THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
June 24, 2019

In the Matter of:	:	
	:	
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)	:	

ORDER AND
REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Introduction

This matter arises out of Respondent's representation of two clients in immigration cases. Its outcome turns on the application of *In re Mance*, 980 A.2d 1196 (D.C. 2009), in which the Court clarified that a flat fee payment for legal services is considered an "advance[] of unearned fees," required by D.C. Rules of Professional Conduct 1.15(a) and (e) to be safeguarded as client property until earned.

In the first matter (involving client Ramiro Moya), Respondent received a flat fee more than a year before the Court issued its opinion in *Mance*. Consistent with common practice at the time (*Mance*, 980 A.2d at 1206), he treated the fee as his own. After *Mance* was decided, Respondent did not identify or transfer any unearned portion of the Moya fee to a trust account.

* 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.

In the second matter (involving client Yalcin Gur), Respondent received a flat fee, three years after the Court decided *Mance*. He again treated it as his own before he earned it, but did not have the client's consent to do so.

Respondent did not contest the material facts in this disciplinary case. Instead, he argued that he did not timely know that *Mance* had clarified the way flat fees were to be treated, and was thus unaware that any of his actions were wrong.

The Hearing Committee found with respect to the Moya matter that Respondent was presumed to know about *Mance* after it was decided, that *Mance* required him to identify and place in trust any unearned fee in the case, and that his failure to do so constituted reckless misappropriation and commingling. In the Gur matter, the Hearing Committee found that Respondent engaged in intentional misappropriation and commingling when he treated the flat fee as his own.

The Hearing Committee recommended disbarment.

We conclude that *Mance* did not require Respondent to audit his file and reallocate the unearned portion of Mr. Moya's flat fee to his trust account. We thus dismiss the charges arising from the Moya matter.

In the Gur matter, we agree that Respondent was obligated to hold his flat fee in trust until earned and that he engaged in misappropriation and commingling when he instead treated it as his own without his client's consent. However, Disciplinary Counsel did not prove by clear and convincing evidence that Respondent's failure to comply with *Mance* resulted from anything other than his good faith mistake of law, and consequently proved only that Respondent acted negligently.

Because Respondent violated Rules 1.15(a) and 1.15(e) in the Gur matter, we recommend that he be suspended from the practice of law for seven months, followed by one year of probation with conditions.

Facts[1]

Respondent was admitted to the Bar in 1983, and practiced business and corporate law as an associate in a Chicago-based firm. He left that firm in 1993 to open his own practice. FF 1, 3.

Respondent handles immigration cases, primarily on a flat fee basis. FF 3. From at least June 2008 until November 2012, he regularly deposited all flat fees into his commercial operating account. FF 4. Before December 2012, Respondent did not know that he needed client consent to spend flat fees before he earned them. FF 15.

The Moya Matter

On June 25, 2008, Respondent agreed to represent Mr. Moya in an immigration matter for an $8,000 flat fee, with $5,000 paid up front and the remainder to be paid at specified points as the case progressed. FF 12. Respondent deposited Mr. Moya's two payments totaling $5,500 into his operating account at a time when it held his personal funds, but he did not get Mr. Moya's permission to do so. FF 13-14. Respondent performed substantial work of good quality for Mr. Moya, but did not earn more than $4,500 of the $5,500 he received. FF 16, 26.

[1] Except as noted in this report, we adopt the Hearing Committee's findings of fact because they are supported by substantial evidence in the record as a whole. We have also made supplemental fact findings, citing directly to the transcripts and exhibits. *See* Board Rule 13.7.

In August 2008, Mr. Moya's employer-sponsor withdrew support of the immigration application. Respondent did no more legal work while Mr. Moya sought a new sponsor, but the representation continued. FF 17. Between August 2008 and November 2012, the balance in Respondent's operating account fell below $1,000 (the unearned amount of Mr. Moya's flat fee). FF 26.

In October 2009, the Court issued its opinion in *Mance*.

In November 2010, Mr. Moya's wife spoke to a member of Respondent's staff, seeking a refund of his fee. Respondent was not informed of the request. FF 18.

In September 2012, Mr. Moya's new lawyer requested transfer of the Moya file. FF 18. Respondent delivered the file on October 12, 2012, and four days later unsuccessfully attempted to contact Mr. Moya to arrange the return of his legal fee. FF 18, 20.

On November 2, 2012, Respondent received notice of the disciplinary complaint filed by Mr. Moya seeking return of the fee. He directed his associate, Alex Miller, to determine how the fee should properly be returned to the client. FF 21-22. Mr. Miller researched the question and told Respondent that the refund should be paid out of Respondent's trust account. Tr. 59-60.[2] On November 13, 2012, Respondent sent Mr. Moya a check for the entire $5,500 fee, drawn on his

[2] Mr. Miller did not testify. The record does not contain the reasoning underlying his advice. There is no evidence that he raised any *Mance*-related issues with Respondent. *See* pp. 12-13, *infra.*

trust account. The check was returned as unclaimed.[3] The fee repayment was effected two weeks later. FF 10, 24-25; RX 3; Tr. 62-63.

The Gur Matter

On November 2, 2012, Respondent agreed to represent Mr. Gur in a complex immigration case for a $20,000 flat fee. Mr. Gur paid Respondent $10,000 on November 9, 2012. Without Mr. Gur's consent, Respondent deposited that amount into his operating account on November 12, at a time when it held his personal funds. FF 35-36; Tr. 84. Respondent and Mr. Miller worked on the Gur matter until August 2013, when Mr. Miller left the firm and took Mr. Gur with him as his client. FF 40. The parties stipulated that Respondent did not earn at least $1,000 of the fee Mr. Gur paid. FF 42. Between November 12, 2012 (when Respondent deposited Mr. Gur's fee) and November 25, 2013 (when he refunded $8,000 to Mr. Gur), the balance in his operating account fell below $1,000. FF 41-42.

Conclusions of Law

The Hearing Committee concluded that Respondent engaged in commingling and reckless misappropriation in the Moya matter, and commingling and intentional misappropriation in the Gur matter, violating Rules 1.15(a) and 1.15(e) in both cases. We review its legal conclusions *de novo*. *In re Bailey*, 883 A.2d 106, 115 (D.C. 2005).

[3] When Respondent mailed the check, the account held only $5,418.04, due to the unauthorized deduction of check printing costs by the bank. Disciplinary Counsel did not allege that this discrepancy constituted misconduct. R. Reply Br. at 12-13.

The charges related to the Moya matter should be dismissed. Respondent did not violate Rule 1.15 when he treated the pre-*Mance* flat fee as his own, and he was not required, post-*Mance*, to transfer unearned portions of that fee into his trust account.

In the Gur matter, Disciplinary Counsel proved commingling and negligent misappropriation.

Background — Rule 1.15(a) as Applied to Flat Fees

D.C. Rule of Professional Conduct 1.15(a) requires a lawyer to safeguard "property of clients or third persons that is in the lawyer's possession in connection with a representation," and to keep it separate from the lawyer's own property. Rule 1.15(e) provides that "[a]dvances 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." Rules 1.15(a) and 1.15(e) thus prohibit the commingling or misappropriation of unearned advance fees.

That has not always been the case, however. Nor has it always been clear that a "flat fee" is considered an "advance of unearned fees" subject to the protection of Rule 1.15(a).

To the contrary, prior to January 2000, Rule 1.15(d) (now Rule 1.15(e)) provided that "[a]dvances of legal fees and costs *become the property of the lawyer upon receipt*." *In re Arneja*, 790 A.2d 552, 552–53 (D.C. 2002) (emphasis added). In Opinion 113, "the Legal Ethics Committee rejected the view that fee advances are

'funds of a client' under DR 9-103, and therefore concluded that such advances do not need to be placed in a separate account." *See* D.C. Bar Legal Ethics Op. 264 (Feb. 1996).

In its Report and Recommendation in *Mance*, the Board discussed the January 2000 amendment that changed the existing protocol:

> The amendment . . . was designed to reverse the conclusions of Opinion 113, which . . . provided that advance fees were the attorney's property. There was no indication or suggestion . . . that the amended rule would now encompass flat fees, which were expressly excluded in Opinion 113. Indeed, nowhere in the [Rules] Committee's Report is there any discussion of flat fees or any expansion of the definition of advance fee beyond what was understood in Opinion 113. Instead, the [Rules] Committee made clear that the impetus behind the rule amendment was not any dissatisfaction with how D.C. had understood fees, rather, it was to make the D.C. rule consistent with similar rules in Maryland and Virginia . . . . Thus, the rule was amended to default to an advance fee becoming the client's property with the ability of the client to consent to another arrangement.

In re Mance, Bar Docket No. 241-04, at 17 (BPR July 28, 2006). Thus, for seven years after Respondent began his solo immigration practice, advances of unearned fees belonged to a lawyer upon receipt. He conducted his practice accordingly.

The 2000 change to then-Rule 1.15(d) reversed the rule that unearned fees belonged to the lawyer, but it did not specifically address "flat fees," which are fees that "embrace[] all work to be done, whether it be relatively simple and of short duration, or complex and protracted." *Mance,* 980 A.2d at 1202. The ambiguity in the appropriate treatment of flat fees persisted until the *Mance* decision in 2009, when the Court "announce[d] for the first time that under Rule 1.15(d) flat fees are an advance of unearned fees that belong to the client until earned by the lawyer

(unless other reasonable arrangements have been made)." *Mance*, 980 A.2d at 1205-06.

The *Mance* Court noted that "[t]he rule's application to flat fees [was] not clear on its face . . .[. T]he understanding among lawyers with respondent's type of practice [was] that flat fees belong to the lawyer upon receipt, and therefore need not be kept separately in a trust account." *Id.* at 1206. Acknowledging the common understanding of the Bar that flat fees were not advanced fees, the Court expressed confidence:

> that the D.C. Bar Board of Governors, the Bar's relevant sections, and the Board and Bar Counsel will take steps to inform the Bar and provide attorneys with helpful guidance on how to conform their practice to the rule we announce in this opinion. Our purpose is 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 interest of the public will be protected.

Id. The Hearing Committee Report in this case catalogues the subsequent efforts to inform Bar members of the *Mance* holding. *See* FF 28-34 (documenting articles in *Washington Lawyer*, Ethics Opinion 355, and D.C. Bar CLE classes).

The Bar's outreach efforts, however, did not enlighten Respondent, whose continuing legal education activities were confined to developments in immigration law. Tr. 119-20.[4] He first learned of *Mance* in December 2012, only after he sought

[4] The testimony by Respondent's expert in this case credibly demonstrates that a significant number of attorneys remain ignorant of the *Mance* holding. *See* Tr. 241-48, 253-55. In his brief to the Board, Respondent suggests actions to remedy that problem. *See* R. Br. at 18-19. We commend one of those suggestions — adding a *Mance*-specific comment to Rule 1.15 — to the D.C. Bar's Rules of Professional Conduct Review Committee.

a consultation with the D.C. Bar's Practice Management Advisory Service ("PMAS") in reaction to Mr. Moya's disciplinary complaint. FF 38.

The Moya Matter

There is no dispute that Respondent was not deemed to violate Rule 1.15 when he treated Mr. Moya's fee as his own in 2008, because he received it before *Mance* was decided. *See Mance*, 980 A.2d at 1208 (treating flat fee as the lawyer's own before it was earned did not constitute misappropriation or commingling pre-*Mance*). The question before us is what if anything Respondent should have done with the unearned $1,000 portion of the fee once the Court issued the *Mance* opinion.

Relying on a presumption that lawyers know the Rules of Professional Conduct (and cases interpreting them), the Hearing Committee reasoned that once *Mance* was decided, Respondent had constructive knowledge of its holding and was therefore required to identify any unearned portion of the fee, disgorge it, and place it in his trust account. We disagree.

When he received the fee from Mr. Moya, Respondent — as did others — treated it as his own and was free to spend it as he saw fit. *See In re Kanu*, 5 A.3d 1, 5 n.1, 17 n.4 (D.C. 2010) (recognizing that *Mance* does not apply to flat fees received before *Mance* was decided).

Nothing in *Mance*, however, supports the Hearing Committee's notion that the Court intended to require Respondent (and, presumably, myriad other practitioners) immediately to audit all their *pending* flat fee cases, ascertain the amounts of any unearned fees, disgorge those funds, and place them in trust until

"earned."[5] Nor has Disciplinary Counsel pointed us to anything in the post-*Mance* literature advocating such a requirement. The logistical and practical difficulties in such corrective accountings are evident, especially since many lawyers would have had no reason (prior to *Mance*) to keep detailed records of the time value of their work relative to the flat fees they received. The *Mance* Court chose to make its holding prospective only, carefully balancing clarification of the Rule with a concern to avoid disciplining attorneys for "inadvertent violations based on reasonable, but mistaken interpretations." *Mance*, 980 A.2d at 1206; *accord In re Martin*, 67 A.3d 1032, 1045-46 (D.C. 2013) (prospective holding because "of the uncertainty regarding the scope of [Rule 1.15] at the time of the events described"). Sustaining the charges against Respondent in the Moya matter would upset that balance, and snare Respondent — and perhaps others — in an ethical trap that *Mance* did not set. The *Mance* Court explicitly wanted "to make lawyers' obligations clear." *Mance*, 980 A.2d at 1206. If the Court intended members of the Bar to place in trust funds that had been received pre-*Mance*, it could have — and would have — explicitly said so.

Respondent was thus not required to determine the unearned amount of his fee in the Moya case and deposit it in trust. He did not violate Rule 1.15.

[5] In this case we consider only whether the unearned flat fee was required to be placed in trust during the representation. Rule 1.16(d) provides that at the end of a representation a lawyer must refund any fee that has not been earned. Respondent was not charged with violating Rule 1.16(d) (nor could he have been) because he refunded Mr. Moya's entire payment.

The Gur Matter

Respondent received Mr. Gur's flat fee three years *after Mance* was decided. He was therefore *not* permitted to treat the fee as his own, because he did not seek or obtain his client's consent to do so. He engaged in commingling when he deposited the money into an operating account that contained his own funds, and he engaged in misappropriation when the balance in that account fell below the amount of the unearned fee. *See In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013) (misappropriation occurs when the balance in a lawyer's account "falls below the amount due the client").

The principal issue before the Board is Respondent's level of culpability, *i.e.* whether Disciplinary Counsel proved by clear and convincing evidence that Respondent's conduct was at least reckless. Absent such a showing, Disciplinary Counsel proved only negligent misappropriation. *See In re Ray*, 675 A.2d 1381, 1388 (D.C. 1996) ("If [the attorney's] conduct was not deliberate or reckless, then [Disciplinary] Counsel proved no more than simple negligence.").

The Hearing Committee concluded that Respondent engaged in intentional misappropriation because:

> . . . 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 [operating account] to his IOLTA on November 6, 2012. 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 [operating account]. 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. Several months later, Respondent attended a CLE offered by the D.C. Bar on how to handle client funds. 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.

HC Rpt. at 36-37 (citations omitted). Our *de novo* review shows that the record does not support the Hearing Committee's conclusions. *See In re Hewett*, 11 A.3d 279, 284-85 (D.C. 2011) (whether misappropriation resulted from more than negligence is a question of law reviewed *de novo*).

The Moya Refund and the Gur Deposit

The Hearing Committee concluded that Respondent's professed ignorance of *Mance* in the Gur matter was disproved by his virtually simultaneous transfer of funds in the Moya matter. Specifically, the Hearing Committee relied on the fact that (acting on his associate Mr. Miller's advice) Respondent transferred money into his *trust* account to pay Mr. Moya's refund less than a week before he deposited Mr. Gur's fee into his *operating* account.

The Hearing Committee "*interpret[ed] Mr. Miller's advice* as addressing the account in which Mr. Moya's funds were to be *held*." HC Rpt. at 24 (first emphasis added). It then inferred that "[i]f 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." *Id.* at 25. Hence, the Committee reasoned, Respondent knew he should have held the Gur fee in his trust account.

The Hearing Committee's interpretation of Mr. Miller's advice, however, is not supported by the record. There is simply no evidence that Mr. Miller's interactions with Respondent had anything to do with *Mance* or with the treatment of flat fees upon their receipt. Instead, his advice only addressed the proper mechanism by which to refund Mr. Moya's fee.

The Moya complaint was the first time that a client had ever asked Respondent for a refund, so he "wanted to make sure that [he] properly returned the funds," and "tasked [Mr. Miller] with making sure that [Respondent] did so properly." Mr. Miller researched that question, and "told [Respondent] that the money had to come from a trust account for the refund." Respondent then sent Mr. Moya a refund check, drawn on his trust account. Tr. 59-61.

There is no additional evidence concerning that interaction between Respondent and Mr. Miller. In particular, there is no explanation of the rationale for Mr. Miller's advice and there is no evidence that he mentioned anything about flat fees or *Mance*. There is no evidence contradicting Respondent's professed continuing ignorance of *Mance*. Thus, there is not clear and convincing evidence supporting the Hearing Committee's interpretive expansion of the scope of Mr. Miller's advice, or showing that Respondent knew anything about *Mance* when he deposited Mr. Gur's flat fee.

Respondent's Later Understanding of Mance

The Hearing Committee also deduced that Respondent understood his fee obligations under *Mance* after he interacted with the Bar's PMAS in December 2012, and participated in a CLE during the Spring of 2013.

Evidence that Respondent unreasonably delayed correcting an initially negligent misappropriation could support a conclusion that his conduct morphed into recklessness. *See, e.g.*, *In re Utley*, 698 A.2d 446, 449-50 (D.C. 1997) (a negligent misappropriation "ripened" into recklessness because the respondent unreasonably delayed in repaying a duplicate fee that she knew was unauthorized); *In re Gregory*, 790 A.2d 573, 579 (D.C. 2002) (per curiam) (appended Board Report) (when a respondent is on notice of issues regarding the safety of entrusted funds, "continued inattention" to those issues supports a finding of recklessness); *In re Cloud*, 939 A.2d 653, 661-62 (D.C. 2008) (reckless misappropriation where the respondent "refused to disgorge [excess fees he had paid himself] with anything like reasonable promptness after he learned he was not entitled to keep them"). The essential factor in each of these cases was the respondent's actual awareness of impropriety; here, the Hearing Committee's deduction as to Respondent's purported enlightenment is not supported by clear and convincing evidence.

After receiving the Moya complaint, which sought a refund of his fee (DX 4), Respondent met in December 2012 with a PMAS representative in an effort to improve his office procedures, especially as they related to the handling of client complaints. Tr. 66-67. During that meeting, Respondent heard about *Mance* for the

first time. Tr. 68. There is no evidence, however, that the PMAS representative told Respondent how to handle flat fees, or advised him retrospectively to audit his pending files for compliance. Indeed, PMAS refused to give Respondent specific guidance on *Mance* and instead advised him to retain counsel. Tr. 69. The uncontradicted record shows that after meeting with PMAS, Respondent understood only that he needed to comply with *Mance* for *new* cases, and to "make sure [his] clients are advised about the difference between a trust and an operating account, and to make sure they fully understood their options about how prepayment should be treated." Tr. 100. Respondent testified, without contradiction, that he thought that he only had to comply with *Mance* going forward, and did not understand that he should audit any open case files for *Mance* compliance. *Id*.[6] There is simply no evidence that Respondent was warned by PMAS, or was otherwise aware, of the need to bring any existing flat fee accounts into compliance with *Mance*.[7]

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[6] The reason why Respondent did not audit open client matters for *Mance* compliance is not entirely clear. He testified that he did not do such an audit when he learned about *Mance* because he was focusing on making sure that he was *Mance*-complaint with new clients, and he had already completed the work for which he had been paid on most of his open cases. Tr. 100-01. However, Respondent's counsel stipulated that Respondent had only earned "a very small portion" of Mr. Gur's fee by the time Respondent met with PMAS. Tr. 169-70. Indeed, Respondent conceded that had he done a compliance audit of open cases, he would have found that Mr. Gur's case and "very few" others were non-compliant. Tr. 100-01. Although these explanations are somewhat contradictory, that contradiction alone is not clear and convincing evidence that Respondent knew in December 2012 that he should bring his open cases into *Mance* compliance. Thus, his failure to do so does not cause his initial negligent misappropriation to "ripen" into a reckless misappropriation.

[7] Like Mr. Miller, the PMAS representative did not testify, and there is no basis to challenge Respondent's testimony that he remained unaware of any obligation to review open cases for *Mance* compliance.

The record does show, however, that after the PMAS meeting Respondent followed the PMAS recommendation: he hired knowledgeable counsel and, heeding counsel's advice, recrafted his written fee agreements and developed multilingual client-intake scripts that were *Mance*-compliant. Tr. 69, 72-73. Later, in May 2013, he attended a three-hour CLE program entitled "Lawyer Trust Accounts." FF 39. But again, there is no evidence that Respondent ever understood after meeting with counsel or attending the CLE that he should review and adjust his existing flat fee holdings retrospectively. *See* Tr. 117.

Ignorance of the Law

The Hearing Committee concluded that Respondent's ignorance of *Mance* does not excuse his misconduct because he is presumed to know the law, including his obligations under the Rules of Professional Conduct. We agree. Ignorance of an ethical Rule is not a defense to a misconduct charge:

> [A] lawyer's mistake about the applicability of an ethical rule cannot excuse or even mitigate misconduct when the lawyer has violated a rule fundamental to governance of the legal profession. *In re Haar*, 698 A.2d at 425 n.13. If a failure to understand the most central Rules of Professional Conduct could be an acceptable defense for a charged violation, even in cases of good faith mistake, the public's confidence in the bar, and, more importantly, the public's protection against lawyer overreaching would diminish considerably.

In re Smith, 817 A.2d 196, 202 (D.C. 2003); *see also In re Pierson*, 690 A.2d 941, 947 (D.C. 1997) ("[I]gnorance or a claim of 'innocent' behavior is not an acceptable defense to a charge of misappropriation."); *In re Harrison*, 461 A.2d 1034, 1036 n.3

(D.C. 1983) ("[P]ractitioners in the District are subject to this jurisdiction's code of professional ethics whether or not they are aware of each prohibition.").

An attorney's license to practice law reflects a continuing endorsement by the Court of Appeals that the lawyer is "fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and an officer of the Court." D.C. Bar R. XI, § 2(a). Each member of the Bar has a duty "to conform to the standards imposed upon members of the Bar as conditions for the privilege to practice law." *Id.* A lawyer who pays no heed to evolving standards cannot seriously hope to conform to them. The fitness to practice law is not a static attribute, fixed in place as of the date of admission to the Bar. Comment [6] to Rule 1.1 provides that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence." Our system of discipline — and its protection of clients — "*depends primarily upon understanding and voluntary compliance*, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings." Rules of Professional Conduct, Scope [2] (emphasis added). As a consequence, attorneys who remain ignorant of disciplinary law will not be excused when they run afoul of it. Respondent's failure to treat the Gur flat fee as the client's funds violated Rule 1.15, whether or not he had actual knowledge of *Mance* when he did so.

Degree of Culpability

We agree with the Hearing Committee that unawareness of one's professional obligations is no defense to a charged Rule violation. We also agree that Respondent should have stayed abreast of his obligations under the Rules of Professional Conduct. We cannot, however, accept the conclusion that Respondent's ignorance of a change in the law rendered his unwitting conduct either intentional or reckless.

The Hearing Committee correctly observed that intentional misappropriation occurs when "an attorney handles entrusted funds in a way 'that reveals . . . an intent to treat the funds as the attorney's own.'" HC Rpt. at 16 (quoting *In re Anderson*, 778 A.2d 330, 339 (D.C. 2001)). The Hearing Committee concluded that, as a matter of law, Respondent was on notice of his mistaken understanding of Rule 1.15(e) when *Mance* was issued in 2009. HC Rpt. at 36. It then reasoned that Respondent's handling of the Moya refund, his meeting with PMAS, and his CLE attendance showed that he knew what *Mance* required, but never restored Mr. Gur's unearned fees to his trust account and thus committed intentional misappropriation. *Id.* at 34-40.

As discussed above, we disagree that Disciplinary Counsel proved by clear and convincing evidence that Respondent was aware of *Mance* when he accepted Mr. Gur's flat fee, or that he subsequently learned that he was required retrospectively to audit his pending files for *Mance* compliance. This absence of clear and convincing evidence that Respondent knew he was not allowed to use the unearned portion of Mr. Gur's fee without client permission distinguishes this case

from *Hewett*, 11 A.3d at 286, and *In re Bach*, 966 A.2d 350, 350 (D.C. 2009), where the respondents were found to have engaged in intentional misappropriation when they took funds even though they knew that they did not have the requisite permission to do so (in those cases, permission from a court). Because Respondent did not know that the "old" law had changed and that *Mance* required him to obtain Mr. Gur's permission to treat the flat fee as his own, we conclude that his intentional use of the unearned portion of Mr. Gur's flat fee did not constitute intentional misappropriation.

In addressing the Hearing Committee's alternative view that Respondent's failure to stay current on the disciplinary law was reckless, we consider *In re Romansky*, where Disciplinary Counsel alleged that the respondent engaged in dishonesty when he charged clients a premium over his hourly fee, relying on new firm engagement letters that permitted such billing. The clients, however, were not covered by the new engagement letters, and thus the respondent was not permitted to charge a premium rate. The Board concluded that the respondent had "acted dishonestly when he premium billed, without notice, clients who had signed the old engagement letter." *In re Romansky* (*Romansky I*), 825 A.2d 311, 315 (D.C. 2003). The Court remanded the case to the Board to determine whether the respondent's overcharge was knowing or reckless, which would violate Rule 8.4(c), or merely negligent, which would not. *Id.* at 317.

After remand, the Court agreed with the Board that Disciplinary Counsel failed to prove that the respondent acted knowingly, citing testimony from multiple

witnesses that confusion regarding the applicable billing practices was possible given the changes being implemented at the firm. *In re Romansky* (*Romansky II*), 938 A.2d 733, 740 (D.C. 2007). The Court then examined whether the respondent's conduct evidenced recklessness, which the Court defined as "a state of mind in which a person does not care about the consequences of his or her action." *Id.*; *see also Romansky I*, 825 A.2d at 316 ("Reckless 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."). The respondent's ignorance of the specific terms of the engagement letters at issue, "combined with his lack of any effort to ascertain their content, could support a conclusion that he 'consciously disregarded the risk' that he might be improperly charging his client a premium." *Romansky II*, 938 A.2d at 741 (quoting *Anderson*, 778 A.2d at 339). The Court, however, determined that Disciplinary Counsel did not prove recklessness by clear and convincing evidence because the evidence of a good faith mistake (confusion over the application of the new billing practice and the large number of the respondent's monthly bills) was in equipoise with evidence of recklessness (the respondent's assumption that he could charge premiums to these clients without taking the time to confirm his understanding by reviewing the engagement letters). *Id.* at 741-42; *cf. In re Smith*, 70 A.3d 1213, 1216 (D.C. 2013) (per curiam) (reckless misappropriation where the respondent did not have a good faith belief that he was entitled to the funds); *In re Pleshaw*, 2 A.3d 169, 173-74 (D.C. 2010) (respondent's conduct reflected

"conscious indifference" where he knew of the conservatorship rules, but "disregarded them for his own convenience").

There is nothing in the record to support a finding that Respondent consciously disregarded a risk that he was mishandling flat fees. Rather, he believed he was complying with the Rules, but instead was handling flat fees under an outdated protocol. He erroneously understood that the Rules "required [him] to put any prepaid fees into [his] operating account," and did not know that that requirement had changed. Tr. 72. He was unaware of the *Mance* decision, and accordingly erred when he received and deposited Mr. Gur's flat fee. His ignorance of *Mance* was, according to the expert testimony in this case, indistinguishable from that of many other practitioners in the community. *See* Tr. 241-48, 253-55. When he later learned of *Mance*, he hired knowledgeable counsel to advise him how to comply with its mandate. Tr. 69. He followed that advice in good faith. That conduct did not rise to the level of recklessness that would require disbarment under *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc).

To the contrary, Disciplinary Counsel did not prove anything other than negligent misappropriation, which the Court has described as:

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

In re Abbey, 169 A.3d 865, 872 (D.C. 2017). In *In re Haar* (*Haar II*), 698 A.2d 412 (D.C. 1997), the lawyer (Respondent in this case) and the client disputed the lawyer's share of settlement proceeds. The client initially offered Respondent $4,000, to counter Respondent's demand of almost $13,000. Respondent took $4,000, believing he was entitled to do so under the law of accord and satisfaction, and then refused to redeposit it after the client demanded its return. *Id.* at 414-15. The Court held that Respondent had engaged in a form of negligent misappropriation:

> Haar mistakenly perceived no dispute whatsoever over his right to the $4,000 because he mistakenly understood the law to accord him at least that much since it had been offered in settlement. We therefore have here a special form of misappropriation case based on a lawyer's good faith, negligent mistake of established law and on his good faith, negligent failure to address a controlling question of fact.

Id. at 422 (Respondent suspended for 30 days). *Haar II* does not stand alone. Several other cases have found negligent misappropriation where Disciplinary Counsel failed to prove that the unauthorized use of entrusted funds resulted from anything other than a respondent's good faith mistake regarding a controlling rule.

In *In re Travers*, 764 A.2d 242, 249-50 (D.C. 2000), the Court found that the respondent's misappropriation was negligent because he "sincerely believed" that he did not have to comply with a statute that required court approval before taking his fee. The Court reached a similar conclusion in *Ray*, 675 A.2d at 1387-88, finding negligent misappropriation because it was the respondent's "ignorance of proper procedures that caused him not to secure court approval for his fee." *See also Bailey*, 883 A.2d at 122 (the respondent's failure to pay a third-party its share of settlement

proceeds was a negligent misappropriation because the respondent had an "honest but mistaken belief" that the third-party was not entitled to the settlement funds).

Disciplinary Counsel did not prove by clear and convincing evidence that Respondent's handling of Mr. Gur's flat fee, in compliance with pre-*Mance* law, was anything other than a "non-intentional, non-deliberate, non-reckless" mistake of law. Respondent committed commingling and negligent misappropriation in the Gur matter.

Sanction

The sanction imposed in an attorney disciplinary matter must 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); *Martin*, 67 A.3d at 1053; *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "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) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam). The sanction 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; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

In determining an 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. 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)). Because it found reckless and intentional misappropriation, the Hearing Committee recommended disbarment pursuant to *Addams*, 579 A.2d at 191, and did not assess the relevant factors.

Seriousness of the Conduct

The charges against Respondent — commingling and misappropriation — are serious. *In re Evans*, 578 A.2d 1141, 1151-52 (D.C. 1990). Indeed, "[a] six-month suspension without a fitness requirement is the norm for attorneys who have committed negligent misappropriation of entrusted funds together with the related violations." *In re Edwards*, 870 A.2d 90, 94 (D.C. 2005); *see In re Robinson*, 74 A.3d 688, 694 (D.C. 2013) ("Few individual acts can impact the public's trust of the legal system more than an attorney who mishandles the money of a client.").

Prejudice to the Client

Disciplinary Counsel stipulated that Respondent's clients were not harmed and that Respondent provided high-quality legal work in both cases. Despite the

quality work he had done, Respondent refunded Mr. Moya's entire fee. He also refunded $8,000 of the $10,000 paid by Mr. Gur. Respondent promptly provided the clients with their files upon the termination of the representation. Respondent also testified without contradiction that there have never been judgments against his firm or against Respondent personally, and that he maintained a "rainy day" fund of approximately $100,000 that provided a safeguard for any fees he may not have earned. Tr. 78-79, 98-99.

Dishonesty

Disciplinary Counsel does not contend that Respondent acted dishonestly. JX 1 ¶ 26.[8]

The Hearing Committee concluded that Respondent did not testify dishonestly, but found his testimony "guarded" or "less than transparent and forthcoming." HC Rpt. at 6-7. Because false testimony to a Hearing Committee is a significant aggravating factor, we have carefully examined the record *de novo*. *See In re Cleaver-Bascombe*, 986 A.2d 1191, 1200 (D.C. 2010); *In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013).

The Hearing Committee's distrust was based on Respondent's failure to recall details of relatively inconsequential topics (the jurisdictions in which he was admitted, his dates of admission, the CLE requirements in those jurisdictions, and the number of his new clients added monthly and annually), and two of some

[8] The parties submitted Joint Stipulations, which were admitted into evidence as JX 1. HC Rpt. at 3.

consequence (the reason he opened an IOLTA account, and his testimony describing the advice from Mr. Miller). HC Rpt. at 6-7. We discuss only the potentially consequential matters.

With respect to why he opened the IOLTA account, Respondent testified that "I knew I had to have an IOLTA account" but could not recall how he became aware of that requirement. Tr. 192-93. No other testimony or evidence suggested that his statements were incorrect or evasive. We see nothing in the record that would suggest that Respondent was not completely truthful in that testimony. And, as discussed earlier (pp. 12-13, *supra*), we reach a similar conclusion with respect to Respondent's testimony regarding Mr. Miller's advice.

Disciplinary Counsel argues that substantial evidence in the record supports the Hearing Committee's fact-finding regarding Respondent's credibility, but cites no facts to support its contention.

We have reviewed the issue *de novo*. We confirm the Hearing Committee's finding that Respondent did not testify falsely, but we reject any suggestion in the Hearing Committee Report qualifying or limiting that conclusion. Having carefully reviewed all of the testimony, we see no basis for the Hearing Committee's skepticism as to Respondent's forthrightness.

Mitigating Factors

Disciplinary Counsel agrees that Respondent appropriately expressed remorse and fully cooperated in the disciplinary investigation. Respondent has also accepted

responsibility for his actions by stipulating to the underlying facts and simply mounting a defense based on legal arguments applicable to those facts.

As well, the Hearing Committee concluded that Respondent has "had an honorable career" and that he had "done very good work for his clients." Tr. 196.

Finally, even though he did good legal work for the clients at issue, Respondent made a full refund of his fee to Mr. Moya, and refunded $8,000 of the $10,000 paid by Mr. Gur. There is thus no suggestion that he attempted to retain an unearned fee.

Aggravating Factors

Respondent was suspended for thirty days in 1997 for negligent misappropriation. *Haar II*, 698 A.2d at 425. He now urges that his prior discipline should not enhance the sanction in this case. R. Br. at 46.

Even though the specific elements of Respondent's misappropriation in *Haar II* differ from those in this case, they share a troubling characteristic.

Respondent's earlier misconduct was triggered by his misunderstanding of the substantive law of accord and satisfaction — "a mistake that careful analysis of a known legal doctrine would have revealed." *Haar II*, 698 A.2d at 422.

Here, Respondent's misconduct also resulted from his mistake of law — this time his utter ignorance of *Mance* and the protections that it affords to clients. Regrettably, he was oblivious to *Mance* because "staying abreast of ethics, you know, [of] the changing landscape of professional responsibility . . . [was not] on [his] radar." Tr. 205-06. He had not read the case, and had not read any of the post-

Mance publications or the ethics opinion related to it. Despite a major change in the protocol for handling flat fees, Respondent's understanding of his obligations remained frozen in the past.

Respondent's prior discipline, however, was notice to him that ignorance of the law does not excuse a violation of the Rules. At the very least, his suspension should have instilled in him a commitment to pay particular attention to developments in the Rules pertaining to misappropriation. Instead, he was utterly indifferent to them. He seems not to have learned the lesson of his past transgression. As a consequence, we view his earlier discipline as a substantial aggravating factor in this matter.

Comparability Analysis

As noted above, the typical sanction for negligent misappropriation is a six-month suspension from practice. *Edwards*, 870 A.2d at 94; *see In re Davenport*, 794 A.2d 602, 603 ("When the Board finds that an attorney has commingled and negligently misappropriated funds, we have uniformly imposed a suspension for a period of no less than six months."); *see, e.g.*, *In re Frank*, 881 A.2d 1099, 1100 (D.C. 2005) (per curiam) (six-month suspension for negligent misappropriation); *In re Katz*, 801 A.2d 982, 982 (D.C. 2002) (per curiam) (providing that a six-month suspension was appropriate before taking into account disability mitigation under *In re Kersey*, 520 A.2d 321 (D.C. 1987), which resulted in a stayed suspension). The Court has imposed lengthy suspensions of up to three years where significant additional misconduct accompanies the negligent misappropriation. *See In re Kline*,

11 A.3d 261 (D.C. 2011) (three-year suspension; additional misconduct included forgery and dishonesty); *In re Boykins*, 999 A.2d 166 (D.C. 2010) (two-year suspension with fitness; additional misconduct included intentional and reckless false statements to Disciplinary Counsel); *In re Midlen*, 885 A.2d 1280 (D.C. 2005) (eighteen-month suspension; additional misconduct included dishonesty). This case does not contain the more serious dishonest conduct reflected in *Kline*, *Boykins*, or *Midlen*. Nor does it include the troubling element in *In re Ponds*, Board Docket No. 17-BD-015 (BPR June 24, 2019), in which a *Mance*-related violation included material financial harm to a client and thus we recommended a nine-month suspension. We view this case as more closely akin to *In re Robinson*, 74 A.3d 688 (D.C. 2013), where the respondent was suspended for seven months for negligent misappropriation and a failure meaningfully to remedy the inattention of a subordinate employee responsible for handling the firm's trust account. Although not an exact comparison, Robinson's failure to oversee his employee is akin to Respondent's failure to monitor the Rules governing misappropriation, both of which failures resulted in the mishandling of client funds.

Finally, an appropriate sanction should "deter others from engaging in similar misconduct." *In re Askew*, 96 A.3d 52, 54 (D.C. 2014) (per curiam); *In re Robinson*, 736 A.2d 983, 988 n.11 (D.C. 1999) (sanction plays a "significant protective role" in deterring future misconduct by the attorney in question "and others so situated"); *In re Jenkins*, Board Docket No. 15-BD-110, at 12 (BPR Dec. 5, 2016) (imposing a Board reprimand because the informal admonition recommended by the Hearing

Committee "would [not] send a clear enough message to attorneys" tempted to backdate documents). Our decision to hold Respondent responsible for misappropriation despite his ignorance of the change in the law regarding flat fees should be understood as a message to all members of the Bar about the seriousness with which lawyers should take their obligations under the Rules of Professional Conduct. There is no mandatory ethics CLE requirement in the District of Columbia, but every lawyer — regardless of his or her employment, area of practice or level of seniority — should read, become familiar with, understand, and adhere to the Rules of Professional Conduct and the Court's decisions applying those Rules. Failure to do so risks a Rule violation that can, as here, result in a serious sanction.

For all of these reasons we conclude that Respondent should receive a suspension longer than the typical six-month suspension imposed in similar misappropriation cases.

Conclusion

We dismiss the charges against Respondent relating to the Moya matter.

In the Gur matter, we recommend that Respondent be suspended from the practice of law for seven months. In addition, following his reinstatement to practice Respondent should be placed on probation for a period of one year, during which time he must submit to an evaluation of his office practice by the D.C. Bar's Practice

Management Advisory Service and complete up to ten hours of CLE classes recommended by PMAS in its sole discretion.[9]

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Robert C. Bernius, Chair

All Board members concur in this Order and Report and Recommendation.

[9] We would ordinarily recommend CLE in the first instance, but Respondent has already taken relevant CLE classes. JX 1 ¶ 21.