THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
December 13, 2022

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

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

This matter arises from Respondent's representation of an undocumented immigrant, J.A., in his efforts to avoid removal from the United States. An Ad Hoc Hearing Committee found that Respondent engaged in misappropriation, neglect, failure to keep complete records of entrusted funds, failure to give sufficient notice of withdrawal from the representation, and failure to refund unearned fees, in violation of Rules 1.3(a), 1.15(a), (b), and (e), and 1.16(d). A majority of the Hearing Committee concluded that the misappropriation was negligent and recommended that Respondent receive an eight-month suspension with restitution and CLE requirements. The Hearing Committee Chair filed a dissent, asserting that Respondent's misappropriation was reckless.

Respondent initially filed an exception to the Hearing Committee Report but withdrew it before briefing began. Respondent agrees that he engaged in negligent

* 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.

misappropriation. Disciplinary Counsel excepts only to the Hearing Committee majority's finding that the misappropriation was negligent.

The Board concludes that the Hearing Committee's findings of fact are supported by substantial evidence in the record and that there is clear and convincing evidence that Respondent's conduct violated Rules 1.3(a), 1.15(a), (b), and (e), and 1.16(d). We disagree with the Hearing Committee majority's conclusion that Respondent's misappropriation was only negligent and instead adopt the Hearing Committee Chair and Disciplinary Counsel's conclusion that the misappropriation was reckless. We therefore recommend, as we must, that Respondent be disbarred.

II. FINDINGS OF FACT

We agree with the Hearing Committee's findings of fact ("FF") and briefly restate pertinent points here with citations to the Hearing Committee's Report.

J.A., an undocumented immigrant, faced removal from the United States after he was arrested on a charge of stealing a bicycle. Years earlier, he had witnessed a robbery at his workplace. FF 6-7. J.A.'s wife, T.S., hired Respondent in 2016 to file a U Visa application – which is designed to protect non-citizen crime victims from deportation for four years while they cooperate with law enforcement – and, separately, to represent J.A. in removal proceedings. FF 7-8, 13, 20-21. Respondent primarily communicated with his client through T.S. FF 33-35.

The Fee Agreements

The most serious charge in this case (misappropriation) hinges on the nature of the two fee agreements T.S. signed on J.A.'s behalf. The agreements were nearly

identical, except in describing the scope of the representation and the amount of fees charged. FF 42. Respondent charged flat fees for both representations, and the fee agreements stated that the entire fee would be earned upon receipt. FF 43. This arrangement is permissible as long as the client provides informed consent to waive Rule 1.15(a)'s requirement to hold unearned fees in trust. *See In re Mance*, 980 A.2d 1196, 1202, 1206-07 (D.C. 2009); *see also* Rule 1.0(e). Here, the agreements included statements providing that the client "WAIVE[S] the requirement that the flat fee, given to [Respondent] for work to be performed on my behalf, is to be held in trust. *(Rule 1.15(d) of the D.C. Rules of Professional Conduct).*" FF 43; DCX 9 at 254, 294 (emphasis and italics in original).[1] The agreements did not discuss any risks created by not holding client funds in trust, disclose any alternative fee arrangements, or otherwise include any of the five specific pieces of information that *Mance* requires for obtaining informed consent as to flat fees. *See* DCX 9 at 254-59, 294-300. Respondent exclusively charged flat fees in all client matters, and neither Respondent nor T.S. considered an alternative fee arrangement. FF 50-51; *see also* Tr. 383 (Respondent) ("If [T.S.] had said that she would rather [her flat fee payments to Respondent] be put in a trust, *then* I would've requested that it would've been an hourly billing retainer." (emphasis added)).

Respondent and T.S. had differing recollections of their discussions regarding the fee agreement. Respondent testified that he orally explained each page of the

[1] Rule 1.15(d) was renumbered as Rule 1.15(e) effective August 1, 2010. The text of the Rule was unaffected. *See* Order, No. M-235-09 (D.C. Mar. 22, 2010).

retainer agreement, including the flat fee provision, to T.S. and other prospective clients. FF 44-45. Importantly, Respondent was unaware of the requirement to specifically notify the client about any risks or consequences of not holding client funds in trust[2], and he did not believe there were any material risks that required further explanation. FF 55-56; *see also* Tr. 46 (Q: "Do you have to notify the client about any risks or consequences of not putting their money in a trust account?" A: "You know, I'm not entirely sure if I understand the rule to say that, exactly."); Tr. 379 ("I would describe [informed consent] as notifying the individual of what it is they are consenting to, giving them the opportunity to ask questions regarding whether there's any issues with that or if they have any concerns, and then at that point it is up to them to determine whether they would agree with whatever they are consenting to."). Respondent also testified that, in his view, there were no material risks at issue because he would have refunded any unearned fees:

> THE CHAIR: Particularly in this case regarding [T.S.], when you discussed this with her, did you explain the risks and alternatives, reasonable alternatives to her waiving the need to go into a trust fund?
>
> THE WITNESS: Well, I explained to her what the difference is between me putting it into a trust versus me having it earned upon receipt, and I also explained that at the conclusion or if there's any termination of the contract, that they would have a right to any unearned fees and the right to dispute any work done on the case. So, I do believe they are informed of any risks; although, I don't necessary[sic] think

[2] Respondent also testified that he was not familiar with the *Mance* decision. FF 56. Nevertheless, his actions were consistent with *Mance*'s holding that "money paid by a client as a flat fee for legal services remains the client's property, and counsel may not treat any portion of the money otherwise until it is earned, *unless the client has agreed otherwise*." *See Mance*, 980 A.2d at 1199 (emphasis added).

> that there is risk seeing that they are able to get any unearned fees back or dispute any fees or time spent on the case.
>
> THE CHAIR: So, in your view there were no material risks?
>
> THE WITNESS: No, sir. I don't believe that there was any risk to the extent that -- at least in this particular case in regards, especially, because there was never a request for any refund of any fees. Even if there had been a request, we would've come to a resolution, I would hope, and if fees were due or we felt fees were due for any work that they disputed they would've received a refund of those fees.

Tr. 379-380; *see* FF 56.

T.S. testified that she and Respondent "skimmed" through the agreement before she signed it, and that they did not discuss whether her fees would be placed in a trust account or the risks and consequences of not holding them in trust until earned. FF 46 (quoting Tr. 426-28). After weighing the two witnesses' credibility, the Hearing Committee concluded that Respondent failed to obtain informed consent from T.S. to treat the flat fees as earned upon receipt. Specifically, because he did not know the "material risks" to T.S. of not having her advanced fees deposited in a trust account, the Hearing Committee concluded that he could not have obtained, and did not obtain, T.S.'s informed consent, as required. FF 59 (quoting Rule 1.0(e)).

Handling of Client Funds

On June 13, 2016, T.S. paid a $2,000 flat fee in the U Visa matter through two money orders for $1,000 each. FF 47; DCX 19 at 586; Tr. 53-55. On June 14, 2016, Respondent deposited the $2,000 flat fee from the U Visa matter into his business operating bank account and simultaneously withdrew $500, leaving a bank account

balance of $1,706.36. FF 47-48. Respondent did not begin working on the case until June 15, 2016, when he earned $250 for one hour of work. FF 49; DCX 9 at 472-73 (invoice created after withdrawal from the representation). Because Respondent had failed to obtain informed consent from T.S. to treat her advance fees as his own property upon receipt, and because he had not earned at least $293.64 ($2,000 minus $1,706.36) before making the $500 withdrawal, that withdrawal formed the basis for the Hearing Committee's unanimous conclusion that Respondent engaged in misappropriation. *See* HC Rpt. at 48.

On August 15, 2016, T.S. paid a $3,800 flat fee in the removal matter through a cashier's check. FF 53; DCX 22 at 717. On August 16, 2016, Respondent cashed the check and placed the funds, as cash, in his safe. FF 53. Pursuant to his retainer agreement, Respondent believed that the funds were his property, and he was not holding them in trust. *Id.* There is no evidence as to whether Respondent spent those funds. *Id.*

The U Visa Application

Soon after being retained, Respondent visited J.A. and prepared the three required forms for the U Visa application: the Form I-918 application, the I-192 waiver request, and the I-192 fee waiver request. FF 14-15. The U Visa application was based on J.A. having witnessed a robbery at his workplace several years earlier. FF 4, 12. Respondent mailed the application to U.S. Citizenship and Immigration Services (USCIS), but he did not retain a copy for his records and only received confirmation of receipt for one of the three forms (the I-192 waiver request). FF 15.

Respondent incorrectly assumed that the confirmation of receipt for one document applied to the entire U Visa application. FF 16. Respondent took no affirmative steps to verify his assumption, and USCIS ultimately informed J.A.'s successor counsel that it had no record of a Form I-918 application ever being filed. FF 17. Nevertheless, based on testimony that USCIS does not accept individual forms without the other required documents, the Hearing Committee concluded that Disciplinary Counsel failed to prove that Respondent never filed the completed U Visa application. FF 18.

The Removal Proceedings

Around the time Respondent was preparing the U Visa application, J.A. was transferred from county jail to U.S. Immigration and Customs Enforcement (ICE) custody due to a prior removal order. FF 19. In an effort to avoid J.A.'s immediate deportation, Respondent requested that ICE interview him to determine whether he had a reasonable fear of persecution and torture upon being returned to Mexico. *Id.*; *see also* FF 20. J.A.'s case was referred to an immigration judge, and T.S. hired Respondent to represent him in those proceedings. FF 20-21.

While the removal proceedings were pending, Respondent requested a bond hearing. FF 25. After the hearing date was set, J.A. and T.S. asked Respondent to seek to reschedule the hearing because they did not like the assigned judge. FF 26. Respondent then sought a continuance based on a purported scheduling conflict. FF 27. The court granted Respondent's request and instructed him to call the court

to reschedule the hearing. *Id.* Respondent did not do so and never provided instructions to enable J.A. or T.S. to reschedule the hearing themselves. FF 28.

Based in part on his objection to perceived judge shopping by his client, Respondent decided to withdraw from the representation. FF 36-37. Respondent's motion to withdraw was granted on January 11, 2017. FF 38.

J.A. represented himself at the bond hearing on February 9, 2017. FF 40. He was released on bond, but was informed by USCIS officials that they had no record of a U Visa application having been filed. *Id.* As a result, J.A. paid $10,000 to retain counsel to file a new U Visa application. FF 41.

The Fee Dispute

After Respondent withdrew from the representation, T.S. requested a detailed bill to account for the flat fees she had paid. FF 37, 62. In response, Respondent created a statement detailing his work in both the U Visa and removal matters. FF 62. Respondent had not kept contemporaneous time records, so Respondent estimated the time spent on each task based on his notes and experience. FF 63. Based on those time estimates, Respondent believed he had earned the full amount of the flat fees and did not owe a refund. FF 64, 66. T.S. did not request a refund at first, but later filed for fee arbitration. FF 64, 67. The Hearing Committee concluded that Respondent had earned only $5,050 of the $5,800 he collected because he mishandled aspects of both representations, and, thus, some of the work reflected in his itemized bill provided no benefit to J.A. FF 65; HC Rpt. at 59-60. Specifically:

- The U Visa Matter: Respondent collected a $2,000 flat fee for this representation. FF 47. In the itemized billing statement he created at T.S.'s request (RX 39), Respondent claimed to have spent 12.3 hours on the U Visa matter, thus earning $3,075 at his rate of $250/hour. FF 64; RX 39 at 373. The Hearing Committee found that 5.7 of those hours (worth $1,425) – relating to the application's preparation, filing, and follow-up, as well the preparation for Respondent's withdrawal – conferred no benefit to J.A. *See* HC Rpt. at 59-60 & n.12 (listing specific time entries). Thus, Respondent earned only $1,650 of the $2,000 charged.
- The Removal Matter: Respondent collected a $3,800 flat fee for this representation. FF 52. In the itemized billing statement he created at T.S.'s request (RX 40), Respondent claimed to have spent 15.8 hours on the removal matter, thus earning $3,950 at his rate of $250/hour. FF 64; RX 40. The Hearing Committee found that 2.2 of those hours (worth $550) – consisting of work performed after Respondent completed the bond hearing package, including 1.5 hours for preparing his motion to withdraw – conferred no benefit to J.A. *See* HC Rpt. at 60 & n.13 (listing specific time entries). Thus, Respondent earned only $3,400 of the $3,800 charged.

III. CONCLUSIONS OF LAW

Based on the above-described facts, the Hearing Committee concluded that Respondent violated Rules 1.3(a) (diligence and zeal), 1.15(a) and (e) (misappropriation and record-keeping), 1.15(b) (failure to place client funds in trust

account), and 1.16(d) (failure to return client property upon termination of representation). We begin with the most serious of the violations.

A. Misappropriation (Rules 1.15(a) and (e))

1. Respondent misappropriated entrusted funds.

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

Misappropriation has occurred when (1) client funds were entrusted to the attorney; (2) the attorney used those funds for the attorney's own purposes; and (3) such use was unauthorized. *In re Harris-Lindsey*, 242 A.3d 613, 620 (D.C. 2020) (citing *In re Travers*, 764 A.2d 242, 250 (D.C. 2000)). Funds are "entrusted" when the lawyer is "imbued with authority to prevent their unauthorized use." *Id.* at 624-26 (applying holding prospectively); *see Anderson*, 778 A.2d at 335; *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983).

Misappropriation is essentially a *per se* offense and does not require proof of improper intent. *See Anderson*, 778 A.2d at 335. For example, an attorney engages in "unauthorized use" when "the client did not consent to the attorney's use of the funds," *Harris-Lindsey*, 242 A.3d at 624-26, or where "the balance in [the

attorney's] trust account falls below the amount due [to] the client [or third party]," *In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013) (first alteration in original) (internal quotation marks and citations omitted). Thus, "when the balance in [a] [r]espondent's . . . account dip[s] below the amount owed" to the respondent's client or clients, misappropriation has occurred. *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Pels*, 653 A.2d 388, 394 (D.C. 1995)).

Before the Hearing Committee, Respondent argued that he did not violate Rule 1.15 because he obtained T.S.'s consent to treat her fee payments as earned upon receipt, pointing out that (1) T.S. signed his retainer agreement containing a trust account waiver and (2) Respondent explained to T.S. that she would be paying a flat fee, which would not be placed into a trust account and would be considered earned upon receipt. FF 43-45. The Hearing Committee found – and Respondent now concedes, *see* R. Br. at 10-13 – that he failed to obtain informed consent as defined by Rule 1.0(e), the *Mance* decision, and D.C. Bar Legal Ethics Opinion 355. *See* HC Rpt. at 42-43. Specifically, the Committee cited Respondent's failure to disclose the benefits of holding client funds in a trust account, including protection from creditors and the risk of funds disappearing without a proper accounting. *See* HC Rpt. at 44. As a result, Respondent concedes that he engaged in misappropriation in the U Visa matter when he deposited the $2,000 fee in his business operating bank account and immediately withdrew $500, leaving a balance

of $1,706.36, before he had performed any work in the case.[3] We agree with the Hearing Committee's conclusion that Respondent engaged in misappropriation in the U Visa matter for the reasons set forth on pages 46-48 of the Report. Therefore, the only remaining issue – and the only issue in dispute – is Respondent's level of intent, *i.e.*, whether the misappropriation was negligent or reckless.

2. Respondent's Misappropriation was Reckless.

i. Legal standard

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

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

In re Abbey, 169 A.3d 865, 872 (D.C. 2017); *see also Anderson*, 778 A.2d at 339 (providing that negligent misappropriation occurs where "the unauthorized use was inadvertent or the result of simple negligence"). The Court has recognized that a

[3] Disciplinary Counsel did not take exception to the Hearing Committee's finding that it failed to prove misappropriation in the removal matter. *See* ODC Br. at 3.

"special form of misappropriation [may exist] based on a lawyer's good faith, negligent mistake of established law" that "careful analysis of a known legal doctrine would have revealed." *In re Haar* (*Haar II*), 698 A.2d 412, 421-22, 424 (D.C. 1997) (finding negligent misappropriation where an attorney mistakenly withdrew from a trust account $4,000 to which he believed he was entitled, before the client manifested unequivocal agreement).

By contrast, reckless misappropriation

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

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

Although the Board and the Court must accept the Hearing Committee's findings of fact if they are supported by substantial evidence, a respondent's level of

intent for a misappropriation violation is a "determination of ultimate fact" that is reviewed *de novo*. *See In re Gray*, 224 A.3d 1222, 1228 (D.C. 2020) (per curiam); *see also In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam) ("The Board . . . owe[s] no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus are reviewed *de novo*." (quoting *In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam))); *see also In re Krame*, No. 19-BG-674, slip op. at 9-17 (D.C. Nov. 3, 2022) (explaining that the Board and the Court must defer to "subsidiary fact[s]," such as credibility findings, when they are supported by substantial evidence, even if they bear on an ultimate fact that is reviewed *de novo*).

An objective standard is applied in determining whether a respondent's misappropriation was negligent versus reckless. *See Gray*, 224 A.3d at 1232. In *Gray*, the Court found that even though Respondent's substandard accounting practices "appear to have worked reasonably well for him and for his clients for many years," he then "essentially stopped monitoring in any meaningful way the status of his trust account" and "consciously ignored the hazard at his peril." *Id.* at 1229. The Court acknowledged that the respondent had a good-faith but erroneous belief that the funds he had withdrawn were his own property. However, it concluded that his belief was not objectively reasonable because his "utter failure to monitor the money going into and out of his trust account over a period of eight years . . . reflected an unacceptable disregard for the safety of entrusted funds and a

conscious indifference to the consequences of ignoring his fiduciary obligation to protect his client's money." *Id.* at 1230.

By contrast, in *In re Haar* (*Haar III*), 270 A.3d 286 (D.C. 2022), the respondent's good-faith but erroneous belief that entrusted funds could be treated as his own led the Court to find only negligent misappropriation. In *Haar III*, the respondent accepted a large flat fee, which he placed in his operating account, and committed misappropriation when he withdrew unearned fees before he had earned them. *Haar III*, 270 A.3d at 292. The respondent first learned of the *Mance* decision while the case at issue was still pending, and although he made efforts to bring his practice in compliance with *Mance* going forward, he failed to reexamine his pending cases, which would have alerted him to the misappropriation at issue. *Id.* at 293. Due to the nature of the respondent's practice, in which cases were not normally pending for very long, the Court concluded that "even a more diligent Mr. Haar may have had little reason to consider *Mance*'s application to unearned flat fees." *Id.* at 297. The Court also noted the *Mance* Court's observation that Rule 1.15(e)'s application to flat fees "is not clear on its face" and that the Rule has not been updated to reflect *Mance*. *Id.* at 298 (quoting *Mance*, 980 A.2d at 1206) (internal quotations omitted).

More recently, in *In re Ponds*, 279 A.3d 357 (D.C. 2022) (per curiam), the Court found that the respondent had committed reckless misappropriation. As here, the finding of misappropriation in *Ponds* rested on the respondent's failure to provide his client with information sufficient to obtain his informed consent pursuant

to *Mance*. *See id.* at 360. Focusing on the issue of whether the failure to obtain informed consent was negligent or reckless, the Court relied on the Hearing Committee's findings that the fee agreement at issue in *Ponds* (1) failed to explain that the respondent would refund any unearned portion of the flat fee; (2) did not advise that the respondent would otherwise have been obliged to place the flat fee in an escrow account; and (3) did not explain what an escrow account is or what risks are involved when funds are not kept in an escrow account. *Id.*

The Board in *Ponds* had found that the respondent acted negligently because he had attempted to comply with *Mance*, thus demonstrating a good-faith misunderstanding of its requirements. *Id.* at 360-61. The Court ultimately agreed with the Hearing Committee's finding of reckless misappropriation, however, because even if the respondent subjectively believed his fee agreement was permissible, he demonstrated a "conscious indifference" to the *Mance* requirements that went beyond an "understandable mistake of law." *Id.* at 361-62 (citing *Gray*, 224 A.3d at 1232). The Court explained that the respondent's fee agreement and conduct were "fundamentally incompatible with the requirements of *In re Mance*" and found it "quite implausible" that the respondent made a good-faith effort to comply with *Mance* because neither the written fee agreement nor the client discussion provided the necessary information for the client to have given informed consent. *Id.* Contrasting the case with *Haar III*, in which the Court observed that certain aspects of *Mance* were not clear at the time of the misconduct, the Court

found that the requirements of informed consent articulated therein were "quite clear." *Id.* at 361.

ii. Hearing Committee's Findings

Here, while Respondent's ignorance of the requirements of informed consent is not a defense to the misappropriation charge, the Hearing Committee found that it was relevant to the determination as to whether Respondent acted recklessly or only negligently. The Hearing Committee majority found that Respondent had a "good faith but incorrect grasp of Rule 1.15" in part because he was "simply unaware of *Mance*'s articulation of the disclosures necessary to obtain informed consent to treat advance flat fees as his own property." *See* HC Rpt. at 51-52. The majority also relied on the Court's recent decision in *Haar III*, 270 A.3d 286, in which the respondent's failure to keep abreast of developments in the legal ethics rules did not rise to the level of "conscious indifference" to the consequences of his behavior sufficient to establish recklessness. *See* HC Rpt. at 52-53. The majority therefore concluded that additional proof of conscious indifference was required, beyond Respondent's failure to meet every element of informed consent. *Id.* at 53.

In his Dissent, the Chair concluded that there was no reasonable excuse for Respondent's failure to fulfill the requirements of informed consent. *See* Dissent at 5-6. Specifically, the Chair emphasized that the requirement to obtain informed consent to treat advance fees as earned upon receipt predates *Mance*, and although *Mance* clarified that rule as it applies to flat fees, Respondent knew or should have

known that he needed to explain the material risks and reasonably available alternatives to his proposed fee arrangement. *See* Dissent at 5-6; Rule 1.0(e).

iii. Disciplinary Counsel's Exceptions and Respondent's Response

Disciplinary Counsel contends that Respondent's ignorance of the law does not preclude a finding of recklessness. In particular, Disciplinary Counsel argues that Respondent became a member of the Bar after the *Mance* decision had been issued and knew that informed consent was required in order to treat advance fees as earned upon receipt. Therefore, unlike the respondent in *Haar III*, Respondent could not claim uncertainty in the law or reliance on a prior practice that complied with the Rules. ODC Br. at 11-14. Disciplinary Counsel further contends that Respondent's misappropriation was reckless because he operated his law practice without apprising himself of the case law and Rules of Professional Conduct governing handling of entrusted funds, as demonstrated by his indiscriminate commingling of advance fees with his own funds and failure to track them. *Id.* at 17.

Respondent cites the Hearing Committee majority's findings that his failure to fully understand the law – specifically, *Mance*'s articulation of the disclosures necessary to obtain informed consent – was negligent. R. Br. at 10-11. While acknowledging that intent is an issue of ultimate fact reviewed *de novo*, Respondent contends that the findings of fact underlying the negligent misappropriation finding must be given deference because they were based on the Hearing Committee majority's evaluation of witness testimony and the exhibits. *Id.* at 10-13.

Because the Court's decision in *Ponds* was issued on August 5, 2022, after the Hearing Committee Report in this matter, the Board ordered the parties to address the impact, if any, of *Ponds* on this case. Disciplinary Counsel contends that *Ponds* supports its position that Respondent's misappropriation was reckless because, like the respondent in *Ponds*, Respondent never discussed, *inter alia*, the risks and reasonably available alternatives to treating the legal fees as earned upon receipt. ODC Supp. Br. at 4-5. Respondent contends that the Hearing Committee's findings that he credibly testified he was unaware of *Mance* and believed he had met the requirements for informed consent distinguish this case from *Ponds*. R. Supp. Br. at 2-3. Respondent further emphasizes the Hearing Committee's findings that some of T.S.'s testimony was not credible. *See id.* at 4.

iv. Analysis

As in *Ponds*, "[t]he proper resolution of this case turns on whether [Respondent]'s conceded misappropriation was merely negligent – i.e., reflected a good-faith but inadequate effort to comply with the requirements of *In re Mance* – or instead was reckless, i.e., reflected, at a minimum, 'conscious indifference' to those requirements." 279 A.3d at 361 (citation omitted). The Board concludes that Respondent's misappropriation was reckless, rather than negligent. The Hearing Committee majority's finding that Respondent held a "good faith but incorrect grasp" of Rule 1.15 is not supported by substantial evidence in the record given that Respondent knew he needed informed consent, *see* FF 61; Tr. 46-47; that *Mance*, issued 7 years before the engagement at issue, enumerates the information necessary

to obtain informed consent to flat fee arrangements, and that the definition of informed consent – including the requirement to explain material risks and reasonably available alternatives – predates *Mance*. *See* Dissent at 5-6. Thus, unlike the nuances of *Mance* that the respondent in *Haar III* failed to grasp, informed consent is a basic concept that has been "quite clear" both before and after that decision. *Cf. Ponds*, 279 A.3d at 361.

The concept of informed consent underlying an attorney's professional obligations to clients is not limited to the context of handling entrusted funds, but is also employed in Rules 1.2(c), 1.5(e), 1.6(e), 1.7(c), 1.8(a), 1.8(e), 1.8(f), 1.8(h), 1.9, 1.12(a), 1.18(d), and 2.3. *See, e.g.*, *In re Dailey*, 230 A.3d 902, 914-15 (D.C. 2020) (per curiam) (finding a violation of Rule 1.7 where the attorney "'never even thought about' the possibility of a conflict of interest" and thus failed to obtain the client's informed consent); *In re Osemene*, Board Docket No. 18-BD-105, at 8-9 (BPR May 31, 2022) (finding Rule 1.6(a) violation notwithstanding the respondent's argument that he had orally informed the client that he intended to file a withdrawal motion containing client secrets and sent the client a copy before it was filed, as there was "no evidence that the Client was informed of material risks and reasonably available alternatives"), *recommendation adopted after no exceptions filed*, 277 A.3d 1271 (D.C. 2022) (per curiam).

As evidenced by his own retainer agreements, Respondent knew he needed his clients to waive the requirement to safeguard advance fees in trust. *See* FF 43; DCX 9 at 254, 294 ("WAIVE[S] the requirement that the flat fee, given to

[Respondent] for work to be performed on my behalf, is to be held in trust. *(Rule 1.15(d) of the D.C. Rules of Professional Conduct).*" (emphasis in original)). Respondent's retainer agreements also expressly referenced Rule 1.15(d) (now Rule 1.15(e)), which provides:

> Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred ***unless the client gives informed consent to a different arrangement***. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(emphasis added).[4] Rule 1.0(e), which is referenced in Comment [9] to Rule 1.15, in turn defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

But Respondent did not even mention, let alone discuss, any risks or reasonably available alternatives to his proposed fee arrangement with T.S. *See* FF 50, 55-56. Indeed, Respondent testified that in his view there were no risks to convey. FF 56. Even if Respondent subjectively believed that he was complying with the requirements of informed consent, his view that there were no risks involved

[4] Unlike the respondent in *Ponds*, who resisted his client's efforts to obtain refunds for unearned fees, *see* 279 A.3d at 361, Respondent's retainer agreements explained his obligation to refund any unearned fees upon the termination of the representation. DCX 9 at 255, 258, 295, 298; Tr. 379-380. Respondent also made clear that, upon discharge or withdrawal, he would "do an accounting of all work performed in the case" based on his hourly rate and refund any unearned fees and unincurred expenses. DCX 9 at 258, 298.

with waiving the requirement to safeguard client funds in a trust account is not objectively reasonable and demonstrates Respondent's conscious indifference to the purpose of Rule 1.15 and the benefits of trust accounts in general. *See Ponds*, 279 A.3d at 361; *Gray*, 224 A.3d at 1230.

It would be nonsensical to require informed consent for something involving no risks or alternatives. *See generally Krame*, No. 19-BG-674, slip op. at 41 ("[T]he Hearing Committee[s] and the Board are 'not precluded from using their common sense in evaluating the record.'" (quoting *In re Godette*, 919 A.2d 1157, 1165-66 (D.C. 2007))). Thus, a reasonable lawyer who was unaware of the related risks and reasonably available alternatives would obtain that information before proposing a waiver to his clients. However, and unlike even the respondent in *Ponds*, Respondent did not appear to make any effort to learn, understand, or comply with *Mance* and the requirements to obtain informed consent as it applied to Rule 1.15. It is not reasonable for an attorney to operate a law practice and accept attorney fees without understanding, for example, that funds placed in a personal or business bank account are subject to the lawyer's creditors, whereas funds placed in a trust account are not. *See generally, e.g.*, DC Bar Legal Ethics Op. 355 (Mar. 2010), https://www.dcbar.org/getmedia/44d1c67d-166e-4698-b594-8bf4d0e48c15/DC_RPC_02_2021_Opinions_Only (explaining that the benefits of holding advance fees in trust include "that trust funds are generally protected from a lawyer's creditors and that trust funds cannot be spent until earned and thus are

more readily available for refund to the client")[5]; D.C. Bar Practice Management Advisory Service, *Basic Training & Beyond* (June 8, 2022) Slides at 90, https://www.dcbar.org/getmedia/5dc2c35d-1552-4719-8441-1ea15e7876c0/Basic-Training-Beyond-Slides-060822 (recommending that attorneys disclose, orally and in writing: (1) that advance fees are normally entrusted; (2) that un-entrusted funds are treated as the lawyer's property; (3) an explanation of the work to be performed to earn the fee; (4) that unearned fees must be refunded; and (5) that un-entrusted fees are subject to the lawyer's creditors).[6]

A practice in which Respondent asked all of his clients to waive the trust account requirement despite his lack of a basic understanding of what he was proposing reflects a conscious indifference to the welfare of entrusted funds, rather than an "understandable mistake of law," thus rising to the level of recklessness. *See Ponds*, 279 A.3d at 361. Like the respondent in *Ponds*, Respondent could not have held a good-faith belief that he was in full compliance with the requirements for informed consent when "neither the fee agreement nor [his] discussion with [the

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[5] Following *Ponds*, Legal Ethics Opinion 355 was removed from the list of ethics opinions on the Bar's website (https://www.dcbar.org/for-lawyers/legal-ethics/ethics-opinions-210-present) because it conflicted with the Court's statement that informed consent under Rule 1.15(e) must be obtained in writing. *See* D.C. Bar Legal Ethics Comm. Amicus Brief Supporting Rehearing or Rehearing en Banc at 2-4, *In re Ponds*, No. 19-BG-0555 (D.C. Sept. 12, 2022), pet. denied Nov. 8, 2022. Legal Ethics Opinion 355 is nevertheless relevant to this case because it was available to Respondent during the time of the misconduct and the writing requirement is not at issue in this case.

[6] Following *Ponds*, the Basic Training & Beyond materials were updated to make clear that those disclosures are required, adding that lawyers must also disclose that if the client does not consent, the advance fee must go into an IOLTA. *See* D.C. Bar Practice Management Advisory Service, *Basic Training & Beyond* (Oct. 12, 2022) Slides at 96, https://www.dcbar.org/getmedia/58ee091f-8785-46d5-9060-79fd58d65fe4/Basic-Training-Beyond-Slides-101222.

client] provided information that would have been necessary for [the client] to have given informed consent." *See Ponds*, 279 A.3d at 361-62.

B. Diligence and Zeal (Rule 1.3(a))

Rule 1.3(a) states that an attorney "shall represent a client zealously and diligently within the bounds of the law." "Neglect has been defined as indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc) (*Reback II*)).

The Hearing Committee concluded that Respondent violated Rule 1.3(a) when he failed to ensure that the entire U Visa application had been properly submitted after he did not receive a receipt from USCIS. Neither party contests that conclusion, which we adopt for the reasons set forth at pages 33-35 of the Hearing Committee Report.

C. Record-Keeping (Rule 1.15(a))

Rule 1.15(a) requires lawyers to keep "[c]omplete records of . . . account funds and other property" and preserve them "for a period of five years after termination of the representation." *See In re Edwards*, 990 A.2d 501, 522 (D.C. 2010) (appended Board Report) ("Financial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" (alteration in original) (quoting *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (per

curiam))). The Hearing Committee found that Respondent violated the record-keeping component of Rule 1.15(a) because he kept no contemporaneous records of how he handled entrusted funds or the time he spent working on either matter. This violation flows from the fact that Respondent believed that he had charged flat fees that were earned upon receipt and covered the entirety of both representations. Neither party contests the Hearing Committee's conclusion, which we adopt for the reasons set forth at pages 53-55 of the Hearing Committee Report.

D. Failure to Deposit Client Funds in Trust Account (Rule 1.15(b))

Rule 1.15(b) requires that all trust funds be deposited with an "approved depository" as defined by the Rules Governing the D.C. Bar. *See* D.C. Bar R. XI, § 20. Because Respondent did not believe he held entrusted funds, he kept them in his business operating bank account and in a safe in his office. Neither party contests the Hearing Committee's conclusion that this conduct violated Rule 1.15(b), which we adopt for the reasons set forth in pages 45-46 of the Hearing Committee Report.

E. Failure to Return Client Property (Rule 1.16(d))

Rule 1.16(d) provides that

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

The Hearing Committee found that Respondent violated Rule 1.16(d) in two ways: First, he left J.A. "high and dry" by withdrawing from the representation shortly before his bond hearing, leaving him little time to obtain new counsel. *See*

HC Rpt. at 56-57. Neither party contests the Hearing Committee's conclusion that this conduct violated Rule 1.16(d), and we agree with the Hearing Committee's conclusions for the reasons set forth on pages 55-57 of the Hearing Committee Report.

Second, as discussed in the factual summary above, the Hearing Committee concluded that Respondent had earned $5,050 of the $5,800 charged across the two client matters. FF 65; HC Rpt. at 59-60. Therefore, Respondent's failure to refund $750 formed a second basis for a Rule 1.16(d) violation. HC Rpt. at 59-60; *see, e.g.*, *In re Samad*, 51 A.3d 486, 497 (D.C. 2012) (per curiam) (finding a violation of Rule 1.16(d) where the respondent claimed that he did some work on the case, but did not "suggest that he earned the entire flat fee or that he returned any portion of the fee"). We accept the Hearing Committee's subsidiary finding that Respondent's "post hoc timekeeping, although far from ideal, is at least reasonable in the amount of time spent on tasks performed," because it is supported by substantial evidence in the record. HC Rpt. at 59; *see Krame*, No. 19-BG-674, slip op. at 10-16. The Hearing Committee's conclusion that Respondent owed a refund is a question of ultimate fact, which we review *de novo*.

As the Court stated in *Mance*, "an attorney earns fees only by conferring a benefit on or performing a legal service for the client." 980 A.2d at 1202 (quoting *In re Sather*, 3 P.3d 403, 410 (Colo. 2000) (en banc)). Respondent's time records demonstrate that he performed 12.3 hours of work on the U Visa application and 15.8 hours of work on the removal and bond proceedings, which would be worth

$7,025 at his rate of $250/hour. FF 64; *see also* FF 65 (crediting Respondent's expert witness's testimony that the time billed by Respondent was "reasonable" and likely an underestimation); RX 39; RX 40. Yet, we agree with the Hearing Committee that Respondent's misconduct – specifically, Respondent's failure to ensure that the entire U Visa application had been properly submitted after he did not receive a receipt from USCIS, which violated Rule 1.3(a), "undid" any benefit his work would have otherwise conferred upon J.A. in the U Visa matter. We also find that it was not reasonable for Respondent to charge for his work surrounding his withdrawal from the removal and bond case, which left his client "high and dry" and itself violated Rule 1.16(d), because he was not performing legal services for the benefit of J.A. Therefore, we agree with the Hearing Committee that Respondent's failure to refund $750 violated Rule 1.16(d).

F. Other Charged Rule Violations

The Hearing Committee found that Disciplinary Counsel failed to prove the charged violations of Rules 1.3(b) (intentional prejudice), 1.4(a) and (b) (communication with client), and 8.4(c) (dishonesty, deceit, or misrepresentation). Disciplinary Counsel has taken no exception to those conclusions. Having reviewed the record, we agree with the Hearing Committee's conclusions for the reasons set forth on pages 35-40 and 60-61 of the Hearing Committee Report.

IV. SANCTION

The Court has held that "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted

from nothing more than simple negligence." *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc); *In re Mayers*, 114 A.3d 1274, 1279 (D.C. 2015) (per curiam). Having found reckless misappropriation, only the presence of "extraordinary circumstances" would warrant a sanction less than disbarment, *see In re Hewett*, 11 A.3d 279, 287-290 (D.C. 2011) (highlighting "truly unique" circumstances), and Respondent has not presented evidence of such circumstances in this case. Therefore, we recommend that Respondent be disbarred.

We make this recommendation reluctantly, recognizing that this case does not involve misconduct as egregious as in *Ponds*, that there is no allegation that Respondent intentionally stole money from his client, and that disbarment would remove the legal services of an immigration lawyer from the already underserved community that Respondent serves. But we also recognize that Respondent's clients are vulnerable, unsophisticated consumers of legal services and, therefore, the very clients who most need the information that Respondent failed to provide. *See Gray*, 224 A.2d at 1234 (underscoring that "respondent's clients had a right to expect from their lawyer the same degree of vigilance in protecting their entrusted funds that any client, rich or poor, would expect when they hand their money over to their lawyer for safekeeping"). We are bound by *Addams*, which, given the absence of extraordinary circumstances, compels us to recommend disbarment upon concluding that Respondent's misappropriation was reckless.

Finally, the Hearing Committee majority recommended that Respondent be required to pay $750 in restitution as a condition of reinstatement. We agree, based

on our finding that Respondent earned only $5,050 of the $5,800 charged across the two client matters. *See* Part III.E, *supra*; *see, e.g.*, *In re Rodriguez-Quesada*, 122 A.3d 913, 922-23 (D.C. 2015) (citing D.C. Bar R. XI, § 3(b) and Rule 1.16(d)) (ordering partial restitution as a condition of reinstatement because even though the respondent had made "some efforts" on behalf of his client, he had not earned the full fee).

V. CONCLUSION

For the reasons discussed above, we find that Respondent violated Rules 1.3(a), 1.15(a), (b), and (e), and 1.16(d) and recommend that he be disbarred for reckless misappropriation with reinstatement conditioned on his payment of $750 in restitution to T.S. and J.A., plus interest at the legal rate from January 11, 2017. 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).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Elissa J. Preheim
Elissa J. Preheim, Vice Chair

All members of the Board concur in this Report and Recommendation except Ms. Larkin, who is recused.