $4,000 flat fee, did not set payment milestones, and did not

if Respondent were entitled to withdraw fees earned before completing the representation, the fees were not reasonable "in light of the scope of the representation." *Id.* at 5.

1. Background

Unless the client gives informed consent to another arrangement, flat fees "must be held as client funds in a client's trust or escrow account until they are earned by the lawyer's performance of legal services." *In re Mance*, 980 A.2d 1196, 1203, 1206 (D.C. 2009). Fees are earned "only to the degree that the attorney actually performs the agreed-upon services." *Id.* at 1202 (citation and internal quotation marks omitted). While fee agreements may include "milestones" setting forth when the portions of a flat fee may be deemed earned, such agreements cannot be "extreme[ly]" front-loaded; rather, funds must be safeguarded "until it can reasonably be said that they have been earned in light of the scope of the representation." *Id.* at 1204-05. Withdrawal of unearned fees from a trust account would constitute misappropriation, in violation of Rule 1.15(a). *See In re Gray*, 224 A.3d 1222 (D.C. 2020) (per curiam).

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maintain the fee in escrow. In *Brown*, Disciplinary Counsel has not argued that the respondent was not entitled to any of the flat fee until the sales tax liability had been resolved. Instead, Disciplinary Counsel's brief cites to *Mance* and Legal Ethics Opinion 355, and argues that "[i]n the absence of such agreed-upon milestones, Mr. Brown could not earn any of his fee *until he made a reasonable effort* to persuade the State to resolve [his client's] tax issues." Brief at 26. We agree that Disciplinary Counsel's *Brown* argument accurately states the applicable law.

Though the Court in *Mance* did not define "performance of legal services," the D.C. Bar's Legal Ethics Committee has taken the position that flat fees may be withdrawn when partially earned, even in the absence of an agreement to that effect. In D.C. Bar Legal Ethics Opinion 355 (Mar. 2010)[7], the Committee recognized that "*Mance* does not address whether a lawyer may transfer some portion of a flat fee from a trust account to an operating account prior to the conclusion of a representation where there is no agreement between the lawyer and the client." The Committee opined that "[s]uch a course is not without peril for the lawyer but is *not per se a violation of the Rules*." (emphasis added). The Committee then advised that, while fee agreements *should* set forth when portions of flat fees will be deemed earned, "[i]n the absence of any agreement with the client regarding milestones by which the lawyer will have earned portions of the fixed fee, the lawyer will have the burden to establish that whatever funds that have been transferred to the lawyer's operating account have been earned."[8] The Ethics Opinion further advised that lawyers have the *option* to wait until the representation has been completed before withdrawing the entire flat fee as a lump sum, but need not do so in all cases.

[7] Ethics Opinion 355 was recently removed from the Bar's website due to its inconsistency with the Court's recent decision in *In re Ponds* on a separate issue—whether informed consent to treat advance fees as earned must be in writing. *See* Motion of the D.C. Bar Legal Ethics Committee for Leave to File as Amicus Curiae, *In re Ponds*, D.C. App. No. 19-BG-0555, at 3 (D.C. Sept. 12, 2022).

[8] Ethics Opinion 355's use of the word "burden" does not change the burden of proof in disciplinary cases; Disciplinary Counsel must prove each violation by clear and convincing evidence. *See Anderson*, 778 A.2d at 335, 337-38.

2. Analysis

i. Mance did not create a default rule that no portion of flat fees are earned until tasks are complete.

The question before the *Mance* court was "whether a 'flat fee' paid in advance for legal services is to be deemed an 'advance[ ] of unearned fees' that is required to be treated as property of the client under Rule 1.15(d) [now 1.15(e)] of the D.C. Rules of Professional Conduct." *Mance*, 980 A.2d at 1199 (first alteration in original). Mance had been retained to represent a client in connection with a murder investigation. He agreed with the client on a $15,000 fee, to be paid in two $7,500 installments in advance (only one payment was made). *Id.* at 1200. Both Mance and the client understood that the $15,000 flat fee was Mance's property upon receipt and that it was "nonrefundable." *Id.* at 1200 & n.3. Despite that understanding, the client asked for a refund when he decided to discharge Mance shortly after retaining him. Even though he had done some work on the case, Mance agreed to a full refund, but delayed for several months in making the refund payment. *Id.* at 1200, 1202-03; *see also In re Mance*, Bar Docket No. 241-04, at 8 (BPR July 28, 2006) (finding that the respondent met with and gave legal advice to the father and son). During this time, Mance did not maintain the entire $7,500 in his trust account. He was charged with misappropriation of an unearned advance fee. *Id.*

Because the Board concluded that the fee was paid to assure the respondent's availability for the representation, and to pay for his services during the

representation, it rejected Disciplinary Counsel's argument that it was an advance of unearned fees. The Board conclusion relied on the

> underst[anding] in this jurisdiction for a quarter of a century that a flat fee paid for retaining a lawyer and performing a specific task, without reference to future time charges or sub-tasks performed, is not an advance fee.

In re Mance, Bar Docket No. 241-04, at 17 (BPR July 28, 2006). In short, the Board concluded that the flat fee belonged to Mance even before he had done any work on the case. The Court disagreed.

The Court began by distinguishing between a "flat fee"—a fee that '"embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted,"' from an "engagement retainer"—'"a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required."' *Mance*, 980 A.2d at 1202 (citations omitted). An engagement retainer is earned on receipt, and thus belongs to the lawyer, subject to refund in the event of early termination. *Id.*

In discussing the ownership of a flat fee, *Mance* noted that Rule 1.5(a) provides that '"[a] lawyer's fee shall be reasonable,"' and that '"an attorney earns fees only by conferring a benefit on or performing a legal service for the client,"' and concluded that '"[i]t 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."' *Id.* (citations omitted). Because a flat fee is "money paid up-front for legal services that are yet to be performed," a flat fee is an advance of unearned fees.

Id. Thus, the flat fee belongs to the client, and is earned '"only to the degree that the attorney actually performs the agreed-upon services."' *Id.*

Mance left no doubt that, despite past practice, a lawyer is not permitted to treat flat fees as his or her property upon receipt, and that the fees remain client property until earned. However, as discussed in Legal Ethics Opinion 355, *Mance* did not discuss whether a lawyer can take any portion of the flat fee before the legal services are completed. Contrary to Disciplinary Counsel's argument in this case, *Mance* did not hold that lawyers have an "obligation not to take the client's money unless and until the contracted-for task is complete." ODC Br. at 8. Indeed, in *Mance*, the client terminated the representation before reaching the first milestone. Under Disciplinary Counsel's theory put forth in this case, Mance would owe a refund of the entire amount paid. However, *Mance* recognized that the respondent was only required to return "the portion that he had not earned."[9] *Mance* does not

[9] At oral argument before the Board, Disciplinary Counsel argued that a lawyer like Mance who is prematurely terminated is entitled to quantum meruit recovery because he had done some work before the termination. '"Quantum meruit may refer to either an implied contractual or a quasi-contractual duty requiring compensation for services rendered."' *New Econ. Cap., LLC v. New Markets Cap. Grp.*, 881 A.2d 1087, 1095 (D.C. 2005) (citation omitted).

> To recover on a quantum meruit claim (1) valuable services must be rendered [by the plaintiff]; (2) for the person sought to be charged; (3) which services were accepted by the person sought to be charged, and enjoyed by him or her; and (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff, in performing such services, expected to be paid.

Fred Ezra Co. v. Pedas, 682 A.2d 173, 176 (D.C. 1996) (alteration in original) (citation omitted). We see nothing in *Mance* to support the argument that a lawyer

say that a flat fee is earned only when the representation is complete. Rather than Disciplinary Counsel's "all or nothing" approach, *Mance* speaks in somewhat flexible terms regarding when an attorney earns fees:

- '"an attorney earns fees only by conferring a benefit on or performing a legal service for the client,"' *Mance*, 980 A.2d at 1202 (citation omitted);
- a flat fee a fee is earned '"only to the *degree* that the attorney actually performs the agreed-upon services,"' *id.* (emphasis added) (citation omitted);
- "a flat fee is not owned by an attorney until it has been earned through the performance of services to the client", *id.* at 1203;
- a lawyer must safekeep "the client's funds until it can reasonably be said that they have been earned *in light of the scope of the representation*," *id.* at 1204-05 (emphasis added);
- a lawyer must hold the "flat fee in escrow until it is earned by the lawyer's provision of legal services," *id.* at 1207.

It appears that Disciplinary Counsel relies on the following language in *Mance* to support its argument that flat fees remain the client's property until the representation is complete:

> Although the default rule is that an attorney must hold flat fees in a client trust or escrow account until earned, we note that an attorney may obtain informed consent from the client to deposit all of the money in

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is entitled to compensation for providing partial legal services to a client only following termination. Of course, any compensation received must be "reasonable." *See* Rule 1.5(a).

> the lawyer's operating account or *to deposit some of the money in the lawyer's operating account as it is earned*, per their agreement.

Mance, 980 A.2d at 1206 (emphasis added). Viewed in isolation, the italicized language supports Disciplinary Counsel's argument. But that language should be understood within the context of the entire opinion, where the Court failed to articulate the bright-line rule that Disciplinary Counsel now advocates, and instead focused on whether the attorney had performed services for or conferred a benefit on the client. We reject Disciplinary Counsel's argument that in this flat fee case, Respondent was not permitted to withdraw any fees until the entire representation or any identifiable task was complete. Instead, the issue is whether Disciplinary Counsel proved by clear and convincing evidence that Respondent withdrew more of the flat fee than he had reasonably earned in light of the scope of the representation. As discussed below, we agree with the Hearing Committee that Disciplinary Counsel failed to carry its burden.

Alternatively, given Ethics Opinion 355's guidance that lawyers are not prohibited from taking flat fees as earned even without the client's consent, in the event that the Court agrees with Disciplinary Counsel's understanding of *Mance*, we recommend that that understanding of *Mance* apply prospectively. *See, e.g.*, *Mance*, 980 A.2d at 1205-06 (applying the ruling prospectively where, *inter alia*, Rule 1.15(e)'s application to flat fees was not clear on its face).

ii. Disciplinary Counsel Failed to Prove that Respondent Withdrew Unearned Fees from his Trust Account.

Disciplinary Counsel contends that it was inappropriate for the Hearing Committee to use an "estimate" based on Respondent's testimony about the number of hours he had spent working on the case and his typical hourly rate in order to determine how much he had earned by April 24, 2014, when he withdrew $1,900 from the trust account. *See* ODC Br. at 7; FF 14-15 (concluding that Respondent had earned at least $1,500).

It is true that the parties' fee agreement did not provide for an hourly rate and that Respondent never discussed an hourly rate with Ms. Dijamco. But we need not determine the best method for calculating how much of the fee Respondent had earned by any given date, in the absence of detailed time records.[10] Rather, the question is whether Disciplinary Counsel established by clear and convincing evidence that Respondent had *not* earned the portions of the initial $2,500 payment that he was no longer holding in trust—at least $489.02 by April 24, 2014, and at least $1,761.02 by May 21, 2014. *See* FF 16, 23. Disciplinary Counsel does not offer an alternative means of calculating Respondent's earned fee; rather, it contends that the hourly fee calculation "is directly contrary to the command of *Mance* that an attorney must treat advances on flat-fee services as the client's money until they are earned by actually performing the agreed upon services." ODC Br. at 7. As

[10] The Committee did not rely on contemporaneous time records because Respondent did not provide them and Disciplinary Counsel did not request them. *See* FF 39.

explained above, *Mance* does not prohibit attorneys from withdrawing portions of flat fees as they are earned.

Because the Hearing Committee found Respondent's testimony about the number of hours worked and the value of his work to be credible, and because that finding is supported by substantial evidence, we see no basis on which to conclude that Disciplinary Counsel carried its burden of proof, regardless of the method of calculation.[11]

iii. Disciplinary Counsel Failed to Prove that Respondent Withdrew Unearned Fees from his Personal Bank Account.

The Hearing Committee found that, by the time Respondent received the second $2,500 payment, on January 21, 2015, the entire $5,000 fee had been earned because he completed $5,000 worth of tasks that were itemized in the second fee agreement. FF 30-31, 34-36. For the reasons stated by the Hearing Committee, the Board finds that Disciplinary Counsel failed to prove that Respondent misappropriated the second $2,500 installment payment. *See id.*; HC Rpt. at 29.

[11] Disciplinary Counsel argued that Respondent "admitted that he withdrew the funds without having completed the services, testifying 'I take as I go.' FF 33." ODC Br. at 4. However, in Finding of Fact 33, the Hearing Committee noted that Respondent testified that '"earned money, I take as I go.' Tr. 72," which the Hearing Committee understood "to mean that client payments made for work which had been completed by the time the payment was made were already earned and thus deposited in Respondent's personal account." FF 33.

B. Other Alleged Rule Violations

Neither party has taken exception to the Hearing Committee's conclusions that Disciplinary Counsel has failed to prove the following alleged Rule violations by clear and convincing evidence.

1. Rules 1.1(a) and (b) (competence, skill, and care)

Rule 1.1(a) requires a lawyer to "provide competent representation to a client." "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 1.1(a); *see also In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (appended Board Report) (explaining that a lawyer who has the requisite skill and knowledge, but who does not apply it for a particular client, violates obligations under Rule 1.1(a)). Rule 1.1(b) mandates that "[a] lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." The comments to Rule 1.1 state that competent representation includes "adequate preparation, and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Rule 1.1, cmt. [5]. Rule 1.1 "applies only to failures that constitute a 'serious deficiency' in the attorney's representation of a client." *In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014) (quoting *In re Evans*, 902 A.2d 56, 69 (D.C. 2006)).

The Hearing Committee found that Disciplinary Counsel's expert witness did not have sufficient knowledge of the underlying facts in this case and did not explain why failure to follow the legal strategy she advanced would reflect a lack of

competence. HC Rpt. at 23-24. Rather, in light of the work Respondent actually performed and his desire to try different legal strategies, after strategies employed by his predecessor counsel had failed, the Hearing Committee found that Disciplinary Counsel failed to prove a lack of competence, skill, and care. *See id.* The Board adopts the Hearing Committee's reasoning and conclusion.

2. Rule 1.5(a) (unreasonable fee)

Rule 1.5(a) provides that:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> > (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> >
> > (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> >
> > (3) The fee customarily charged in the locality for similar legal services;
> >
> > (4) The amount involved and the results obtained;
> >
> > (5) The limitations imposed by the client or by the circumstances;
> >
> > (6) The nature and length of the professional relationship with the client;
> >
> > (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
> >
> > (8) Whether the fee is fixed or contingent.

The Court has held that "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) (internal quotation marks and citation omitted). "The prototypical circumstance of charging an unreasonable fee is undoubtedly one in which an attorney did the work that he or she claimed to have done, but charged the client too much for doing it." *Id.* However, "[i]t cannot be reasonable to demand payment for work that an attorney has not in fact done." *Id.*

Disciplinary Counsel's position before the Hearing Committee was that Respondent's fee was inherently unreasonable because he did not complete the representation. *See* HC Rpt. at 25. In light of the Hearing Committee's finding that Respondent earned the full $5,000 fee paid by Ms. Dijamco, FF 34, which is supported by substantial evidence, the Board concludes that Disciplinary Counsel failed to prove that Respondent charged an unreasonable fee. *See* HC Rpt. at 25-26.

3. Rules 1.15(b) and (e) (failure to deposit entrusted funds in approved depository without client consent)

Rule 1.15(e) provides that "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client . . . until earned or incurred unless the client gives informed consent to a different arrangement." Rule 1.15(b) provides that such funds "shall be deposited with an 'approved depository' as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. . . ." The Court has held that "when an attorney receives payment of a flat fee at the outset of a representation, the payment is an 'advance[ ] of unearned fees'" and must be held as property of the client pursuant to Rule 1.15(e) until the fees are earned. *Mance*, 980 A.2d at 1202.

In light of the Hearing Committee's finding that Respondent earned the full $5,000 before depositing Ms. Dijamco's second $2,500 installment, FF 34, which is supported by substantial evidence, the Board concludes that Disciplinary Counsel failed to prove that Respondent's deposit of the second installment into a personal bank account violated the requirement to keep unearned fees in a trust account. *See* HC Rpt. at 30.

4. Rule 8.1(a) (knowingly false statement to disciplinary authority)

Rule 8.1(a) provides that "a lawyer . . . in connection with a disciplinary matter, shall not . . . [k]nowingly make a false statement of fact." The Terminology section of the Rules defines "knowingly" as "actual knowledge of the fact in question" which "may be inferred from circumstances." Rule 1.0(f). The Rule applies to both misrepresentations and omissions, and "[l]ack of materiality does not excuse a knowingly false statement of fact." Rule 8.1, cmt. [1].

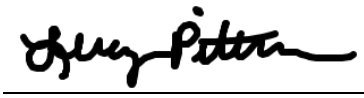
The two statements in question are: (1) in November 2016, Respondent told Disciplinary Counsel that he did not charge Ms. Dijamco for drafting the disciplinary complaint against her former attorneys, even though the July 2014 addendum includes a charge for that task, and (2) in January 2020, in response to a draft of the Specification of Charges, Respondent told Disciplinary Counsel that he had earned the initial $2,500 fee before depositing Ms. Dijamco's check but was forced to deposit it in his trust account because she had addressed the check to Respondent's office. The Hearing Committee found that the first statement was not knowingly false because drafting the complaint was originally part of the contingency fee

agreement, which was later voided, and that the price quoted in the addendum was for work already completed. *See* FF 28; HC Rpt. at 31-32. While the second statement conflicted with the Hearing Committee's finding that Respondent had not earned any part of the fee before April 19, 2014, when he received the first $2,500 payment, Respondent believed it was "technically" true, and Disciplinary Counsel did not develop the record on that point. *See* HC Rpt. at 32-33. The Board adopts the Hearing Committee's reasoning and conclusion.

IV. CONCLUSION

Because Disciplinary Counsel has failed to prove any of the charged Rule violations by clear and convincing evidence, the charges are hereby dismissed. *See* D.C. Bar R. XI, § 9(c).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Lucy E. Pittman
Chair

This Order was prepared by Ms. Sargeant. All members of the Board concur in this Order.