THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
August 1, 2024

In the Matter of:	:	
	:	
JOSEPH OWENS,	:	
	:	Board Docket No. 21-BD-058
Respondent.	:	Bar Docket No. 2018-D041
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 980884)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

This matter arises from Respondent's representation of a client in a security clearance proceeding before the Defense Office of Hearings and Appeals ("DOHA") and false statements to a Maryland Court regarding that representation. The Ad Hoc Hearing Committee found that Respondent violated D.C. (or the corresponding Maryland or Virginia) Rules of Professional Conduct 1.4(a) (communication), 1.15(c) (failure to provide an accounting), and 1.15(a) (recordkeeping and intentional misappropriation), as well as Rule 19-308.4(c) (dishonesty and misrepresentation) of the Maryland Attorneys' Rules of Professional Conduct ("Maryland Rules"), and recommended that Respondent be disbarred for intentional misappropriation.

Disciplinary Counsel took no exception. But Respondent did, arguing in part that the Board does not have jurisdiction to discipline Respondent and should instead

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* 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.

refer this matter to Maryland Bar Counsel, and that, in any event, Respondent did not intentionally or recklessly misappropriate client funds.

We agree with the Hearing Committee's Report and Recommendation, which is attached hereto and adopted and incorporated by reference. Finding that the Virginia Rules of Professional Conduct ("Va. Rules" or "Virginia Rules") apply to all but the dishonesty and misrepresentation charge, we also find that Disciplinary Counsel proved by clear and convincing evidence that Respondent violated Va. Rules 1.15(b)(3) & (b)(5) (recordkeeping, intentional misappropriation, and failing to provide an accounting) and 1.4(a) (communication), as well as Maryland Rule 19-308.4(c) (dishonesty and misrepresentation). We recommend that Respondent be disbarred.

We address four of Respondent's specific arguments below: (1) Jurisdiction (and Respondent's related Motions to Dismiss); (2) Choice of Law; (3) the misappropriation charge; and (4) the failure to communicate charge.

II. FINDINGS OF FACT

All of the Committee's findings of fact are supported by substantial evidence in the record. Board Rule 13.7; *see In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam) (quoting *In re Bradley*, 70 A.3d 1189, 1193 (D.C. 2013) (per curiam)); *see also In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (defining "substantial evidence" as "enough evidence for a reasonable mind to find sufficient to support the conclusion reached"). We summarize the findings of fact as they relate to the misappropriation and communication charges.

On February 25, 2017, after exchanging drafts of an engagement letter, Mr. Joselson retained Respondent to represent him in the security clearance proceeding before DOHA for "'a fee of $4,000.00.'" FF 11. Both Mr. Joselson and Respondent understood the $4,000 to be a flat fee. *See, e.g.*, FF 45 (Mr. Joselson calling the agreement a "fixed-fee" agreement for Respondent to do "whatever it takes to bring [Mr. Joselson] up to speed on the process and defend [him] against DOHA"); FF 47; FF 49 ("Prior to his testimony before the Hearing Committee, Respondent testified unequivocally in the Maryland proceedings that the Agreement with Mr. Joselson was a flat fee agreement."). Thus, the parties agreed to the following language in the Agreement:

> I hereby engage the services of Mathews, Owens & Associates (firm) to represent Yuri Joselson before DOHA: the DoD's Department of Hearings and Appeals [sic] to assist Client with his security clearance for a **maximum** attorney fee of four thousand dollars ($4,000).
>
> Client engages the Firm, any of the Attorneys or paralegals of the firm may work on the litigation. The Firm will prepare all the necessary materials and witnesses for the hearing. Joseph Michael Owens will represent Client at the hearing personally.
>
> Client will pay a fee of $4,000.00. The fee covers all services and expenses of the Firm working on Client's behalf. Client agrees to travel [to] Northern Virginia, Maryland, or Washington, DC for the hearing. The Firm has the obligation to complete the engagement, absent good cause for withdrawal, once the fee is paid.

FF 33 (emphasis in original). Respondent understood that he could keep the entire flat fee in trust or could take out portions of the fee as they were earned during the course of the representation. FF 30.

Mr. Joselson proposed, and Respondent agreed, that if either party terminated the Agreement before all of the contemplated work was completed, Respondent would be paid at $250 per hour for the work performed, and would refund the remainder of the $4,000 payment. FF 34-35.

On May 18, 2017, and about three months after executing the Agreement, Respondent's law firm (acting through Respondent's law partner after she consulted with Respondent) withdrew $6,000 from the firm's IOLTA account, which included Mr. Joselson's paid fee of $4,000. FF 36, 40. This left a balance of $200 (which was separate from Mr. Joselson's fee). FF 40. The $6,000 was deposited in the law firm's operating account and, the next day, the law firm transferred $6,620.97 from its operating account to pay a personal credit card account belonging to either Respondent or his wife. FF 42. Before the law partner withdrew the $6,000, she consulted with Respondent, who told her that he had worked at least sixteen hours on Mr. Joselson's matter. FF 41. Respondent testified to working "seventeen hours" during the hearing, but the Committee did not find his testimony credible. *See* FF 66-79.

When Respondent's law partner withdrew the $4,000, Respondent had not completed all of the work contemplated by the Agreement. FF 24. Specifically, Respondent had filed his appearance, had expressed to DOHA Mr. Joselson's desire to have the hearing in the Washington, D.C. area, and had spoken with Mr. Joselson some number of times. FF 43. But Respondent had not drafted or filed any substantive pleadings, he had not prepared Mr. Joselson or any other witnesses for

the DOHA hearing, nor had he represented Mr. Joselson at the DOHA hearing. *Id.* (Mr. Joselson was eventually granted a security clearance after being represented by subsequent counsel. FF 15.)

Eventually, on October 5, 2017, Mr. Joselson terminated the engagement with Respondent and requested a full refund of the $4,000 fee. FF 145-46. Respondent initially refused, but then refunded $2,000. FF 146. Mr. Joselson sought the remaining $2,000 through the Arbitration Panel of the Committee on the Resolution of Fee Disputes of the Maryland State Bar Association, which awarded him $1,750. FF 17, 147. The Maryland District Court and Circuit Court agreed and, in January 2020, Respondent's law firm sent a check to Mr. Joselson for $1,750, ending the dispute. FF 21, 147.

During the representation, Mr. Joselson believed he was receiving inadequate communications from Respondent. FF 89. For example, after seeking to reschedule the hearing on behalf of Mr. Joselson, Respondent did not provide the judge with alternative dates. FF 80-87. This led to Mr. Joselson finding out on his own that the hearing was not postponed. FF 84-87. Mr. Joselson thus asked Respondent for copies of all emails Respondent had sent to and received from DOHA, and further asked to be copied, blind copied, or have forwarded all future correspondence with DOHA. FF 89. A few days later, Respondent refused—stating he will keep him "informed of the information [he] need[ed]," and later stated that "it is simply unprofessional" for attorneys to copy the client on communications with the Court. FF 91-93 (alterations in original). Mr. Joselson then emailed Respondent a number

of questions to discuss to prepare for the hearing, but concluded that Respondent had failed to be responsive. FF 98.

III. CONCLUSIONS OF LAW

A. We Have Jurisdiction to Decide This Matter and Further Deny Respondent's Motions to Dismiss

Before the Committee, Respondent sought to dismiss this matter because, in his view, the Maryland Rules apply to all of the alleged misconduct. HC Rpt. at 59-63. The Committee recommended that we deny Respondent's request. *Id*. at 63; *see* Board Rule 7.16(a); *In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991) (hearing committee without authority to grant motion to dismiss).

Before the Board, Respondent argues that this matter "has absolutely no nexus – of any kind whatsoever – with the District of Columbia," R. Br. at 6, and thus asks the Board to "dismiss the [Amended] Specification of Charges and refer the matter back to Maryland." R. Br. at 8. Disciplinary Counsel disagrees. Pointing to Section 1 of D.C. Bar Rule XI, and D.C. Rule 8.5(a), Disciplinary Counsel argues that the Board has jurisdiction because Respondent is a member of the D.C. Bar. ODC Br. at 10-11.

We disagree with Respondent on both points. First, we agree with Disciplinary Counsel that the Board has jurisdiction. D.C. Bar Rule XI, Section 1(a) states that "All members of the District of Columbia Bar . . . are subject to the disciplinary jurisdiction of this Court and its Board on Professional Responsibility." D.C. Rule 8.5(a) explains that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the

lawyer's conduct occurs." It moreover notes that a lawyer "may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct." D.C. Rule 8.5(a).

Second, and as we subsequently explain, we agree with the Committee that the Virginia Rules of Professional Conduct apply to all charges but the dishonesty allegation. HC Rpt. at 58-59 ("Therefore, the Va. Rules would apply to the charges set out in the Amended Specification except for the final charge (Amended Specification at 10 ¶ 52.f.) alleging Respondent engaged in conduct 'involving misrepresentation and dishonesty,' which conduct occurred before Maryland courts and which is charged under the Maryland Rule."). Respondent was also on notice before, during, and shortly after the hearing that the Virginia Rules may apply to this case. *See* Disciplinary Counsel's Opposition to Respondent's Motion to Dismiss, p.5 (filed June 17, 2022) (conceding that "it is somewhat unclear whether the D.C., Maryland, or Virginia rules apply to the alleged misconduct"); Tr. 662 (noting the Chair's direction to include the "choice-of-law issue" during closing arguments); Tr. 781 (noting Disciplinary Counsel's questions that go to "a choice of law issue that we have to figure out and discuss later in this case"); Hearing Committee Order, p.2 (filed April 27, 2023) (directing the parties to address "which jurisdiction's rules of professional conduct apply to this matter under D.C. Rule of Professional Conduct 8.5(b)"). With this notice provided, Respondent has not argued, much less shown, that he was prejudiced as a result of the Amended Specification of Charges not charging violations under the Virginia Rules. *See In re Bernstein*, 774 A.2d 309,

315-16 (D.C. 2001) ("Even if we assume, for the sake of argument, that the Board should have applied Virginia rules, the Board's application of the District's rules does not undermine the proposed sanction for Bernstein has not shown that he suffered prejudice."); *see also* HC Rpt. at 63 ("The applicable Rules in the three jurisdictions are similar, if not identical, and . . . similar conduct is sanctioned in each jurisdiction.").

Because Respondent is a member of the D.C. Bar, he was on notice that the Virginia Rules may apply, and he has not demonstrated any prejudice in the failure to identify the Virginia Rules in the Specification of Charges. Therefore, we conclude that the Board has jurisdiction over this matter and deny Respondent's Motions to Dismiss.

B. The Virginia Rules of Professional Conduct Apply to All Charges Arising out of Respondent's Representation of Mr. Joselson

D.C. Rule 8.5(b)(1) explains that "[f]or conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise." D.C. Rule 1.0(n) notes that a '"tribunal' denotes a[n] . . . administrative agency, or other body acting in an adjudicative capacity," which occurs when "a neutral official, after the presentation of evidence or legal argument by a party or parties, [renders] a binding legal judgment directly affecting a party's interests in a particular matter."). "[A]ny particular conduct of an attorney shall be subject to only one set of rules of professional conduct." D.C. Rule 8.5, cmt. [3].

The Committee looked to D.C. Rule 8.5(b)(1) and, although it helpfully analyzed the alleged misconduct against the D.C., Maryland, and Virgnia Rules of Professional Conduct, it also determined that the Virginia Rules should apply to all charges arising from Mr. Joselson's representation.[1] We agree.

First, DOHA is a tribunal because the administrative judge rendered a binding legal judgment. The judge ultimately decided to grant Mr. Joselson's security clearance and, in doing so, explained that "*[i]f a Notice of Appeal is not filed in the prescribed time period, the Administrative Judge's decision will be the final decision in this case*." *See* FF 15 (citing DCX 8 at 43 (emphasis in original)). The decision thus became a final, binding legal judgment. *See* D.C. Rule 1.0(n); HC Rpt. at 58.

Second, all of Respondent's alleged misconduct occurred "in connection with a matter pending before" DOHA. *In re Ponds* is instructive, which involved safekeeping (and other) charges relating to a court proceeding in Virginia. Interpreting the phrase "in connection with" plainly and broadly, the Board found that the safekeeping charges should be analyzed under the Virginia Rules because the fees the respondent received were in connection with the Virginia proceeding. There was thus no reason to delve into a D.C. Rule 8.5(b)(2) "Other Conduct"

[1] The parties and the Committee all agree that Maryland Rule 19-308.4(c) applies to the charge that Respondent engaged in dishonesty and misrepresentation before the Maryland Courts. HC Rpt. at 58-59; R. Br. at 9 (concluding that "Maryland law applies to this case"); ODC Br. at 23 (asking the Board to agree with the Hearing Committee that Respondent violated Maryland Rule 19-308.4(c)). We agree, and henceforth, we use the phrase "all Joselson charges" or the like to reflect all but this charge.

analysis.[2] Board Docket No. 17-BD-015, at 35-36 (BPR June 24, 2019), *decided on other grounds without discussion*, 279 A.3d 357 (D.C. 2022) (per curiam). So too here—all of Respondent's alleged Joselson-related misconduct, including the safekeeping charges, was in connection with Mr. Joselson's security clearance matter.

Third, and under D.C. Rule 8.5(b)(1), the Virginia Rules should apply to all Joselson charges. "The Defense Office of Hearings and Appeals (DOHA), as far as the Hearing Committee can determine, has no rules of conduct for counsel appearing before it." HC Rpt. 57. We agree. Though Mr. Joselson could have had his hearing in New York or Arlington, Virginia (FF 9-10), our analysis does not turn on where he wished to have the hearing, or where the hearing eventually took place. *See In re Koeck*, Board Docket No. 14-BD-061, at 21-22 (BPR Aug. 30, 2017) (cataloguing the different states a Department of Labor proceeding spanned and, in applying the Model Rules to disciplinary misconduct, explaining that the "uniform application of the Model Rules throughout the proceeding ensured a consistent, well-ordered ethics regime"), *recommendation adopted where no exceptions filed*, 178 A.3d 463 (D.C. 2018) (per curiam). Instead, we treat the agency as if it were a court, and look to the

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[2] D.C. Rule 8.5(b)(2)(ii) provides that for any *other* conduct (i.e., not in connection with a matter pending before a tribunal):

> If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

location of the agency's headquarters to determine where the tribunal sits. DOHA is located in Arlington, Virginia; thus, the Virginia Rules apply.[3]

C. Respondent Misappropriated When He Withdrew the Entire Flat Fee Before Completing All of the Work in Mr. Joselson's Case

We review *de novo* the Committee's legal conclusions and its determinations of ultimate fact. *See Klayman*, 228 A.3d at 717; *Bradley*, 70 A.3d at 1194 (Board owes "no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus are reviewed de novo").

Va. Rule 1.15(a)(1) requires that "[a]ll funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable trust accounts." And Va. Rule 1.15(b)(5) requires lawyers to "not disburse funds . . . of a client . . . without their consent or convert funds . . . of a client . . . except as directed by a tribunal."

The Committee found that Respondent intentionally misappropriated when he withdrew the entire flat fee "on May 18, 2017, contrary to the terms of the

[3] Even if the Maryland Rules applied, Respondent does not identify a difference between the Virginia and Maryland Rules that would result in a different outcome in this case. As the Committee recognized, we also acknowledge that the Virginia Rule on recordkeeping appears to outline more specific requirements than the Maryland Rule. HC Rpt. at 84-85; Maryland Rule 19-301.15; Va. Rule 1.15(c)(1) through (c)(4). But like the Committee, we would find that Disciplinary Counsel has proven a recordkeeping violation under the Maryland Rule too. *See* HC Rpt. at 85.

Agreement and significantly prior to fulfilling Respondent's obligations under the Agreement." HC Rpt. at 80; *see also id.* at 98.

Relying on the language Mr. Joselson proposed to calculate a refund in the event of termination before the end of the DOHA matter, Respondent argues that he was entitled to the entire $4,000 fee once he performed sixteen hours of work because, at that point, Mr. Joselson was not entitled to a refund. R Br. at 24. He argues that Disciplinary Counsel failed to prove that he had not earned the $4,000 by completing "at least sixteen hours" of work before his partner removed the funds from the trust account. *Id*. We disagree. First, Respondent's interpretation is not faithful to the plain language of the parties' retainer agreement, or Virginia's approach to handling fixed fees. Respondent's hourly rate only applied in calculating a refund—"[i]n the event that the engagement is terminated by the Firm or by Client prior to the completion of the engagement." FF 47. As the Committee found, this did not transform the agreement from a flat fee to an hourly fee. *Id.*; *see also* FF 35 (noting the Agreement's provision of what occurs if either party terminates the representation); FF 37 (describing that the representation directed Respondent to "prepare all the necessary materials and witnesses for the hearing" and "represent [Mr. Joselson] at the hearing personally," and that the $4,000 "cover[ed] all services and expenses" in connection with the representation (alterations in original)); FF 52 (concluding that only in the event that the engagement is terminated "does the Agreement provide an hourly rate for Respondent's time"). Virginia Legal Ethics Opinion 1889, approved January 6,

2023, p.3, provides that a flat fee is not earned until the representation is complete.[4] The lawyer is entitled to a quantum meruit recovery if the client terminates the representation. Thus, at the time he took all $4,000—before Mr. Joselson terminated the representation—he was not entitled to take Mr. Joselson's $4,000.

Respondent took all of the flat fee before completing all of the work contemplated under the agreement. *See* FF 40-41, 45 (noting that when Respondent's law partner withdrew the entire flat fee per Respondent's instruction, Respondent had not drafted or filed any substantive pleadings, prepared Mr. Joselson or any other witnesses for the DOHA hearing, or represented Mr. Joselson at the DOHA hearing). We thus agree with the Committee that Respondent misappropriated.[5] (And for the reasons described by the Committee, *see* HC Rpt. at 97-98, we agree that he did so intentionally.)

D. Respondent Did Not Keep His Client Reasonably Informed; Nor Did He Promptly Comply with Reasonable Requests for Information

Va. Rule 1.4(a) provides that a "lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests

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[4] This Legal Ethics Opinion was issued after Respondent appropriated the entire fee. However, it is relevant because the conclusion it expresses declared the relevant legal principles, and did not establish new law.

[5] As noted previously, Maryland law would dictate the same result. *See, e.g.*, *Attorney Grievance Comm'n v. Jones*, 297 A.3d 1172, 1201 (Md. 2023) ("[A] 'full flat fee is not earned until all the work associated with the fee is completed.'" (quoting *Attorney Grievance Comm'n v. Zuckerman*, 872 A.2d 693, 704 (Md. 2005))); *Attorney Grievance Comm'n v. Hamilton*, 118 A.3d 958, 973 (Md. 2015) (same).

for information." The Committee found that Respondent violated this Rule because he "categorically refused to provide Mr. Joselson copies of Respondent's communications with DOHA after Mr. Joselson reasonably requested that information." HC Rpt. at 71. Respondent moreover "failed to provide Mr. Joselson with important information about the status of the DOHA matter and the continuance sought by Mr. Joselson." *Id.* Indeed, Mr. Joselson had to resort to direct communication with DOHA to obtain information about the hearing date. *See* FF 86-87.

Respondent argues that he kept Mr. Joselson reasonably informed, and that he was a "difficult client." R. Br. at 33-34. We agree with the Committee in full. Indeed, Respondent testified before the Hearing Committee that the client is not entitled to receive copies of communication with opposing counsel and the court. FF 93-94.

IV. SANCTION

Though Respondent's misconduct is analyzed under the Virginia and Maryland Rules respectively, Respondent's sanction is based on D.C. caselaw. *In re Tun*, 286 A.3d 538, 543 (D.C. 2022) ("[A]lthough we are evaluating misconduct under the rules of another jurisdiction, we make sanctions determinations pursuant to District of Columbia law." (citing *In re Ponds*, 888 A.2d 234, 240-45 (D.C. 2005))).

For the reasons discussed above and in the Committee's Report, we find that Respondent misappropriated and did so intentionally. *See* HC Rpt. at 80, 96-98.

When an attorney engages in intentional misappropriation, the sanction is "virtually automatic disbarment." *In re Gray*, 224 A.3d 1222, 1229 (D.C. 2020) (per curiam). We agree with the Committee that Respondent should be disbarred.

V. CONCLUSION

For the foregoing reasons, the Board finds that Respondent violated Va. Rules 1.15(b)(3) & (b)(5) (recordkeeping, intentional misappropriation, and failing to provide an accounting), 1.4(a) (communication), and Maryland Rule 19-308.4(c) (dishonesty), and should receive the sanction of disbarment. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Michael E. Tigar
Michael E. Tigar

This matter was decided during the 2023-24 term of the Board. All members of the Board concur in this Report and Recommendation, except Dr. Hindle, who did not participate.

THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of:	:	
	:	
JOSEPH OWENS, ESQUIRE	:	
	:	
Respondent.	:	Board Docket No. 21-BD-058
	:	Disc. Docket No. 2018-D041
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 980884)	:	

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

In an Amended Specification of Charges, Respondent Joseph Owens ("Respondent") is charged with violating the District of Columbia Rules of Professional Conduct (the "D.C. Rules") in connection with his representation of an individual who needed a security clearance to work on a classified government contract. Specifically, Respondent is charged with the following Rules violations: D.C. Rules 1.4(a) (Failure to Keep Client Reasonably Informed and Failure to Comply Promptly with Reasonable Request for Information); 1.15(a) (Failure to Keep Records); 1.15(a) (Negligent, Reckless, or Intentional Misappropriation of Funds); 1.15(c) (Failure to Provide an Accounting); and 1.16(d) (Failure to Turn Over Client File and Failure to Refund Unearned Fee). Respondent is also charged with violating Maryland Attorneys' Rule of Professional Conduct 19-308.4(c) (Misrepresentation and Dishonesty).

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

Disciplinary Counsel contends that Respondent committed all of the charged violations, at least recklessly engaged in misappropriation, and should be disbarred as a sanction for his misconduct. Respondent contends that he did not commit any of the charged violations and modified his practices over the last six years to avoid any similar infractions. He argues through counsel that no sanction should be imposed against him.

Unusually, as set forth below, while this proceeding involves alleged violations of the D.C. Rules, none of the alleged conduct occurred in the District of Columbia. Respondent claims the Maryland Attorneys' Rules of Professional Conduct (the "Md. Rules") should apply because his principal place of business is in Maryland. (Respondent is a member of both the D.C. and Maryland bars.) At the same time, if relevant, the alleged conduct related to a proceeding at a U.S. government office in Virginia, and the Virginia Rules of Professional Conduct (the "Va. Rules") may apply. For this reason, this Ad Hoc Hearing Committee (the "Hearing Committee") has reviewed the alleged violations under the Professional Rules of all three jurisdictions.

The Hearing Committee finds that Disciplinary Counsel has proved, by clear and convincing evidence, that Respondent violated D.C. (or, as discussed herein, the corresponding Maryland or Virginia) Rules 1.4(a), 1.15(c), 1.15(a) (record keeping and misappropriation), and Md. Rule 19-308.4(c). The Hearing Committee finds that Disciplinary Counsel failed to prove that Respondent violated D.C. Rule 1.16(d) (Failure to turn over client file or to refund unearned fee). Furthermore, the Hearing

Committee finds that Disciplinary Counsel proved, by clear and convincing evidence, that Respondent's misappropriation (in violation of Rule 1.15(a)) was intentional. Therefore, the Hearing Committee recommends that Respondent be disbarred.

I. PROCEDURAL HISTORY

On October 20, 2021, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"). The Specification alleges Respondent violated the following D.C. Rules:

- Rule 1.4(a), by failing to keep his client reasonably informed about the status of the case for which he had been retained and failing to comply promptly with reasonable requests for information;
- Rule 1.15(a), for failing to keep records of client funds;
- Rule 1.15(a), for negligently, recklessly, or intentionally misappropriating client funds;
- Rule 1.15(c), for failing to provide an accounting;
- Rule 1.16(d), for failing to turn over the client file and failing to refund an unearned fee; and
- Rule 8.4(c), for engaging in conduct involving misrepresentation and dishonesty.

Respondent filed an Answer on November 10, 2021, admitting in part and denying in part the allegations of the Specification.

On January 5, 2022, Disciplinary Counsel filed an Amended Specification of Charges ("Amended Specification"), in which the allegations remained the same as those in the Specification, with one change. The Amended Specification substituted a reference to the Maryland Attorneys' Rules of Professional Conduct, and a change to the final charge in subparagraph 52.f. to reference Md. Rule 19-308.4(c), in place of the charge based on D.C. Rule 8.4(c). On January 18, 2022, Respondent filed his Answer to the Amended Specification, in substance repeating his previous Answer to the Specification.

On June 10, 2022, Respondent filed a Motion to Dismiss, contending that Respondent, as a member of the Bar of Maryland, with his principal place of business in Maryland, was subject only to the State of Maryland's jurisdiction. Respondent contended that the Office of Bar Counsel for the Attorney Grievance Commission of Maryland had investigated the allegations against Respondent and closed its investigation without taking any action against Respondent. Respondent contended that the Amended Specification should be dismissed because it did not charge under the Maryland Rules, which Respondent contended were the only applicable Rules under D.C. Rule 8.5(b). Alternatively, Respondent moved the Board to direct Disciplinary Counsel to amend the Amended Specification to reference and apply only the Maryland Rules.

On June 17, 2022, Disciplinary Counsel filed its Opposition to Respondent's Motion to Dismiss, contending that the District of Columbia Rules of Professional Conduct remained applicable because Respondent is a member of both the Maryland

and D.C. Bars. Disciplinary Counsel also contended that Respondent had not demonstrated any difference between the applications of the D.C. Rules to the conduct alleged in the Amended Specification and the Maryland or the Virginia Rules, should they apply. Disciplinary Counsel also pointed out that the Hearing Committee does not have the authority to dismiss the Amended Specification, citing Board Rule 7.16(a).

Prior to the hearing, Disciplinary Counsel submitted exhibits DCX 1 through 34, and Respondent submitted exhibits numbered RX 1 through 137. Subsequently, certain of Respondent's exhibits were withdrawn and a motion was made to treat them *in camera* (which motion the Hearing Committee granted on an interim basis) and a replacement set of exhibits was submitted that included the previously withdrawn exhibits with redactions. By Order of January 12, 2023, the Board on Professional Responsibility granted Respondent's motion for a protective order to prevent disclosure of certain health information. Subsequently, at the hearing, Disciplinary Counsel offered exhibits DCX 35-36. During the hearing, the Hearing Committee admitted all of Disciplinary Counsel's exhibits. The Hearing Committee also admitted a number of Respondent's exhibits, some of which were admitted under an interim protective order upon Disciplinary Counsel's motion, RX 5, 9, 48, 50, 51, 52 (under interim seal), 53 (under interim seal), 54, 55, 56 (under interim seal), 57, 58 (under interim seal), 59 (under interim seal), 60, 63, 66, 68, 69, 70, 72, 77, 81, 83, 84, 92, 97 (under interim seal), 122, 123, 125, 127, 128, 129, 130, and

135. Respondent withdrew the other proposed Respondent's exhibits. *See* Tr. 911-917, 923.[1]

A hearing was held via Zoom videoconference on portions of March 14 and April 11, 12, 14, and 24, 2023, before the Hearing Committee. Assistant Disciplinary Counsel Jelani Lowery, Esquire, represented the Office of Disciplinary Counsel. Respondent was present during most portions of the hearing and was represented throughout the hearing by Michelle Elisabeth Crawford, Esquire.

During the hearing, Disciplinary Counsel called as witnesses Yuri Joselson, Respondent's former client; Azadeh Matinpour, an investigative attorney for the Office of Disciplinary Counsel; and attorney Lucas Webster. Respondent renewed his motion to strike Ms. Matinpour's testimony on the ground that her testimony would be as an expert and Disciplinary Counsel had submitted no expert statement prior to the hearing, pursuant to the Hearing Committee's Order of January 4, 2022. The Hearing Committee permitted Ms. Matinpour to testify, and pointed out that the Hearing Committee Chair's requirement that an expert report be filed before the hearing was to provide the other party the opportunity to provide rebuttal testimony or to properly prepare cross examination. The Hearing Committee ordered that Respondent would be given additional time to prepare cross-examination if Ms. Matinpour gave expert testimony; Respondent requested additional time to prepare for cross examination; and the Hearing Committee agreed that additional time to

[1] "DCX" refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to transcript pages of the hearing. "FF" refers to the Hearing Committee's Findings of Fact.

prepare was necessary. Tr. 94-99, 111-12. Respondent's counsel did not object to any specific portion of Ms. Matinpour's testimony as being of an expert nature and her testimony was admitted.

Respondent testified on his own behalf and called as witnesses David A. Marks and Evan Seamone, Ph.D. Dr. Seamone appeared as a fact witness, not as an expert witness as originally noticed (*see* Tr. 877-79).

At the conclusion of the merits phase of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proved by clear and convincing evidence at least one of the Rule violations set forth in the Amended Specification of Charges. Tr. 1097; *see* Board Rule 11.11. Invited by the Hearing Committee to do so, Respondent provided a statement and testimony in mitigation of sanction, and was cross-examined by Disciplinary Counsel. Tr. 1098, 1100-1126.

Disciplinary Counsel submitted its Post-Hearing Brief on June 2, 2023 ("Disciplinary Counsel's Brief"), and Respondent submitted his Post-Hearing Brief on June 22, 2023 ("Respondent's Brief"). Both briefs contained proposed findings of fact, conclusions of law, and recommendations as to sanction. Disciplinary Counsel submitted a Reply Brief on June 30, 2023 ("Disciplinary Counsel's Reply"), and Respondent submitted, by Motion for Leave, a Reply to Statements Introduced During Rebuttal on July 6, 2023 ("Respondent's Surreply"). On July 10, 2023, Disciplinary Counsel moved to strike Respondent's Surreply. By Order on July 10, 2023, the Hearing Committee ordered Respondent's Surreply be made part of the

record to be given whatever weight the Hearing Committee determined to be appropriate. The Hearing Committee also ordered that it would not accept any further briefing by the parties.

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence submitted at the hearing, and these findings of fact are established by clear and convincing evidence. *See* Board Rule 11.6; *In re Carter*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence" is more than a preponderance of the evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established" (citation omitted)).

The Hearing Committee found that testimony by many of the witnesses was credible and truthful. The Hearing Committee, however, found that portions of Respondent's testimony lacked credibility or was intentionally dishonest for the reasons discussed herein, and because his testimony was contradicted by his testimony in associated litigation in Maryland courts, or other evidence in the record. Where testimony is inconsistent or contradicted by other testimony of that same witness, between different witnesses, or between witnesses and exhibits, the Hearing Committee has taken into account the context, motivation, and supporting evidence to give appropriate weight to one piece of evidence or testimony over another.

A. Background

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on May 9, 2008, and assigned Bar

number 980884. DCX 1; Answer to Amended Specification at 1 (incorporating Answer to Specification at 1 ¶ 2).

2. Respondent is also a member of the Bar of Maryland and is licensed to practice before U.S. military courts. He maintains his only and principal place of business in an office in Maryland and, for the time relevant to this proceeding, was a partner in the Maryland law firm of Matthews, Owens & Associates. His civilian (i.e., non-military) law practice is primarily in Maryland, and he seldom appears in the District of Columbia courts. Tr. 258, 261, 270-71, 273-75, 429 (Respondent); *see, e.g.*, DCX 5 at 6 (showing letterhead of Matthews, Owens & Associates).

3. Respondent joined the Army out of high school in 1988 and resigned from active duty in 1995, after which he went to and graduated from law school. Tr. 259, 261. Thereafter, he returned to active duty in the Army as an attorney in its Judge Advocate General's ("JAG") Corps, while also serving in the Army reserves. Throughout the time relevant to this matter, Respondent was an officer in the JAG Corps Reserves, which required a number of deployments of various lengths. *See* Tr. 259-271 (Respondent); *see also* Tr. 191-93 (Webster). He retired from the Army in 2022. Tr. 269 (Respondent).

4. Respondent almost exclusively represents clients on a flat fee basis. Tr. 434, 605 (Respondent). In testimony given in connection with state litigation in Maryland related to his representation of Mr. Joselson, which is the subject of this proceeding, Respondent confirmed, "I don't do hourly." DCX 27 at 66-67. He also made it clear to the Hearing Committee that he did not even know how to do hourly

billing ("I didn't, quite frankly, know how to bill [hourly], and I never really tried to learn . . . ." Tr. 605 (Respondent)).

5. Respondent "regularly do[es] not keep time records" (Tr. 445 (Respondent)) and employs no milestones or other criteria for determining at what stage of a representation he has earned a portion of a flat fee. Tr. 443-454, 650-51 (Respondent).

6. In a circumstance in which a flat fee representation ended before all of the anticipated work was completed, Respondent, together with his law partner, would make what they considered a "reasonable refund" of fees to the client. Tr. 443-450 (Respondent). Respondent understood this procedure to be in line with the guidance given him informally by the Maryland Bar. Tr. 443-45, 450-53, 606-610 (Respondent).

7. The only exceptions to Respondent billing a flat fee, prior to the Joselson matter, were cases the State of Maryland assigned to him for which he was expected to bill on an hourly basis. Respondent never billed those cases because he did not know how to bill on an hourly basis and he enjoyed providing legal assistance to some people without charging for his time. Tr. 603-05 (Respondent).

B. Respondent's Representation of Yuri Joselson

8. Yuri Joselson is a naturalized United States citizen, originally from Ukraine. Tr. 33 (Joselson); Answer to Amended Specification at 1 (incorporating Answer to Specification at 1 ¶ 3). At the time that he retained Respondent, Mr. Joselson needed a security clearance from the Department of Defense. Tr. 33-34

(Joselson). After an investigation, Mr. Joselson received a Statement of Reasons ("SOR") referring his security clearance request to be heard by the Defense Department Defense Office of Hearings and Appeals ("DOHA") before an Administrative Judge to determine whether it was "clearly consistent with the national interest" to grant Mr. Joselson a clearance. RX 52 at 1 (under seal); *see* DCX 5 at 3. Originally, the hearing was scheduled for March 7, 2017, though it was subsequently rescheduled to a later date. Tr. 300-01 (Respondent); DCX 14 at 2.

9. The DOHA Department Counsel offered to have the hearing in New York, near Mr. Joselson's residence. Respondent informed Department Counsel on May 4, 2017, that Mr. Joselson requested to appear at a DOHA hearing in "dc." RX 123 at 37-38.

10. DOHA staff made clear that a DOHA hearing in the Washington, D.C. area would be at the DOHA offices in Arlington, Virginia. RX 92. Both Respondent and Mr. Joselson understood that any DOHA hearing in the "Washington, D.C. area" would physically occur in Arlington, Virginia. Tr. 752-53, 760-61, 784-85 (Respondent); Tr. 811-12 (Joselson).

11. On February 25, 2017, after exchanging drafts of an engagement letter, Mr. Joselson retained Respondent to represent him in the security clearance proceeding at DOHA for "a fee of $4,000.00," and they executed an Agreement for Engagement of Legal Services (the "Agreement"). DCX 5 at 6; *see* RX 123 at 1-4. The Agreement stated that "[t]he fee covers all services and expenses of the firm working on Client's behalf." DCX 5 at 6.

12. Mr. Joselson terminated Respondent's representation of him by email on October 5, 2017. DCX 5 at 41-43.

13. Mr. Joselson hired a new lawyer, Alan Edmunds, who represented Mr. Joselson at his DOHA hearing in Arlington, Virginia. Tr. 809-812 (Joselson); RX 50.

14. After Mr. Joselson retained Mr. Edmunds, Mr. Joselson asked Respondent to send to Mr. Edmunds Mr. Joselson's client file, which Respondent arranged to have sent to Mr. Edmunds's law firm. RX 83; RX 84; RX 125; Tr. 68 (Joselson); Tr. 371-72 (Respondent); Tr. 849-857 (Marks). Mr. Edmunds never received that package (Tr. 803-804 (Joselson)), but obtained a copy of the file directly from DOHA. DCX 9.

15. Mr. Joselson, represented by Mr. Edmunds, participated in a DOHA hearing before an Administrative Judge on December 12, 2017, in Arlington, Virginia. RX 92; Tr. 806-07, 810-11 (Joselson). The DOHA Administrative Judge found that it was "clearly consistent with the national interest" to grant Mr. Joselson a security clearance, and Mr. Joselson subsequently received a security clearance. DCX 8 at 43-46; Tr. 67 (Joselson).

16. Upon terminating his engagement of Respondent, Mr. Joselson requested a full refund of his $4,000 payment to Respondent arguing that Respondent had not done any useful work on his behalf. DCX 5 at 42-47; Tr. 61-62 (Joselson). Mr. Joselson also requested an accounting of the work Respondent had done for any amount of the fee Respondent intended to keep. Amended

Specification of Charges at 5 ¶ 23; Answer to Amended Specification at 1 (incorporating Answer to Specification at 2 ¶ 24 ("Respondent admits the allegations of Paragraph 23 of the Specification of Charges.")). Respondent initially informed Mr. Joselson that he would not give him any refund of his fee. DCX 27 at 88. Three months after Mr. Joselson terminated the Agreement, on or about January 19, 2018, Respondent refunded to Mr. Joselson $2,000 of the $4,000 Mr. Joselson had paid Respondent. DCX 8 at 48; Tr. 62-63 (Joselson).

17. Mr. Joselson filed a request for arbitration with the Arbitration Panel of the Committee on the Resolution of Fee Disputes of the Maryland State Bar Association, asking for a refund from Respondent of the remaining $2,000 of the $4,000 fee Mr. Joselson had paid to Respondent. DCX 13; Tr. 69-70 (Joselson); Tr. 128-130 (Webster); *see* DCX 14. The arbitration took place in Maryland on November 8, 2018, after which the arbitrator concluded Respondent had earned only $250 of the $4,000 fee paid by Mr. Joselson. DCX 14. Respondent was on military orders at the time (Tr. 367-68 (Respondent)) and did not participate in the arbitration proceeding (Tr. 132-33 (Webster)). The arbitrator ordered Respondent to refund an additional $1,750 to Mr. Joselson. DCX 14; Tr. 133-36 (Webster).

18. On January 14, 2019, Mr. Joselson sued Respondent for the payment of the arbitration award in the District Court of Maryland for Howard County. DCX 16; DCX 17; Tr. 137-39 (Webster). On July 14, 2019, Respondent filed a counterclaim against Mr. Joselson seeking the return of the $2,000 Respondent had previously refunded to Mr. Joselson. DCX 21; Tr. 144-45 (Webster). After a trial

on July 15, 2019, the District Court judge entered a judgment in favor of Mr. Joselson for $1,750 (on top of the $2,000 previously refunded) and dismissed Respondent's counterclaim as untimely filed. DCX 22 at 39-40; DCX 23; Tr. 145-46, 150-51 (Webster).

19. On July 17, 2019, Respondent filed a Notice of Appeal for a *de novo* trial in Maryland Circuit Court. DCX 24; Tr. 151-52 (Webster). The *de novo* trial was held on December 3, 2019 (Tr. 153-56 (Webster); DCX 25 at 3).

20. Respondent testified at length about the Joselson matter in the December 3, 2019, trial in Maryland. *See generally* DCX 27. Respondent testified in the Maryland proceeding that his Agreement with Mr. Joselson was a flat fee agreement. DCX 27 at 12, 85. Respondent also testified that he would not have entered into an agreement with Mr. Joselson to charge an hourly fee. DCX 27 at 67-68, 87-88. Respondent admitted that he had no hourly records of his work on the Joselson matter. DCX 27 at 87 ("I do not. I do not have anything in writing, and [Joselson] was explained of that in the beginning of the process that I do not keep an accounting."); *see also* DCX 27 at 83-84. On December 5, 2019, the Circuit Court entered judgment in favor of Mr. Joselson for $1,750. DCX 28; Tr. 157 (Webster).

21. On January 6, 2020, Mr. Joselson filed in the Circuit Court of Maryland for Howard County a Request for Writ of Garnishment for the award of $1,750 plus costs and interest. DCX 31. That same day, Respondent's law partner issued a $1,750 check to Mr. Joselson to satisfy the judgment. DCX 32; Tr. 163 (Webster).

i. Respondent's Alleged Misappropriation of Funds

22. Ms. Matinpour, an investigative attorney at the Office of Disciplinary Counsel, prepared an analysis of Respondent's law firm's IOLTA bank records. Tr. 100-01, 104-05 (Matinpour); *See* DCX 34. That analysis showed that, when Respondent's law firm, on May 18, 2017, withdrew $6,000 from its IOLTA account and transferred it to the firm's Operating Account, a total of $200 remained in the IOLTA account. DCX 34.

23. As discussed below, although that is not apparent from the records provided by Respondent to Disciplinary Counsel (FF 141-142, 144), Respondent has testified that all of the $4,000 fee paid by Mr. Joselson was included within the $6,000 withdrawn from the IOLTA account. FF 40, 140. The Committee has no basis for doubting this representation in the absence of any records supporting or contradicting Respondent's testimony.

24. When Mr. Joselson's full $4,000 retainer was withdrawn from the IOLTA account in May 2017, Respondent had not earned all of those fees because Respondent had not completed all of the work contemplated by the Agreement. FF 27, 43.

25. As also discussed below, FF 62-63, Disciplinary Counsel has proved by clear and convincing evidence that the Agreement was a flat fee agreement and the refund provisions of the Agreement had no application in May 2017, when Mr. Joselson's full $4,000 retainer was withdrawn from the IOLTA account.

26. Respondent recognized that, if the Agreement was for a flat fee, he would not have been entitled to take Mr. Joselson's full fee in May because he had not completed the representation or performed all of the work required by the Agreement at that time. Tr. 446 (Respondent) ("[I]f this was a flat-fee case, I would have given a reasonable refund based upon the fact that I am not doing -- I'm not doing the -- the hearing.").

27. As of May 18, 2017, when Respondent took all of Mr. Joselson's fee, he had not yet rescheduled the date of the hearing to December 2017 or prepared Mr. Joselson for the hearing; nor had he performed the key part of the representation: representing Mr. Joselson at the DOHA hearing. *See* Tr. 838 (Joselson); FF 80, 88. Indeed, the matter was in its early stages on May 18, 2017. The DOHA hearing did not take place until December 2017. FF 15.

28. The Hearing Committee finds that Disciplinary Counsel has proved by clear and convincing evidence that a significant portion of the $4,000 flat fee paid by Mr. Joselson remained unearned by Respondent at the time the full fee was withdrawn from the IOLTA account on May 18, 2017.

29. Therefore, the Hearing Committee finds that Disciplinary Counsel has proved by clear and convincing evidence that Respondent, acting through his law firm, misappropriated Mr. Joselson's funds on May 18, 2017.

ii. <u>The Agreement Between Respondent and Mr. Joselson</u>

30. In the course of being retained by Mr. Joselson, Respondent proposed to Mr. Joselson the "standard flat-fee agreement" that Respondent sends to all of his

clients and uses in all of his cases. Tr. 287, 434-35 (Respondent). Respondent's understanding was that, in a flat fee arrangement with a client, there are "guideposts" so that, while he could keep the entire fee in trust, he also could take out portions of the fee as they were earned during the course of the representation. Tr. 289 (Respondent).

31. Mr. Joselson requested changes to the proposed engagement letter. He suggested language to set out Respondent's responsibilities to Mr. Joselson and to outline what would occur should either party terminate the engagement before completion of the representation. DCX 5 at 6; RX 123 at 1-13; Tr. 287, 441-42 (Respondent); Tr. 36, 799 (Joselson).

32. Mr. Joselson sought to make clear in the engagement letter that Respondent would represent him through the DOHA hearing and would prepare him for the hearing. Tr. 36, 38-39, 800 (Joselson).

33. To that end, Mr. Joselson proposed and Respondent agreed to the following language in the engagement letter:

> I hereby engage the services of Mathews, Owens & Associates (firm) to represent Yuri Joselson before DOHA: the DoD's Department of Hearings and Appeals [sic] to assist Client with his security clearance for a **maximum** attorney fee of four thousand dollars ($4,000).
>
> Client engages the Firm, any of the Attorneys or paralegals of the firm may work on the litigation. The Firm will prepare all the necessary materials and witnesses for the hearing. Joseph Michael Owens will represent Client at the hearing personally.

> Client will pay a fee of $4,000.00. The fee covers all services and expenses of the Firm working on Client's behalf. Client agrees to travel [to] Northern Virginia, Maryland, or Washington, DC for the hearing. The Firm has the obligation to complete the engagement, absent good cause for withdrawal, once the fee is paid.

DCX 5 at 6 (emphasis in the original).

34. Mr. Joselson also sought to include language in the engagement letter that would set out what happened if either party terminated the Agreement before all of the contemplated work was completed. Tr. 800-03 (Joselson). Mr. Joselson wanted to insert language in the engagement letter to protect himself "in case something falls apart and [Respondent] performed some work . . . he would be partially compensated for the work he has already . . . done." Tr. 802 (Joselson).

35. Therefore, Mr. Joselson proposed and Respondent agreed to the following language in the engagement letter:

> The Client has the right to terminate the Firm's engagement at any time. In the event that the engagement is terminated by the Firm or by Client prior to the completion of the engagement, then the Firm shall provide an appropriate refund. Refund will consist of original payment minus an appropriate deduction for work performed, at the hourly rate of $250 for legal services performed by councel [sic], $100 performed by paralegals, and $30 performed by clerks and secretaries.

DCX 5 at 6.

36. Respondent and Mr. Joselson executed the Agreement, containing these provisions among others, on February 25, 2017. *Id.*

37. The Agreement required Respondent to, *inter alia,* "prepare all the necessary materials and witnesses for the hearing" and "represent [Mr. Joselson] at

the hearing personally." *Id.* The $4,000 fee, paid in advance by Mr. Joselson, "cover[ed] all services and expenses" in connection with the representation. *Id.*

38. Mr. Joselson paid Respondent's law firm $4,000, by check dated February 25, 2017. DCX 5 at 7. On March 16, 2017, Respondent's law firm deposited the $4,000 in the firm's IOLTA trust account. *Id.*; DCX 10 at 2; DCX 11; DCX 34; Tr. 103-04 (Matinpour).

39. Respondent was a partner in his law firm, and he believed that he was a signatory on the firm's IOLTA trust account. Tr. 465 (Respondent).

40. On May 18, 2017, Respondent's law firm (acting through Respondent's law partner after she consulted with Respondent) withdrew $6,000 from the firm's IOLTA account, leaving a balance of $200 in the trust account. DCX 10 at 10; DCX 34; Tr. 652-53, 658-660 (Respondent). The firm always left a minimum of $200 in the IOLTA account, so that $200 did not include any portion of Mr. Joselson's retainer. Tr. 657-58 (Respondent). Respondent admitted that the $4,000 fee paid by Mr. Joselson was included within the $6,000 withdrawn from the IOLTA account on May 18, 2017. Tr. 658-59 (Respondent); RX 128.

41. Before Respondent's law partner withdrew Mr. Joselson's full fee from the IOLTA account on May 18, 2017, she consulted with Respondent, who told her he had worked at least sixteen hours on the Joselson matter. Tr. 508-510 (Respondent).

42. The $6,000 withdrawn from the IOLTA account was deposited in the law firm's operating account. DCX 12 at 2; DCX 34; Tr. 105 (Matinpour). The

next day, the law firm transferred $6,620.97 from its operating account to pay a personal credit card account belonging to either Respondent or his wife. DCX 12 at 2; DCX 34; DCX 35; Tr. 105 (Matinpour); Tr. 476-77 (Respondent).

43. At the time Respondent's law partner removed the full fee paid by Mr. Joselson from the IOLTA account in May 2017, Respondent had filed his appearance and had expressed to DOHA Mr. Joselson's desire to have the hearing in the Washington, D.C. area. DCX 7 at 6, 19-20. In addition, Respondent had spoken with Mr. Joselson some number of times. RX 122; *see* Tr. 64-66 (Joselson). However, Respondent, had not drafted or filed any substantive pleadings, prepared Mr. Joselson or any other witnesses for the DOHA hearing, or represented Mr. Joselson at the DOHA hearing. Tr. 63-64, 838 (Joselson).

44. Mr. Joselson terminated the Agreement on October 5, 2017, nearly five months after Respondent's firm withdrew Mr. Joselson's fee from its IOLTA trust account. FF 12, 40.

iii. The Nature of the Fee Set Out in the Agreement

45. Mr. Joselson understood the Agreement to be a "fixed-fee" agreement in which he paid Respondent a "set amount of money, and [Respondent] takes whatever it takes to bring me up to speed on the process and defend me against DOHA." Tr. 801-02 (Joselson). Respondent did not agree with Mr. Joselson about any milestones, including accumulated hours, by which Respondent would have "earned" portions of the flat or "fixed" fee. Tr. 646-47 (Respondent).

46. Mr. Joselson added the refund language relating to hourly fees "in case something falls apart and [Respondent] performed some work or his office performed some work, he would be partially compensated for the work [that] has already been done." Tr. 802 (Joselson).

47. Both Respondent and Mr. Joselson understood that the addition of Mr. Joselson's hourly rate language, concerning the calculation of a refund "[i]n the event that the engagement is terminated by the Firm or by Client prior to the completion of the engagement," (DCX 5 at 6), did not convert the Agreement into an hourly fee agreement. Tr. 801-02 (Joselson); Answer to Amended Specification at 1 (incorporating Answer to Specification at 1 ¶ 5 ("Respondent admits . . . that Mr. Joselson entered into a flat fee agreement with Respondent . . . .")); *see* Tr. 636-646 (Respondent).

48. Respondent's law partner later characterized the Agreement as an "hourly [fee agreement] with a maximum fee of four thousand dollars ($4,000.00)" (RX 128).

49. Prior to his testimony before the Hearing Committee, Respondent testified unequivocally in the Maryland proceedings that the Agreement with Mr. Joselson was a flat fee agreement. For example, in his testimony in the Circuit Court for Howard County, Maryland, Respondent referred to the Agreement as being for a "flat fee." DCX 22 at 72; *see also, e.g.*, DCX 27 at 12 ("Yes, I was hired for a flat fee of $4,000 to participate in a security matter"); DCX 27 at 84-85 ("Q[uestion]: . . . It indicates it is a flat fee of $4,000, right? [Respondent:] Correct."); DCX 27 at

87-88 ("If he wanted me to charge an hourly rate . . . I wouldn't have. I wouldn't have done it."); DCX 27 at 57 ("I told [Mr. Joselson] I do a flat-fee contract. . . . I sent my boilerplate contract to him initially, and he called me and he wanted some . . . he wanted some clarification language in there -- but the clarification language is the same stuff that we had already talked about."); DCX 27 at 106 (counsel for Respondent argues to Maryland court that Respondent's firm charged Mr. Joselson a flat fee). Similarly, in the hearing before the District Court of Maryland for Howard County, Respondent referred to the Agreement as being for a "flat fee." DCX 22 at 72.

50. Nonetheless, in May 2017, Respondent, and his law firm, decided to compensate themselves for the first sixteen hours of work Respondent claimed he had performed for Mr. Joselson, at the rate of $250 per hour, early in the representation and before completing significant portions of the legal work contemplated to be performed under the Agreement. As a result, Respondent's law firm withdrew from the trust fund an amount that included the entire $4,000 fee well before all the work contemplated by the Agreement was performed. FF 22-24.

51. In contrast to his earlier testimony in the Maryland litigation that the Agreement for a flat fee, Respondent asserted to the Hearing Committee that the Agreement allowed Respondent to withdraw from the trust account the entire $4,000 fee after he claimed to have worked "at least" sixteen hours for Mr. Joselson. Tr. 653 (Respondent); *see* Tr. 289-290 (Respondent). Respondent claimed that, for each hour he worked for Mr. Joselson, he had "earn[ed]" and could withdraw $250 from

the fee deposited in the IOLTA trust fund. Tr. 289-290 (Respondent). According to Respondent, "once I worked for 16 hours, the fee is earned," (Tr. 476 (Respondent)), even if the matter was only in its early stages. Tr. 475-76.

52. A plain reading of the Agreement supports Mr. Joselson's understanding of the terms of the Agreement, not Respondent's. The provision of an hourly rate of $250 per hour for Respondent's time applies only in one circumstance: "*In the event that the engagement is terminated by the Firm or by Client prior to the completion of the engagement*, then [Respondent] shall provide an appropriate refund" from the $4,000 fee paid by Mr. Joselson. DCX 5 at 6 (emphasis added); FF 34-35. Only in that event does the Agreement provide an hourly rate for Respondent's time to be calculated in determining the amount to be refunded to Mr. Joselson. DCX 5 at 6

53. Respondent had the same understanding of the terms of the Agreement as Mr. Joselson – that it was a flat fee agreement – when he testified before the Maryland courts. *See* FF 20, 47-49. It was only later, when Respondent was confronted with the Specification, including a charge of misappropriation of funds for taking Mr. Joselson's full fee in May 2017, that Respondent vehemently rejected the contention it was a "flat fee" agreement. Respondent's Brief at 31; *but see* Answer to Amended Specification at 1 (incorporating Answer to Specification at 1 ¶ 5 ("Respondent admits . . . that Mr. Joselson entered into a flat fee agreement with Respondent . . . .")). Before the Hearing Committee Respondent argued, instead, that the refund language added by Mr. Joselson converted the Agreement to what he

called a "hybrid" fee agreement. Tr. 632 (Respondent); Respondent's Brief at 1, 5 *et seq*.; Respondent's Surreply at 1-2. Under Respondent's newly-formed interpretation, he claimed he had earned Mr. Joselson's full fee after the first sixteen hours of claimed work on an hourly rate basis (at $250 per hour). *E.g.*, Tr. 476 (Respondent). According to Respondent, once he had worked sixteen hours on Mr. Joselson's behalf, any additional work he performed for Mr. Joselson was for "free." Tr. 475-76 (Respondent).

54. The Hearing Committee finds that there is no reasonable reading of the Agreement under which Respondent would be compensated at the rate of $250 per hour during the representation. The hourly-rate-based refund provision, by its own terms, applied only "[i]n the event that the engagement is terminated by the Firm or by Client prior to the completion of the engagement." DCX 5 at 6. After such termination of the Agreement, the $250 per hour rate applied solely for the purpose of calculating the refund that Respondent owed to Mr. Joselson as a result of the premature termination of the representation. The refund provision of the Agreement had no application during the ongoing representation of Mr. Joselson. More specifically, it certainly had no application on May 18, 2017, in the early months of Respondent's representation of Mr. Joselson, when Respondent took all of Mr. Joselson's fee, more than four months before the termination of the Agreement in October 2017. *See* FF 44.

55. The Hearing Committee finds Respondent's claim and testimony that the Agreement with Mr. Joselson was a "hybrid" fee agreement under which

Respondent earned the full fee on an hourly basis after allegedly working sixteen hours neither persuasive nor credible, and directly contradicted by Respondent's testimony in the earlier Maryland litigation. The Agreement provided for a flat fee of $4,000, which required Respondent to perform all of his obligations under the Agreement before earning the full fee. Respondent himself admitted before the Maryland courts that the Agreement was a flat fee agreement. *See* FF 47-49. Indeed, Respondent gave unequivocal testimony before the Maryland Circuit Court that the Agreement was a flat fee agreement. *See, e.g.*, DCX 27 at 12, 57, 87-88; FF 49. The refund provision of the Agreement, which applied only in the event the representation was terminated prematurely, did not convert a flat fee agreement into an hourly rate agreement in May 2017.

56. The Hearing Committee concludes that Respondent's defensive use of the term "hybrid agreement" stemmed solely from Respondent's creative advocacy, not the evidence presented to the Hearing Committee. *See, e.g.*, Respondent's Brief at 1; Tr. 641 (Respondent). "Hybrid agreement" is not a term found in common parlance when referring to lawyer fee agreements. *See* Rule 1.5, cmt. [1] ("It is sufficient . . . to state that the basic rate [for legal services] is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee.").

57. Furthermore, the Hearing Committee does not find credible Respondent's testimony at the hearing that the flat fee agreement originally proposed by Respondent somehow became a "hybrid agreement" by the addition of Mr.

Joselson's refund language. *See* FF 51, 53. Mr. Joselson's proposed language, adopted by Respondent and inserted into the Agreement, merely provided a means of calculating the refund due Mr. Joselson only if and when the Agreement was prematurely terminated; it did not apply to the fee arrangement contemplated by the Agreement while the representation was occurring.

58. Throughout the long history of Respondent's relationship with Mr. Joselson, including litigation in three different Maryland forums pertaining to the Agreement, the term "hybrid agreement" does not appear anywhere except in Respondent's testimony before the Hearing Committee in this proceeding and Respondent's briefs to the Hearing Committee.

59. At the hearing, Respondent admitted that, if the Agreement was for a flat fee, he was not entitled to take Mr. Joselson's full fee in May 2017 because he did not complete all the work required by the Agreement (including preparing for and representing Mr. Joselson at the DOHA hearing). FF 26. Indeed, Respondent admitted at the hearing that, "if this was a flat-fee case, I would have given a reasonable refund based upon the fact that I am not doing -- I'm not doing the -- the hearing." Tr. 446 (Respondent).

60. Similarly, Respondent admitted in his testimony before the Maryland Circuit Court that Mr. Joselson was "entitled to something back" because Respondent did not complete his work on the matter and did not represent Mr. Joselson at the DOHA hearing. DCX 27 at 79.

61. When Mr. Joselson demanded a refund of his fees from Respondent after terminating the representation, Respondent initially denied the request but later refunded to Mr. Joselson $2,000 of the $4,000 fee. FF 16. Mr. Joselson had to seek arbitration and file litigation to obtain the arbitration award before recovering from Respondent all but $250 of the remaining fee. FF 17-21.

62. In his Brief at 5, Respondent contests Disciplinary Counsel's characterization of the Agreement as a flat fee agreement by stating that he specifically stated to Mr. Joselson, in an email that is not part of the record evidence in this matter:

> I have no problem with the amendment to the contract, with the exception of flat fees. They are not allowed in Maryland. This simply means is that I cannot keep an entire fee if the matter is resolved [sic] favorably without a board or you otherwise discharge me. The word 'flat' needs to be removed. *Ibid*.

The Hearing Committee finds that this argument is not credible or convincing in light of Respondent's own repeated testimony in the Maryland proceeding that the Agreement was a flat fee agreement and Respondent's admitted use of flat fee agreements in virtually all of his engagements. FF 4-7, 47-49, 53.

63. The Hearing Committee finds that Disciplinary Counsel has proved by clear and convincing evidence that the Agreement was a flat fee agreement, which also provided for a formula for calculating the sum to be refunded to Mr. Joselson if and only if the Agreement was terminated before the representation contemplated by the Agreement was completed.

iv. <u>The Hours Respondent Spent on Mr. Joselson's Matter</u>

64. Both Respondent and Disciplinary Counsel spent considerable effort during the hearing and in their exhibits and briefs presenting evidence seeking to prove or disprove that Respondent actually spent at least sixteen hours working on Mr. Joselson's behalf before his law firm withdrew Mr. Joselson's $4,000 from its IOLTA account. *See, e.g.*, Tr. 40-43, 63-66 (Joselson); Tr. 300-360 (Respondent); Respondent's Brief at 7-17; Disciplinary Counsel's Brief at 5-9.

65. Mr. Joselson testified that many of his contacts with Respondent had been unsuccessful or non-substantive, and that Respondent had failed to respond to Mr. Joselson's inquiries. *E.g.*, Tr. 58-66 (Joselson). Mr. Joselson also testified that Respondent did not seem to have read Mr. Joselson's materials. Tr. 41-42 (Joselson). Disciplinary Counsel introduced evidence that by May 18, 2017, Respondent had spoken to Mr. Joselson by telephone only eight times, and had exchanged a few emails with opposing counsel regarding his appearance and the location for the hearing. Disciplinary Counsel's Brief at 5 (citing DCX 7 at 6, 19-20; RX 122).

66. In response, Respondent testified that he had worked "at a minimum 17 [hours]." Tr. 357 (Respondent). Respondent's testimony on this subject, however, was not credible for several reasons.

67. First, Respondent kept no time records of his work on the Joselson matter. FF 129; Tr. 445 (Respondent). As a result, there is no documentary evidence, and no contemporaneous evidence, that supports Respondent's testimony.

68. Second, Respondent admitted that he did not know how to do hourly billing. Tr. 605 (Respondent) ("I didn't, quite frankly, know how to bill [hourly], and I never really tried to learn . . . ."). Indeed, Respondent's practice almost exclusively involved flat fee billing. FF 4-7. By testifying that he does not know how to bill on an hourly basis, Respondent disqualified himself as a witness on the subject of the number of billable hours he allegedly worked on the Joselson matter.

69. Third, Respondent's testimony before the Hearing Committee concerning the work he performed on the Joselson matter was inconsistent with his testimony before the Maryland courts.

70. For example, before the Hearing Committee, Respondent testified that he had included in his time estimation a conversation with Charles Hale, the government representative in Mr. Joselson's case. Tr. 301-04 (Respondent). Respondent testified that he contacted Mr. Hale "to get the case postponed." Tr. 302 (Respondent). He also testified that "I talked to Mr. Hale, told him I'm just getting on the case," and "we got a continuance." Tr. 304 (Respondent). Respondent testified before Hearing Committee that he understood that his conversation with Mr. Hale "can be billable hours, yes." *Id.*

71. Respondent's testimony at the hearing was directly contradicted by his testimony before the Maryland courts. Respondent testified in the Maryland Circuit Court that his conversation with Mr. Hale involved, *inter alia*, "other cases that we had tried together," "his life in the department of hearing examiners," "my life since I left private practice," and "all sorts of things," as well as the Joselson case. DCX 27

at 65-66. Respondent testified in the Maryland Circuit Court that "it was a pleasant conversation, but very little of it had to do with discovery or scheduling." DCX 27 at 66. Significantly, Respondent conceded in the Maryland District Court: "*There's no way that I would bill somebody for that conversation* . . . . I can't bill -- I can't bill hourly." DCX 22 at 95 (emphasis added).

72. Similarly, Respondent testified before the Hearing Committee that, at the "very beginning of the representation" he spent "at least" thirty minutes to an hour at Wells Fargo bank asking questions of bank representatives on Mr. Joselson's behalf (Tr. 338-340 (Respondent)), presumably included within the "at least" sixteen hours of alleged billable work. But Respondent testified in the Maryland proceeding that while he was at the bank

> for probably an hour and a half. . . . [D]uring that hour and a half I also deposited some checks and I also waited for [the bank representative] to have an opportunity to meet with me. And during that hour and a half I probably had my computer with me -- I don't know, either had my computer or a magazine, so I was either reading or doing other work. *I'm not going to bill somebody for that, and that's why I don't do hourly*.

DCX 27 at 67 (emphasis added). Thus, before the Hearing Committee, Respondent portrayed his time at Wells Fargo as billable work on behalf of Mr. Joselson, he conversely admitted to the Maryland Circuit Court that he would not bill for that time, which was largely spent on other matters.

73. Respondent also testified before the Hearing Committee that he spoke with colleague Jonathan Crisp in his office about the Joselson matter, and that this conversation was billable time. Tr. 354-55 (Respondent). But in the Maryland

Circuit Court Respondent testified that his conversation with Mr. Crisp was "also a conversation about Eagles football, and it was also a conversation about Phillies baseball." DCX 27 at 71.

74. Respondent also testified before the Hearing Committee that he spent several hours over the course of two nights reviewing a packet of materials from Mr. Joselson at the beginning of the representation. Tr. 319 (Respondent). But Respondent also admitted that, on at least one of the two nights, he had a "game" on television as he was looking at the documents. Tr. 317 (Respondent).

75. The Maryland courts concluded in two trials that Respondent could only be credited with one hour of time worked on Mr. Joselson's behalf and required Respondent to refund to Mr. Joselson all but $250 of the fee Mr. Joselson had paid to Respondent. FF 18-20. Disciplinary Counsel does not claim the Maryland proceedings are *res judicata* in this matter, in part because of the different standard of proof in the different forums. Tr. 988-89 (Disciplinary Counsel). Nevertheless, the Maryland court decisions have probative value.

76. Respondent gave intentionally false testimony before the Hearing Committee about the Maryland court proceedings in an effort to explain away the Maryland courts' decisions. Respondent testified that the Maryland courts awarded $1,750 of the remaining $2,000 of Mr. Joselson's retainer because Respondent did not testify in the Maryland proceedings about the work he performed for Mr. Joselson. Tr. 477 (Respondent) ("Q[uestion]: And you testified that you did not present this evidence to the District Court o[f] -- Maryland in the fee dispute

proceeding or to the Circuit Court of Maryland in the fee dispute – A[nswer]: It was not presented, no, sir."). Indeed, Respondent went so far as to testify that his counsel in the Maryland Circuit Court proceeding, Tara Ross (DCX 27 at 1), never asked him about his work on the Joselson matter: "Ms. Ross did not ask any of the pertinent questions, and she's apologized to me profusely since, but it is what it is, and her apology has been accepted." Tr. 479 (Respondent); *see also* Tr. 487 (Respondent) ("Q[uestion]: So during that proceeding, did you present evidence or attempt to prove that you had earned all $4,000 of Mr. Joselson's fee? A[nswer]: No. As I said earlier, my counsel did not ask any questions in reference to what I had done."). Through this testimony, Respondent sought to explain the Maryland courts' adverse rulings against him by claiming that the evidence concerning his work on the Joselson matter was never presented to the Maryland courts.

77. Contrary to Respondent's testimony at the hearing, as Respondent clearly had to know since he was the witness, he was asked questions in the Maryland Circuit Court trial by his counsel, Ms. Ross, about the work he performed on the Joselson matter, and he testified about it at length. *See* DCX 27 at 64-71. Indeed, Respondent asserted on cross-examination in the Maryland Circuit Court:

> The question before this Court is whether I engaged in sixteen hours' worth of services. And if you would like me to answer that question as to when I did sixteen hours' worth of services, I will be happy to do so. *I have done it once already; I will do it again.*

DCX 27 at 93 (emphasis added). Respondent also addressed the work he allegedly performed on the Joselson matter in the District Court trial after the Judge directly asked him about it. DCX 22 at 66-70; *see also* DCX 22 at 94-95. Thus, Respondent

falsely testified to the Hearing Committee when he claimed he had had no opportunity to testify before the Maryland courts about the alleged work he performed on the Joselson matter.

78. In light of the Hearing Committee's finding that the Agreement was for a flat fee as of the time Respondent took Mr. Joselson's full fee in May 2017, the number of hours Respondent allegedly worked on Mr. Joselson's behalf by May 2017 is not determinative of the charge in the Amended Specification that Respondent engaged in misappropriation. As Respondent has admitted, the full amount of the fee was withdrawn from the trust account in May 2017, FF 22-23, well before Respondent had completed much of the legal work contemplated by the Agreement. For example, at the time the fees were withdrawn and used by Respondent to pay off credit card bills, Respondent had not prepared Mr. Joselson for the hearing or represented him at the hearing. FF 43.

79. Respondent's reliance at the hearing on the hours he claims to have spent representing Mr. Joselson, compensated at $250 per hour, rather than the portion of legal services he had earned as of May 2017 under the flat fee Agreement, was contrary to the terms of the Agreement. The hourly charge component of the Agreement became relevant only when the representation was terminated in October 2017 and applied only to the issue of the refund Respondent owed to Mr. Joselson after the termination of the representation. It had no application in May 2017, during the ongoing representation. FF 54-55. Although not substantively relevant to whether Respondent acted contrary to the terms of the Agreement, for the reasons

discussed above, the Hearing Committee finds that Respondent's testimony concerning the "at least" seventeen hours he allegedly worked on Mr. Joselson's behalf by May 2017 was not credible.

C. Respondent's Failure to Communicate with Mr. Joselson

80. As many as five days prior to August 26, 2017, because of issues arising from his mother's health, Mr. Joselson asked Respondent, in a voicemail, to seek a postponement of the DOHA hearing then scheduled for September 20, 2017. DCX 5 at 15; Tr. 43 (Joselson); *see* DCX 14 at 2.

81. On August 26, 2017, Mr. Joselson sent to Respondent an email stating that he had left Respondent a voicemail and repeating his request that Respondent seek a postponement of the DOHA hearing. DCX 5 at 15; Tr. 43-44 (Joselson).

82. On August 30, 2017, Respondent contacted DOHA Department Counsel and the DOHA Administrative Judge seeking an extension of the hearing. DCX 7 at 11.

83. On August 31, 2017, the Administrative Judge replied, asking Respondent to propose alternative dates and asking DOHA Department Counsel whether he opposed the request for a continuance. *Id.*

84. On September 1, 2017, Mr. Joselson emailed Respondent asking whether he had heard back from the Administrative Judge regarding a possible rescheduling of the hearing. DCX 5 at 17. Respondent responded that he had been in communication with the Administrative Judge but that there was "no definitive

answer." *Id.* Respondent stated that he hoped the hearing would occur in December. *Id.*

85. Mr. Joselson interpreted his communications with Respondent as an assurance there would be a postponement of the hearing: "[H]e responded that, 'Everything is good. We just need to figure out when is the -- when will we hold a hearing,' something like that." Tr. 46 (Joselson).

86. On or before September 5, 2017, Mr. Joselson received a certified letter from DOHA stating that the hearing was still scheduled for September 20, 2017, after all. *See* DCX 5 at 18. On September 5, 2017, Mr. Joselson sent an email to a person at DOHA asking: "Did [Respondent] contact your office? Was [the] hearing actually postponed?" DCX 5 at 18.

87. The Administrative Judge assigned to Mr. Joselson's case responded to Mr. Joselson that same day, stating she had not "made a decision on whether to postpone this hearing date yet. I was waiting for [Respondent] to provide me some dates when he and his client, Mr. Joselson, are available." DCX 5 at 19.

88. Also on September 5, 2017, Respondent proposed to the Administrative Judge and Department Counsel dates in December 2017 for the hearing. DCX 7 at 15. The next day the Administrative Judge rescheduled the hearing for December 12, 2017. DCX 7 at 14.

89. Because Mr. Joselson was becoming increasingly concerned about what he considered to be inadequate communications from Respondent, on September 13, 2017, he asked Respondent for copies of all emails Respondent had

sent to and received from DOHA regarding his case. DCX 5 at 20. He also asked Respondent to "copy or blind-copy [Mr. Joselson] on all future correspondence with the DOHA, or forward all the messages to me." *Id.* Mr. Joselson explained: "I assure you that I will not interfere with your representation; I simply would like to stay informed and avoid even a slightest possibility of a mistake." *Id.*

90. Mr. Joselson sent a follow-up email to Respondent three days later with a copy of his September 13, 2017, letter, stating he was "perplexed by your silence. . . . I realize how busy you might be, however this is becoming urgent. Kindly respond at your earliest convenience." *Id.* at 21.

91. On September 16, 2017, Respondent replied, both verbally and in writing that he would not copy Mr. Joselson on his communications with the Administrative Judge or DOHA Department Counsel. *See id.* at 22; Tr. 522 (Respondent). Respondent told Mr. Joselson that he would keep him "informed of the information [he] need[ed]." DCX 5 at 22.

92. On September 21, 2017, Mr. Joselson sent Respondent another written request to be copied on all correspondence pertaining to his case. In that letter, Mr. Joselson elaborated on a number of incidents in which he thought Respondent's communications with him had been inadequate or Respondent failed to explain the reasons why Respondent refused to share communications with Mr. Joselson. DCX 5 at 24-25.

93. Respondent responded to Mr. Joselson the same day: "[A]s I stated before I will not cc you on correspondence with the Court. Attorneys do not copy

the client on communications with the Court. It is not illegal, it is simply unprofessional." DCX 5 at 26.

94. Before the Hearing Committee, Respondent elaborated on his position:

> Q[uestion]: Is it your position that a client is not entitled to copies of communications their attorney has sent to the court [and] to opposing counsel or copies of communications the attorney has received from the court [or] opposing counsel?
>
> . . . .
>
> A[nswer]: I would say this. I would say no. . . .
>
> . . . .
>
> A[nswer]: Sir, communications between myself and the court don't belong to the client. Communications between myself and the court are communications between me and the court.

Tr. 522-26 (Respondent).

95. Respondent's own witness, Dr. Seamone, who had worked with Respondent on military matters (Tr. 887-88 (Seamone)), did not follow Respondent's practice. Dr. Seamone does not copy his clients on his correspondence with the court or opposing counsel, but he does provide to his clients copies of all of his communications with opposing counsel or the court, after extracting privacy information or information he could not share because of an order of the court. Tr. 901-06 (Seamone).

96. Respondent argues he cannot share emails, either by blind copying Mr. Joselson or by sending him copies of correspondence after the fact, because there were "dangers" of having Mr. Joselson communicating with the tribunal or opposing counsel. Respondent's Brief at 14. Respondent's view is that "he would never have

a client communicate directly with any Court, and his concerns were elevated when dealing with [Mr.] Joselson," and it is "arguably improper ex-parte communication to communicate with a represented party via e-mail as the party initiating the e-mail cannot know whether counsel is viewing the e-mails simultaneously." *Id.* at 15.

97. Respondent also asserts that he engaged in numerous telephone calls and had numerous email exchanges with Mr. Joselson. RX 122; RX 123; Tr. 340-358 (Respondent). Respondent does not have records of certain of the calls he claims he had with Mr. Joselson. Tr. 502-03 (Respondent). Mr. Joselson made numerous telephone calls to Respondent seeking information and guidance, but Respondent failed to provide guidance or direction to assist Mr. Joselson to prepare for the DOHA hearing. Tr. 796-99, 815, 838 (Joselson).

98. On September 21, 2017, Mr. Joselson emailed to Respondent a number of questions Mr. Joselson wanted to discuss with Respondent to prepare for the DOHA hearing. DCX 5 at 38. After some effort by Mr. Joselson to try to obtain answers to his questions from Respondent (*see* DCX 5 at 36-39; Tr. 60-61 (Joselson)), Mr. Joselson concluded that Respondent had failed to be responsive. DCX 5 at 42.

99. By email of October 5, 2017, Mr. Joselson terminated the engagement with Respondent, stating: "It became more than apparent to me that you are either not willing or not able to handle my case. . . . I no longer trust that you are qualified to represent me," and "You systematically ignored my messages. You misstated

facts to me on multiple occasions. You failed to inform me of the developments of my case." DCX 5 at 41-42.

100. The Hearing Committee finds credible Mr. Joselson's testimony that Respondent failed to fulfill Mr. Joselson's reasonable expectations for information consistent with Respondent's duty to act in Mr. Joselson's best interests and Mr. Joselson's overall requirements and objectives as to the character of the representation. Mr. Joselson made numerous efforts to obtain information from Respondent to which, in Mr. Joselson's view, Respondent failed to respond. FF 98. Respondent categorically refused to provide or forward to Mr. Joselson copies of communications between Respondent and the DOHA Administrative Judge or opposing counsel, despite Mr. Joselson's repeated and reasonable requests for that information. FF 89-94. In addition, Respondent falsely represented to Mr. Joselson that he had always responded to the DOHA tribunal within 24 hours (DCX 5 at 26), when, in fact, Respondent failed to respond to the Administrative Judge about rescheduling the hearing for three business days (two of the five days were over a weekend). Tr. 535-36; DCX 5 at 26; DCX 7 at 11, 15.

101. The Hearing Committee concludes, therefore, that Disciplinary Counsel has proved by clear and convincing evidence that Respondent failed to keep Mr. Joselson reasonably informed about the status of the DOHA proceeding and failed to promptly comply with Mr. Joselson's reasonable requests for information.

D. Respondent's Alleged Failure to Convey Mr. Joselson's File to New Counsel

102. The Hearing Committee finds that Disciplinary Counsel has failed to prove by clear and convincing evidence that Respondent failed to turn over to Mr. Joselson's new lawyer, Mr. Edmunds, Respondent's file on Mr. Joselson's case. The evidence provided to the Hearing Committee demonstrated that Respondent made a good-faith effort to provide the file to Mr. Edmunds, although Mr. Edmunds never received it from Respondent. FF 14. Disciplinary Counsel has not argued in favor of this charge. Disciplinary Counsel's Brief at 16 n.3.

E. Respondent's Alleged Misrepresentation and Dishonesty

103. Mr. Joselson formally complained about Respondent's actions as his counsel to the D.C. Office of Disciplinary Counsel and the Attorney Grievance Commission of Maryland, to which complaints Respondent responded. *See generally* RX 63; RX 66; RX 68; RX 69; RX 70; RX 72; Tr. 69 (Joselson).

104. In response to the complaint filed with Maryland, an official of the Office of Bar Counsel for the Attorney Grievance Commission of Maryland informed Mr. Joselson in writing: "there is an insufficient basis to demonstrate misconduct or that the overall circumstances do not warrant an investigation. As such, this file is closed." RX 135 at 1.

105. In response to Mr. Joselson's complaint to the D.C. Office of Disciplinary Counsel, dated January 26, 2018 (DCX 5; DCX 6), Respondent exchanged correspondence with Joseph Bowman, an Assistant Disciplinary Counsel. RX 66; DCX 7.

106. This was followed by a subpoena to Respondent for documents, dated February 25, 2019, from the Board on Professional Responsibility. RX 69; Tr. 110 (Matinpour). In particular, the subpoena requested production of Respondent's firm's IOLTA accounts and other information. *See* RX 69 at 2.

107. Between April 1 and April 5, 2019, Respondent exchanged emails with Mr. Bowman in which Mr. Bowman asked for various information. DCX 33 at 1-4; DCX 36; Tr. 101-02 (Matinpour).

108. On April 3, 2019, Respondent informed Mr. Bowman that Mr. Joselson's complaint to the Attorney Grievance Commission of Maryland had been dismissed without action. *See* RX 123 at 84. Respondent testified at the hearing that Mr. Bowman had "implied" that the D.C. investigation would also be closed in light of the Maryland action. Tr. 582-83 (Respondent). Thus, Respondent testified that he had construed from his conversations with Mr. Bowman that the investigation by the D.C. Office of Disciplinary Counsel's investigation would be handled in a similar way as the Attorney Grievance Commission of Maryland's investigation had been handled: "Mr. Bowman said that 'DC was a reciprocal jurisdiction and so please send me a copy of the . . . Maryland action where the issue was resolved.'. . . I forwarded [it] to Mr. Bowman." Tr. 377 (Respondent); *see also* Tr. 578 (Respondent). Therefore, Respondent claimed he reasonably assumed that the D.C. investigation had been closed. "[H]earing nothing, and having been told that Maryland is a reciprocal jurisdiction, I operated off the premise that the DC case was closed." Tr. 577 (Respondent). There is no indication in the record that Respondent

had either requested or received anything in writing stating that the D.C. investigation would be closed because the Maryland investigation had been closed or for any other reason. As the parties have orally stipulated: "there is no contention that Mr. Bowman specifically told [Respondent] that the case was closed." Tr. 787-790 (Counsel for the Parties).

109. On April 4, 2019, a day after Respondent informed Mr. Bowman of the status of the Maryland investigation, Respondent sent to Mr. Bowman some of the information Mr. Bowman had requested. Respondent also informed Mr. Bowman that Respondent would be away for military duty but would have his cell phone and could receive emails and phone calls over the coming weekend. Respondent also stated he was working on retrieving the account number for the law firm's IOLTA account at Well Fargo Bank. RX 123 at 86. Respondent and Mr. Bowman exchanged additional emails regarding the D.C. inquiry between April 4 and April 8, 2019. DCX 33 at 1-3; RX 123 at 88-90.

110. Respondent testified before the Hearing Committee that, at the time he and Mr. Bowman discussed the issue of reciprocity with Maryland – on April 3, 2019 – he believed the D.C. investigation had been resolved in his favor and was closed. Tr. 376-77, 388-89, 394-95 (Respondent). Respondent admitted that Mr. Bowman continued to ask for information after that date, but testified he did not know why Mr. Bowman was requesting additional information. Tr. 577-78 (Respondent). Subsequently, Respondent testified that he understood Mr. Bowman's requests were "in reference to this case, because it was all going on at the

same time that [Bowman] was asking for the Maryland stuff." Tr. 718-19 (Respondent). None of Respondent's emails to Mr. Bowman after April 3, 2019, state that Respondent understood the D.C. investigation to be closed or made any reference to the purported closure of the D.C. investigation. *See, e.g.*, DCX 33 at 1-3; RX 123 at 88-90.

111. Disciplinary Counsel did not present testimony from Mr. Bowman regarding his communications with Respondent, including whether Mr. Bowman had made statements to Respondent implying he had terminated the D.C. investigation simply because the Maryland investigation was closed and Mr. Bowman had not communicated further with Respondent for some time. In lieu of Mr. Bowman's testimony before the Hearing Committee, the parties entered into two oral stipulations: (1) that there is no contention that Mr. Bowman specifically told Respondent that the case was closed; and (2) that there is no contention that the case was not transferred to Assistant Disciplinary Counsel Lowery. Tr. 787-89 (Lowery). Counsel for Respondent agreed, stating that "number one, Mr. Bowman didn't tell [Respondent] the case was closed, he talked to him about reciprocal jurisdiction; and number two, we are happy to stipulate that the case was transferred to [Mr. Lowery]." Tr. 789-790 (Counsel for Respondent).

112. Contrary to Respondent's claimed understanding that the D.C. investigation had been closed, on April 12, 2019, Assistant Disciplinary Counsel Lowery sent a letter to Respondent indicating that responsibility for the investigation of Respondent by the D.C. Office of Disciplinary Counsel had been transferred from

Mr. Bowman to him, Mr. Lowery. Further, Mr. Lowery stated in the letter that "Disciplinary Counsel's investigation into the above-referenced matter continues." DCX 33 at 5-6.

113. Respondent claimed before the Hearing Committee that he did not remember receiving Mr. Lowery's letter although he did not dispute that the letter had been sent. Tr. 559 (Respondent). Respondent testified that he receives a lot of "stuff" from the D.C. Bar and does not always pay attention to it. Tr. 560 (Respondent). The Hearing Committee does not find this testimony to be credible. The Lowery letter was sent in an envelope identified as coming from the "OFFICE OF DISCIPLINARY COUNSEL" and was marked "PERSONAL AND CONFIDENTIAL." DCX 33 at 6. The envelope from Mr. Lowery was clearly distinguishable from ordinary "stuff" from the District of Columbia Bar, and Respondent presumably would have been anxious to see a letter likely dealing with the status of the D.C. investigation involving his actions. It is not credible that Respondent would have ignored or forgotten such correspondence if he received it.

114. In January of 2019, Mr. Joselson had filed an action in the District Court of Maryland for Howard County to enforce the arbitration award against Respondent. FF 18. On May 18, 2019 – a month after Mr. Lowery's letter stating that the investigation of his actions were continuing (FF 112) – Respondent filed a Motion to Continue and a Motion to Appoint Counsel. DCX 20; Tr. 581-83 (Respondent). In that filing, Respondent stated: "Joselson has filed several

complaints against [Respondent]; *all have been resolved in [Respondent's] favor*." DCX 20 at 1 (emphasis added).

115. Two months later, at a trial on July 15, 2019, in the Maryland District Court, Respondent stated: "[Mr. Joselson] filed a complaint in the District of Columbia because I'm barred there, and that was also dismissed." DCX 22 at 77.

116. Mr. Joselson responded: "But it was not dismissed." *Id.* Mr. Joselson also said "D.C. [is] investigating if there is a criminal case against [Respondent]." *Id.*

117. Following the Maryland District Court trial, Respondent spoke by telephone with Mr. Lowery to determine the status of the D.C. investigation by the Office of Disciplinary Counsel of Mr. Joselson's complaint. Tr. 585-86 (Respondent).

118. As a follow up to that conversation, Respondent sent a letter to Mr. Lowery dated July 15, 2019, confirming his understanding that the D.C. investigation of Mr. Joselson's complaint about Respondent "is not concluded and [Mr. Lowery] likely will not be reviewing [Respondent's] case until approximately August 2019." DCX 33 at 7. Respondent's letter also stated that Respondent understood that he "should soon be expecting a subpoena for my case file for Yuri Joselson." *Id.*

119. After the District Court in Maryland ruled in Mr. Joselson's favor, Respondent filed a notice of appeal for a *de novo* trial in Maryland Circuit Court. FF 19.

120. On August 8, 2019, less than a month after Respondent wrote to Mr. Lowery stating that he (Respondent) understood that the D.C. investigation is not concluded, Respondent filed a motion in the Maryland Circuit Court seeking to disqualify Mr. Joselson's counsel. DCX 26. In that motion, Respondent stated: "Joselson filed numerous complaints against [Respondent] to include a complaint with the Attorney Grievance Commission (AGC) of the State of Maryland; . . . *The complaints against [Respondent] were resolved in favor of [Respondent]*." DCX 26 at 1 (emphasis added).

121. Respondent claims that the foregoing statement was literally true because there was no specific mention of the District of Columbia matter. Respondent's Brief at 27, 40. Respondent also argues that, when, in his conversations with Mr. Bowman in early April 2019, Mr. Bowman talked about reciprocity with Maryland, Respondent had reason to believe that conversation meant that the dismissal of Mr. Joselson's complaints against Respondent in Maryland meant the D.C. complaint was also dismissed. *Id.* at 40. Respondent denied it was his intention to mislead or lie to the court. Tr. 630 (Respondent).

122. The Hearing Committee finds that Disciplinary Counsel has proved by clear and convincing evidence that Respondent made false and misleading statements before the Maryland District Court and Circuit Court regarding the status of the investigation by the D.C. Office of Disciplinary Counsel regarding Respondent's dealings with Mr. Joselson. At the time that Respondent represented to those courts that Mr. Joselson's complaint in the District of Columbia had been

dismissed, that was a false statement. In fact, at the time Respondent made those statements, the D.C. investigation was ongoing and Mr. Joselson's complaint had not been dismissed.

123. The Hearing Committee also finds that Disciplinary Counsel has proved by clear and convincing evidence that Respondent knowingly misled or lied to the Maryland District Court and the Maryland Circuit Court about the status of the then-pending investigation by the D.C. Office of Disciplinary Counsel. The Hearing Committee does not find credible Respondent's explanation that he reasonably believed that the investigation by the D.C. Office of Disciplinary Counsel had been completed when Respondent made his statements to the Maryland courts. Respondent is an experienced lawyer facing the possibility in D.C. of potentially severe sanctions. It defies belief to assume that Respondent would be so cavalier as to believe the D.C. Office of Disciplinary Counsel's investigation was completed, and to so represent to a court, on the basis of a vague representation in early April 2019 about reciprocity with the Maryland investigation without seeking some form of confirmation from D.C. Disciplinary Counsel before Respondent made false representations to the Maryland courts. Further, Respondent's claim is not credible because he continued to receive correspondence and inquiries from Mr. Bowman and Mr. Lowery concerning the ongoing D.C. investigation even after Respondent had informed Mr. Bowman of the outcome of the Maryland inquiry, which would lead any reasonable person to conclude that the D.C. investigation was continuing. *See* FF 109-110, 112.

124. The Hearing Committee also does not find credible Respondent's claim that he could have confused Mr. Lowery's formal letter of April 12, 2019, concerning the fact that the investigation was ongoing, marked "PERSONAL AND CONFIDENTIAL," with more usual D.C. Bar "stuff." Respondent is an experienced attorney and the investigation by the Office of Disciplinary Counsel could have serious impact on his legal career. Respondent does not claim the letter was not sent or not received. FF 113.

125. However, even if Respondent somehow missed or failed to receive Mr. Lowery's letter of April 12, 2019, he could not reasonably have failed to recall his own letter to Mr. Lowery of July 15, 2019, confirming that Respondent understood that the investigation was ongoing. Respondent acknowledged, in his letter to Mr. Lowery, that there would be no resolution of the D.C. investigation at least until sometime in August 2019. DCX 33 at 7. Nonetheless, on August 8, 2019, Respondent stated to the Circuit Court that "the [attorney grievance] *complaints* . . . were resolved in [Respondent's] favor." DCX 26 at 1 (emphasis added). Respondent had to know this assertion was false.

126. Before the Hearing Committee, Respondent sought to defend his statements to the Maryland courts by claiming that Disciplinary Counsel said he is "going to review the case in August [2019], and that's what I put in my letter. And I heard nothing, August, September, October, November. . . . So I mean, I assumed. . . that it was done." Tr. 394 (Respondent). The Hearing Committee does not find Respondent's testimony to be credible. Respondent's false statement to the

Circuit Court that the "complaints" against him had been "resolved in [his] favor" was less than one month – not four months – after Respondent had confirmed to Mr. Lowery that he understood that the investigation would continue, possibly through November. Respondent's false statement to the Circuit Court was on August 8, 2019, and Respondent himself acknowledged in his July 15, 2019, letter to Mr. Lowery that Mr. Lowery would be reviewing the matter in August 2019. FF 118, 120. There is no reasonable basis for Respondent to have believed on August 8, 2019, that the D.C. investigation had been resolved in his favor in light of his correspondence with Mr. Lowery.

F. Respondent's Alleged Failure to Provide an Accounting

127. The Agreement was a flat fee agreement with a provision for how to calculate any refund owed to Mr. Joselson should the representation end before the completion of all the work contemplated by the Agreement. FF 55. The calculation of any refund owed to Mr. Joselson in that circumstance was to be based on the hours Respondent spent working on Mr. Joselson's behalf. FF 54, 57.

128. Respondent claimed at the hearing that he spent "a minimum" of seventeen hours by the middle of May 2017 working for Mr. Joselson. Tr. 357-58 (Respondent).

129. Respondent does not keep hourly time records and did not do so in Mr. Joselson's case. Tr. 445-46, 462, 651 (Respondent). "I told [Mr. Joselson] from the beginning that I don't keep an accounting. I tell all my clients that, and I explain to them why." Tr. 462 (Respondent).

130. Respondent further confirmed his failure to provide an accounting to Mr. Joselson reflected his normal practice:

> Q[uestion]: . . . So, do you believe you have an obligation to provide an accounting?
>
> A[nswer]: No, and if anybody asks me [for] the accounting, I can give them a verbal accounting, which I did today, and do any time anybody asks me.

Tr. 414 (Respondent).

131. In the fee litigation in the Maryland District Court (*see* FF 18), Respondent filed a counterclaim alleging that he had performed seventeen hours of work on Mr. Joselson's case and claiming a return of the $2,000 Respondent had already refunded to Mr. Joselson. DCX 21; Tr. 144-45 (Webster).

132. Respondent, however, was unable to provide any support for his counterclaim: "[Respondent] simply said I don't do it that way. I don't have records to show you the amount of time I've worked on this case. I don't have anything more I can provide you. That's not how it works." Tr. 209 (Webster). The counterclaim was dismissed as having been untimely filed. Tr. 146 (Webster); FF 18.

133. Ultimately, because Respondent had no records to support his claim, the Circuit Court Judge for Maryland ruled on appeal that Mr. Joselson should receive an additional refund from Respondent of $1,750 (of the $2,000 outstanding after a previous refund of $2,000 from the $4,000 Mr. Joselson paid Respondent). FF 19-20; *see* DCX 27 at 108-09. While the Judge said he did not doubt Respondent

had done work on the case, he explained "[t]hat should be documented somewhere . . . ." DCX 27 at 108-09.

134. On October 5, 2017, Mr. Joselson informed Respondent he was terminating the Agreement and demanded a full refund of his $4,000 fee. FF 12, 16; Tr. 57-62 (Joselson); DCX 5 at 44-46.

135. On October 6, 2017, after originally declining to refund any money to Mr. Joselson (*see* DCX 8 at 50), Respondent offered to refund to Mr. Joselson $1,000. *See* DCX 27 at 30-31, 78; DCX 5 at 4. Mr. Joselson requested "an invoice substantiating [Respondent's remaining] charge of $3,000. As of [January 14, 2018], I have not received a single statement detailing his work on my case." DCX 5 at 4.

136. The Hearing Committee finds that Disciplinary Counsel has proved by clear and convincing evidence that Respondent did not maintain or provide an accounting of his work for Mr. Joselson when requested to do so.

G. Respondent's Alleged Failure to Keep Complete Records

137. Respondent's law firm maintained an IOLTA account and an operating account at Wells Fargo Bank. DCX 10; DCX 12.

138. Respondent did not maintain the IOLTA account, which was managed by his partner, who was the managing partner of his law firm. Tr. 378, 449 (Respondent). Respondent did not know how to transfer funds in and out of the IOLTA account and did not have the "app" for Wells Fargo (the bank holding the account) on his computer. Tr. 381, 464 (Respondent). Respondent claimed: "I am

not a managing partner. . . . I'm a trial attorney. . . . I don't do the mathematics stuff." Tr. 465 (Respondent).

139. On February 25, 2017, Mr. Joselson paid Respondent's law firm $4,000 to retain Respondent to represent him before DOHA. The law firm deposited that check in the IOLTA account. FF 36-38. On May 18, 2017, the firm withdrew $6,000 from its IOLTA account, leaving a balance of $200. FF 40.

140. Respondent considered his law partner to be responsible for disbursing funds from the IOLTA account. She withdrew the $6,000 from the IOLTA account after talking to Respondent and determining from him that, in his view, he had earned the $4,000 paid by Mr. Joselson because he had done at least sixteen hours' worth of work. *See* FF 40-41. He allegedly based his calculation that he had "earned" the entire $4,000 fee on his claim that the Agreement allowed him to be paid $250 for each hour he claimed to have worked for Mr. Joselson, even though most of the work associated with that representation, such as representing Mr. Joselson at the DOHA hearing, was far from concluded. Tr. 463-476 (Respondent); *see* FF 43.

141. As previously noted, the Hearing Committee concludes that Disciplinary Counsel has proved by clear and convincing evidence that Respondent had no hourly records of his work on the Joselson matter and could not establish that he had worked sixteen hours on Mr. Joselson's behalf as of May 18, 2017. FF 66-67, 128-129.

142. Respondent claimed his law partner may have had records showing what portion of the $6,000 withdrawn from the IOLTA account was money from Mr. Joselson, but no such records were produced to Disciplinary Counsel in response to the subpoena to Respondent. Tr. 472, 660-61 (Respondent).

143. Respondent offered to meet with Disciplinary Counsel to address any questions Disciplinary Counsel might have, but he was not invited to do so and no follow up questions were asked of him on this subject. Tr. 595-96, 661 (Respondent); Tr. 113-14 (Matinpour); *see* RX 83.

144. The Hearing Committee finds that Disciplinary Counsel has proved by clear and convincing evidence that the bank records provided by Respondent's law firm do not show how much of the money withdrawn from the IOLTA account was attributable to Mr. Joselson's fees. Specifically, the bank records fail to show whether Mr. Joselson's entire retainer was withdrawn on May 18, 2017, or at some earlier date, and whether some portion of the retainer payment remained in the bank account thereafter.

H. Respondent's Alleged Failure to Return Unearned Fees to Mr. Joselson

145. Mr. Joselson terminated the Agreement on October 5, 2017. FF 12. At that time, Respondent had not prepared Mr. Joselson for the DOHA hearing and had not represented him in that hearing. Therefore, Respondent had not completed all the work contemplated by the Agreement. FF 27, 59-60; Tr. 63-64 (Joselson).

146. Mr. Joselson requested Respondent to refund to him the entire $4,000 fee he had paid. FF 16. Respondent initially refused to do so, but eventually -- more than three months later -- Respondent refunded $2,000 to Mr. Joselson. *Id.*

147. Mr. Joselson demanded the refund of the remaining $2,000 of the fee he had paid Respondent. He initially sought the assistance of the Committee on the Resolution of Fee Disputes of the Maryland State Bar Association to resolve the dispute. When that arbitrator ruled that Mr. Joselson should receive a refund of $1,750 more from Respondent, Mr. Joselson filed suit in Maryland District Court to enforce the arbitration award. After Mr. Joselson prevailed in Maryland District Court, Respondent appealed to Maryland Circuit Court where, again, Mr. Joselson prevailed. More than two years after termination of the Agreement, Respondent's law firm sent a check to Mr. Joselson for $1,750, ending the dispute. FF 17-21. None of Mr. Joselson's funds were held in trust during the two years of the dispute over fees.

148. The Hearing Committee finds that Disciplinary Counsel has proved by clear and convincing evidence that Respondent failed to refund promptly the full refund requested by Mr. Joselson. Disciplinary Counsel, however, has failed to prove by clear and convincing evidence that the entirety of the refund requested by Mr. Joselson was unearned by Respondent.

149. In the absence of billing records, Disciplinary Counsel's task of proving a negative – that Respondent had not worked at least sixteen hours – was one almost impossible to meet. Respondent, on the other hand, outlined at the hearing the time

he claimed constituted the sixteen hours of work he testified he performed, but his testimony at the hearing was contradicted by his testimony in the Maryland proceedings and lacked credibility. *See* FF 66-78.

150. Nonetheless, Disciplinary Counsel has the burden of proof by clear and convincing evidence (*In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam)), and the Hearing Committee understands that burden applies to each element of the charge. The Hearing Committee concludes that Disciplinary Counsel has failed to prove by clear and convincing evidence that the fee Respondent failed to return when requested was unearned.

III. CONCLUSIONS OF LAW

After four partial days of hearings in this matter, Disciplinary Counsel and Respondent's Counsel provided closing arguments that they further elaborated in their post-hearing briefs.

Disciplinary Counsel contended that Respondent had breached all of the Rules alleged in the Amended Specification of Charges except for the alleged violation of Rule 1.16(d), for failure to provide the client file to successor counsel, which Disciplinary Counsel indicated his office may not (and, in fact, did not) pursue. Disciplinary Counsel argued that Respondent had engaged in misappropriation that was intentional or at least reckless for which the appropriate sanction is disbarment. Disciplinary Counsel also took the position that, for choice of law purposes, under District of Columbia precedent Respondent bore the responsibility for showing that application of Maryland or Virginia law would result in a different outcome than the

application of corresponding District of Columbia law and Rules in order to apply Maryland Rules instead of D.C. Rules in analyzing Respondent's conduct. Disciplinary Counsel also contended that, whatever the outcome of the choice of law determination, District of Columbia precedent applied for determining the applicable sanction. Tr. 954-1011, 1088-1096.

Respondent's Counsel contended that Maryland Rules should apply because Respondent resided in Maryland and that is where his principal place of business and virtually all his civilian practice is located. Respondent's Counsel contended further that, under the Maryland Rules, Respondent had not engaged in misappropriation, and Disciplinary Counsel had failed to meet its burden of proving otherwise. Respondent's Counsel further contended that, if the Hearing Committee found that Respondent had engaged in misappropriation under the District of Columbia Rules, it must conclude the misappropriation was negligent only because Respondent believed he was doing what he was allowed to do. Respondent's Counsel also contended that Respondent conferred with Maryland Bar Ethics Hotline, which informed him that his actions did not violate Maryland professional ethics rules. As to the charge of dishonesty, Respondent's Counsel contended that Respondent reasonably believed that his statements to the Maryland courts were accurate and not misrepresentations. Tr. 1012-1088; *see also* Respondent's Brief at 17.

After considering the evidence, documents, and testimony before it, and reviewing the arguments and briefs from both sides, the Hearing Committee

concludes that Disciplinary Counsel has proved by clear and convincing evidence that Respondent has violated D.C. (or the corresponding Maryland or Virginia) Rules 1.4(a), 1.15(a) (recordkeeping), and 1.15(a) (misappropriation), and Maryland Rule 19-308.4(c). The Hearing Committee concludes that Disciplinary Counsel has failed to prove by clear and convincing evidence that Respondent has violated D.C. Rule 1.16(d), Md. Rule 19-301.16(d), or VA Rule 1.16(d) or (e) (Failure to turn over client file or to refund unearned funds).

A. Choice of Law

Rule 8.5 addresses the issue of choice of law. It provides that

> For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.

Rule 8.5(b)(1); *see also* Rule 8.5 cmt. [4] (clarifying that the application of legal ethics rules applicable to the location where the tribunal is located is mandatory not discretionary: "Paragraph (b) provides that as to a lawyer's conduct relating before a tribunal the lawyer shall be subject only to the rules of professional conduct of that tribunal."

The Defense Office of Hearings and Appeals (DOHA), as far as the Hearing Committee can determine, has no rules of conduct for counsel appearing before it. The relevant Department of Defense Directive provides that an applicant for a security clearance must appear in person before an Administrative Judge for a hearing involving his or her matter "with or without counsel or a personal

representative . . . ." DoDD 5220.6, Enc. 3, at 43 ¶ E3.1.8 (Jan. 2, 1992), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/522006p.pdf.

Respondent claims that, if the professional rules of the forum are to be applied, then Title 13 of the Code of Federal Regulations, Part 134, Subpart B, "Rules of Practice," Rule 134.219, is controlling instead of the D.C. Bar Rules. Respondent's Brief at 28 n.9. Title 13 of the CFR, however, deals with Business Credit and Assistance, and the specific provisions referenced by Respondent pertain to adjudicative hearings before the Office of Hearings and Appeals in the Small Business Administration. They have no application to DOHA proceedings.

The proceeding for which Mr. Joselson retained Respondent was before a DOHA Administrative Judge. FF 8. For the purposes of Rule 8.5, a DOHA hearing is a "tribunal" since it is an "administrative agency or other body [which] acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular manner." Rule 1.0(n). That describes the role of the Administrative Judge in a DOHA hearing. *See* DoDD 5220.6, at 43-46 ¶¶ 3.1.7-3.1.27.

While DOHA counsel offered to have the DOHA hearing in New York State, the parties agreed that the DOHA hearing would occur in the Washington, D.C. area, which, for DOHA hearings, meant in Arlington, Virginia. FF 9-10. Therefore, the Va. Rules would apply to the charges set out in the Amended Specification except for the final charge (Amended Specification at 10 ¶ 52.f.) alleging Respondent

engaged in conduct "involving misrepresentation and dishonesty," which conduct occurred before Maryland courts and which is charged under the Maryland Rule.

In this regard, Rule 8.5 provides that, for all other conduct, if an attorney is admitted in the District of Columbia and another jurisdiction (such as Maryland), "the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices . . . ." Rule 8.5(b)(2)(ii). Respondent principally practices, in non-military-related matters, in Maryland, where he also has his office and place of business. He seldom if ever practices in the District of Columbia. FF 2.

The Amended Specification relates to Respondent's conduct representing Mr. Joselson in connection with the DOHA hearing, except for the conduct charged under the Maryland Rule. None of the actions set forth in the Amended Specification occurred physically in the District of Columbia or was before a tribunal in the District of Columbia. Nonetheless, in order to provide the Board and the Court with the best guidance we can, the Hearing Committee will analyze the charges against Respondent under the Rules and court decisions of the District of Columbia, Maryland, and Virginia.

i. The Motion to Dismiss

Respondent, before the Hearing, filed a Motion to Dismiss the Amended Specification based on the claim that the Maryland Rules should apply, and the Maryland Rules had not been pleaded except as to ¶ 52.f in the Amended Specification. Mot. to Dismiss (June 10, 2022). Disciplinary Counsel opposed the Motion to Dismiss, conceding that it was "somewhat unclear whether the D.C.,

Maryland, or Virginia rules apply to the alleged misconduct." Disciplinary Counsel's Opp'n at 5 (June 17, 2022). Disciplinary Counsel asked the Hearing Committee to apply the D.C. Rules, because, according to Disciplinary Counsel, Respondent and Mr. Joselson had "an understanding that the tribunal will sit in D.C.," as requested by Mr. Joselson. *Id.* at 7.

To the contrary, the Hearing Committee finds that Mr. Joselson and Respondent understood that a DOHA hearing in the "Washington, D.C. area" meant the hearing would be held at the DOHA offices in Arlington, Virginia. FF 9-10. There was never any realistic possibility the hearing would occur within the physical boundaries of the District of Columbia.

Nonetheless, Respondent takes the position that Virginia Rules do not apply, despite the hearing occurring in Virginia, because "[n]o matter [wa]s pending before a tribunal" when Mr. Joselson terminated his representation by Respondent before the DOHA hearing was scheduled to occur. Respondent's Brief at 28. Respondent's argument is unsustainable. The Hearing Committee finds that, months before Mr. Joselson dismissed Respondent as his counsel, Respondent had filed his appearance and a date had been set for a DOHA hearing in Virginia on Mr. Joselson's security clearance. FF 11, 43, 65, 88. (The DOHA Administrative Judge, on September 6, 2017, set the date for the hearing before Mr. Joselson dismissed Respondent as his counsel on October 5, 2017. FF 88, 99.) A logical interpretation of the plain meaning of the word "pending" leads to the conclusion that the matter for which

Respondent was representing Mr. Joselson was "pending" before DOHA, in its Arlington, Virginia office.

The Hearing Committee declined to rule on the Motion to Dismiss, understanding that that was not within the Hearing Committee's authority. *See* Board Rule 7.16(a); *In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991). Disciplinary Counsel points to *In re Bernstein*, 774 A.2d 309, 315-16 (D.C. 2001), to argue that the District of Columbia Court of Appeals has not dismissed any such case involving a similar conflict of laws issue where the Respondent could not show that applying the other jurisdiction's rules would result in a substantially dissimilar result than applying the D.C. Rules.

The Hearing Committee finds mixed guidance on how to address this issue. In the absence of any mention of this issue in the rules of the tribunal, DOHA, Rule 8.5(b)(1) requires the Virginia Rules apply to the conduct (except for misconduct alleged in ¶ 52.f.) alleged in the Amended Specification. Respondent, on the other hand, makes what is, in essence, a due process and equitable argument for applying the Maryland Rules: Respondent practices almost exclusively (in his civilian capacity) in Maryland, and Respondent did what he undestood was correct under the Maryland Rules. Additionally, if Respondent made errors, he argues they occurred five or more years ago, and he has changed his practices to correct any mistakes he made have made. *See, e.g.*, Tr. 1100-1126 (Testimony in Mitigation) (Respondent); Respondent's Surreply at 4.

The actions alleged in the Amended Specification deal with Respondent's relationship with his client, Mr. Joselson. While the Rules of Professional Conduct in each of the potentially relevant jurisdictions – District of Columbia, Maryland, and Virginia – have some minor differences, they largely follow the American Bar Association's Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ (last visited Jan. 10, 2024). Those Model Rules make clear the primary role of the attorney is as a representative of his or her clients. Model Rule: Preamble & Scope ¶¶ 2, 17.

The Amended Specification only charged violations of D.C. Rules and one instance of a violation of a Maryland Rule. It charged no violations of the Virginia Rules and "an attorney can be sanctioned only for those disciplinary violations enumerated in formal charges." *In re Slattery*, 767 A.2d 203, 209 (D.C. 2001) (quoting *In re Smith,* 403 A.2d 296, 300 (D.C. 1979)).

In *Bernstein*, the allegations were like those in this case: Disciplinary Counsel alleged violations of the D.C. Rules for conduct before a tribunal in Virginia. The Court held that there was no harm to Respondent for Disciplinary Counsel's failure to allege violations of the Virginia Rules since Respondent could not show that his alleged violations would have been treated any differently under Virginia law than under D.C. law. "Even if we assume, for the sake of argument, that the Board should have applied Virginia rules, the Board's application of the District's rules does not

undermine the proposed sanction for Bernstein has not shown that he suffered prejudice." 774 A.2d at 315-16.

For the Hearing Committee to recommend dismissal of each of the charges except for ¶ 52.f. as having been incorrectly charged would be highly formalistic and would ignore the core purpose of the Rules to protect the interests of the client and properly inform the Bar as to the professional conduct requirements of the Rules. The applicable Rules in the three jurisdictions are similar, if not identical, and, as discussed below, similar conduct is sanctioned in each jurisdiction. Furthermore, it is not uncommon for lawyers admitted in D.C., Maryland or Virginia to also be admitted to practice in a neighboring jurisdiction. Under these circumstances, it would violate the purpose of the Rules to dismiss the Amended Specification simply because the Amended Specification cited to the District of Columbia Rules instead of the comparable Virginia or Maryland Rules. Since Respondent has not shown that the application of Maryland (or Virginia) Rules would cause a different result after this hearing, Respondent has not been injured nor have his rights been compromised by application of the D.C. Rules and precedent to his alleged conduct. We thus recommend denying Respondent's Motion to Dismiss.

Recognizing that this issue is not free from dispute, the Hearing Committee will consider and propose Conclusions of Law as to each of the Charges, according to the rules of each of the three jurisdictions.

B. Analysis of the Charges

The Hearing Committee provides its analysis of the alleged misconduct in the Amended Specification, as the Hearing Committee concludes they would be applied in each of the Maryland, D.C., and Virginia jurisdictions.

i. Charge that Respondent Failed to Keep His Client Reasonably Informed About the Status of the Case and Did Not Promptly Comply with Reasonable Requests for Information.

The Hearing Committee finds that Disciplinary Counsel has proved by clear and convincing evidence that Respondent failed to keep his client reasonably informed about the status of the DOHA proceeding and failed to promptly comply with his client's reasonable requests for information. FF 80-101.

There can be no question that Mr. Joselson was a demanding client. He made numerous attempts to obtain information from Respondent about preparation for his DOHA hearing but found Respondent to be unresponsive to his queries. FF 89-90, 92, 97-98. As Respondent knew, his client was anxious to get his security clearance, preserve his employment, and protect his family's wellbeing. DCX 5 at 20; *see also* DCX 27 at 73.

The issue of communications between Respondent and his client became most acute after Mr. Joselson received a formal notice of a hearing date at DOHA, which he thought Respondent had arranged to be postponed. FF 80-88. At that point, Mr. Joselson asked to be copied on all of Respondent's correspondence with DOHA (FF 89-90, 92), which Respondent refused to do, claiming to do so would be unprofessional (FF 91, 93-94). In Respondent's view, communications between him

and the tribunal about Mr. Joselson's case do not belong to the client. FF 94. Despite this disagreement, Mr. Joselson continued to attempt to work with Respondent:

> Q: And why did you decide to continue the representation after all that you had experienced to that point?
>
> A: It's hope over the reality. I was still hoping that he might snap out of his style and maybe start working. I guess it was my last attempt to do it.

Tr. 57 (Joselson). On October 5, 2017, Mr. Joselson terminated his engagement with Respondent claiming: "You systematically ignored my messages. You misstated facts to me on multiple occasions. You failed to inform me of the developments of my case." FF 99.

Respondent argues that any dispute between Respondent and Mr. Joselson arose because Mr. Joselson became confused after he received a letter from DOHA affirming the earlier date for his hearing, which date Mr. Joselson had requested Respondent to have rescheduled. Respondent's Brief at 32. Respondent claimed he took quick action to reschedule the hearing. *Id.* But the question remains whether his actions in communicating with his client were sufficiently responsive to his client's "reasonable" requests for information. *See* Rule 1.4(a) ("A lawyer shall keep a client *reasonably* informed . . . ." (emphasis added)). In light of Mr. Joselson's level of concern, there is clear and convincing evidence that Respondent's communications with Mr. Joselson were insufficient and did not keep Mr. Joselson reasonably informed.

Respondent claimed in his post-hearing brief that he committed to inform Mr. Joselson of developments in his case, but would not do so by copying or blind

copying Mr. Joselson on correspondence he had with DOHA. Respondent's Brief at 33. Respondent also argues that communications on scheduling are "normally" not found in a client file, and therefore Respondent had no obligation to turn them over to Mr. Joselson. *Id.* at 33-34.

Respondent's arguments in his brief are not persuasive and contradict Respondent's testimony at the hearing. At the hearing, Respondent made clear he refused to provide those communications to Mr. Joselson. Tr. 522-26 (Respondent). Contrary to Respondent's testimony, Respondent's refusal to keep his client informed about the scheduling of his DOHA hearing was not customary or justifiable. Respondent's witness, Dr. Seamone (who had worked with Respondent on military matters (FF 95)), did not follow Respondent's practice of not providing to his clients copies of correspondence with opposing counsel and the court. FF 95.

Respondent clearly knew his client was anxious about the DOHA proceeding, including both its scheduling and the substantive preparation for it. Despite Mr. Joselson's continued requests for guidance and direction from Respondent, Respondent failed to respond. FF 100. What is required from an attorney is to respond to his client's "reasonable" inquiries; what is "reasonable" may depend both on the level of anxiety of the client and the extent to which the lawyer's failure to respond has only increased that level of anxiety.

a. Analysis Under District of Columbia Rules

D.C. Rule 1.4(a) provides: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for

information." This does not require an attorney to respond immediately to every inquiry from a client: "The guiding principle for evaluating conduct under this rule is whether the lawyer fulfilled the client's 'reasonable . . . expectations for information.'" *In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001) (quoting Rule 1.4, cmt. [3]). "An attorney need not communicate with a client as often as the client would like, as long as the attorney's conduct was reasonable under the circumstances." *Id*. (citing *In re Walker*, 647 P.2d 468, 470 (Or. 1982) (holding that "[a]lthough the [attorney] did not communicate with the client as often as the client believed he should have, the record establishes that he kept the client adequately informed of the progress he made with each case")). Additionally, "a lawyer must initiate communication where necessary and fulfil his client's reasonable expectations for information." *In re Robbins*, 192 A.3d 558, 564-65 (D.C. 2018) (per curiam).

In this case, Respondent clearly failed to provide to Mr. Joselson information that Mr. Joselson specifically and reasonably requested, that is, Respondent's communications with DOHA and opposing counsel regarding the scheduling of Mr. Joselson's DOHA hearing. Comment 2 of Rule 1.4 provides "[a] client is entitled to whatever information the client wishes about all aspects of the subject matter of the representation unless the client expressly consents not to have certain information passed on." In this regard, Respondent failed Mr. Joselson. Additionally, "[t]he lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process

is thorough and complete." *Id.* As Respondent's witness, Dr. Seamone, testified regarding his own practices, even if Respondent concluded, on whatever basis, that he could not blind copy Mr. Joselson on his communications with DOHA, he could have sent copies of correspondence after the fact to Mr. Joselson or found other ways of keeping his client fully and promptly informed. *See* FF 95. Respondent's failure to do that is a clear violation of Rule 1.4(a).

"Failing to return a client's calls or respond to their questions violates [Rule 1.4(a)]." *In re Lattimer*, 223 A.3d 437, 440 (D.C. 2020) (per curiam) (citing *In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998)). To satisfy the expectations of Rule 1.4, "a lawyer not only must respond to client inquiries but also must initiate communications to provide information when needed." *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (citing Rule 1.4(a), cmt. [1]).

Applying these standards, the Court in *Schoeneman* held that the attorney did not violate Rule 1.4(a) when he kept the client informed through monthly conversations in "a long-term, complex fraud investigation coupled with extended negotiations." *Schoeneman*, 777 A.2d at 264. However, in *Robbins*, the Court held that an attorney violated Rule 1.4 when he did not keep the client informed enough to make "decisions to protect his interests." *Robbins*, 192 A.3d at 565. Similarly, the Court has found that an attorney violated this Rule when she "routinely failed to consult with and keep [the client] informed about the status of her matter" including "avoid[ing] all communication with [the client] toward the end of their relationship." *In re Ekekwe-Kauffman*, 210 A.3d 775, 789-790 (D.C. 2019) (per curiam).

Attorneys are also liable for discipline under this Rule if they fail to respond to a client's reasonable request for information regarding the status of their claim. *E.g.*, *In re Bailey*, 283 A.3d 1199, 1207 (D.C. 2022).

Mr. Joselson was an anxious and demanding client, particularly as to the scheduling of the hearing and his preparation for it, but not unreasonable considering the significance of those issues to his and his family's welfare. Respondent's communication with him was unreasonably insufficient.

b. Analysis Under Maryland Rules

Md. Rule 19-301.4 says that:

> (a) An attorney shall:
>
> > (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules;
> >
> > (2) keep the client reasonably informed about the status of the matter; [and]
> >
> > (3) promptly comply with reasonable requests for information . . . .
>
> (b) An attorney shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The Maryland Court of Appeals has held that "a lawyer [violates this Rule] where the lawyer fail[s] to communicate, or promptly comply, with his client's request for information." *Att'y Grievance Comm'n v. Barnett*, 102 A.3d 310, 316-17 (Md. 2014) (citing *Att'y Grievance Comm'n v. Costanzo*, 68 A.3d 808, 820 (Md. 2013) (per curiam)). In one case, an attorney violated Md. Rule 19-301.4 when the

attorney did not inform the client of a hearing date and did not communicate with the client for ten months. *Barnett*, 102 A.3d at 317. In another case, an attorney was found to have violated this Rule when the attorney did not inform the client that the attorney was leaving the country, was "out of communication" with the client for months, did not tell the client about an office relocation, "and was unable to produce documents relating to work he had performed for their case." *Att'y Grievance Comm'n v. Nnaka*, 50 A.3d 1187, 1194 (Md. 2012) (per curiam).

c. Analysis Under Virginia Rules

Virginia Rule 1.4 provides: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Va. Rule 1.4(a). The Rule also requires lawyers to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Va. Rule 1.4(b). Lastly, "[a] lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter." Va. Rule 1.4(c).

Applying this Rule, an attorney violated Rule 1.4 when the attorney did not promptly respond to requests for information. *Robinson v. Va. State Bar*, 2016 WL 3208972, at *4 (Va. Apr. 14, 2016).

d. Conclusion of Law Regarding Failure to Communicate

Under D.C. Rule 1.4(a), Md. Rule 19-301.4, and Va. Rule 1.4, Respondent failed to communicate with Mr. Joselson, and thus violated the Rule in whichever jurisdiction is applicable. The Hearing Committee discerns no meaningful

difference in the application of this requirement among the three jurisdictions. Disciplinary Counsel proved by clear and convincing evidence that Respondent failed to keep Mr. Joselson reasonably informed about the status of the DOHA matter and failed to respond to Mr. Joselson's reasonable requests for information. *See* FF 101. Indeed, the record reflects that Respondent categorically refused to provide to Mr. Joselson copies of Respondent's communications with DOHA after Mr. Joselson reasonably requested that information. FF 91, 93-94. Respondent also failed to provide Mr. Joselson with important information about the status of the DOHA matter and the continuance sought by Mr. Joselson. *See* FF 80-88. Mr. Joselson had to resort to direct communication with DOHA to obtain information about the hearing date. *See* FF 86-87.

ii. Charge that Respondent Engaged in the Unauthorized Use of Entrusted Funds

Disciplinary Counsel has proved, by clear and convincing evidence, that Respondent misappropriated Mr. Joselson's funds on or before May 18, 2017.

On February 25, 2017, Respondent entered into the Agreement with Mr. Joselson by which Respondent agreed to charge a flat fee of $4,000 to negotiate with DOHA about the date and circumstances of his hearing, to prepare Mr. Joselson for his hearing, and to represent him in the DOHA hearing. FF 8-10, 11, 32-33, 37, 80. The Agreement also provided that, if Respondent or Mr. Joselson terminated the engagement before its conclusion, Respondent's law firm would provide an appropriate refund. That refund was to be calculated by subtracting from the original $4,000 payment the sum of $250 per hour for work performed by Respondent (as

well as other calculations for work performed by others in Respondent's law firm). FF 34-35.

The Agreement provided that the refund calculation of $250 per hour for work performed was applicable only if and when the Agreement was terminated prior to concluding all of the anticipated legal work. FF 34-35, 57, 63. Despite these clear provisions, Respondent's law firm (acting through Respondent's law partner after consulting with Respondent), on May 18, 2017, withdrew $6,000 from the IOLTA account, leaving a balance of only $200 in the trust account. FF 40. According to Respondent's law partner, that $6,000 sum included all, or nearly all, of the $4,000 flat fee retainer Mr. Joselson had paid Respondent. RX 128; *see also* FF 23, 40. The firm's records do not disclose when Mr. Joselson's retainer fee was withdrawn from the IOLTA account, but whether Mr. Joselson's fee was withdrawn from the trust account on May 18, 2017, or at some earlier date, it is clear that, by May 18th it had been entirely withdrawn. *See* FF 23, 40, 139. Then, only $200 was left in the IOLTA account (a minimum balance the firm always maintained in the account). FF 40. Mr. Joselson did not terminate the Agreement until October 5, 2017, almost five months later. FF 12, 44.

One day after Respondent's firm withdrew the $6,000 from the IOLTA account and placed it in the firm's operating account, the firm transferred $6,620.97 from its operating account to pay a personal credit card account belonging to either Respondent or his wife. FF 41-42.

Respondent claims the Agreement between him and Mr. Joselson was not a "flat fee" or an hourly-rate agreement, but rather a "hybrid" agreement that entitled Respondent to withdraw from Mr. Joselson's fee $250 per hour spent by Respondent for each hour Respondent claimed he had worked on Mr. Joselson's behalf, regardless of how much of the anticipated representation had been accomplished. Thus, Respondent claims the Agreement permitted his law firm to withdraw the full $4,000 fee from the trust account after Respondent claimed to have worked sixteen or more hours on Mr. Joselson's behalf. FF 50-51, 53.

Respondent sought to demonstrate that he had worked at least the sixteen hours on Mr. Joselson's behalf that he argued entitled him to withdraw the $4,000 fee in May 2017. *See* FF 64, 66, 70-74. Respondent's testimony on this matter was not credible, for the reasons discussed above. *See* FF 52-58, 66-77. Disciplinary Counsel introduced evidence to the contrary but the question of whether Respondent worked at least sixteen hours prior to withdrawing the entire fee on or before May 18, 2017, is irrelevant to an analysis of whether Respondent engaged in an unauthorized use of Mr. Joselson's funds in a flat fee situation. *See* FF 78-79.

The clear language of the Agreement indicates that it was a flat fee agreement with a provision for calculating how much of the fee had to be refunded to Mr. Joselson if and when (and only if and when) the representation was prematurely terminated. FF 52. The calculation of fees to deduct from the refund due to Mr. Joselson did not come into play unless and until the Agreement was terminated before all of the anticipated legal services were provided to Mr. Joselson. FF 54-55.

Irrespective of the number of hours Respondent allegedly worked on the Joselson matter by May 18, 2017, he clearly did not perform all of the legal services he agreed to perform under the Agreement as of May 18, 2017. FF 27. Nonetheless, Respondent withdrew all of the fees on May 18, 2017, well before all of the contracted-for tasks had been completed, before any DOHA hearing had taken place, and some five months before the Agreement was terminated. FF 27, 44. Under the plain language of the Agreement, the termination provision that would have allowed Respondent to apply a $250/hour calculation to reduce a refund to Mr. Joselson was inapplicable on May 18, 2017, during the ongoing representation. FF 54. Respondent's actions were a clear violation of the Agreement. FF 55, 63.

a. Analysis Under District of Columbia Rules

Attorneys must treat advances of unearned fees as the property of the client until they are earned. Rule 1.15(e). Advance payments of flat fees are advances of unearned fees under Rule 1.15. *In re Mance*, 980 A.3d 1196, 1202 (D.C. 2009). Therefore, "[f]lat fees paid to attorneys in advance must ordinarily be treated as client funds until they are earned." *In re Ponds*, 279 A.3d 357, 358 (D.C. 2022) (per curiam). "[E]xtreme 'front-loading' of payment milestones . . . will not excuse [a] lawyer from safekeeping the client's funds until it can reasonably be said that they have been earned in light of the scope of the representation." *Mance*, 980 A.2d at 1204-05.

The D.C. Court of Appeals has held that unauthorized use of client funds is misappropriation which is "essentially a per se offense." *In re Edwards*, 990 A.2d

501, 518 (D.C. 2010). In *Nave*, the Court defined misappropriation to mean "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)). According to the Court, "[o]ne circumstance in which misappropriation occurs is 'when the balance in the lawyer's trust account falls below the amount due [to] the client' or third persons to whom the client is indebted." *Id.* (quoting *In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013)).

At the time the full fee was withdrawn from the trust account in May 2017, Respondent had not yet negotiated a new hearing date for the DOHA hearing, prepared Mr. Joselson for the DOHA hearing, or represented him in the hearing. FF 27. Although much work on Mr. Joselson's behalf was yet to be performed as of May 18, 2017, including the critical work of representing Mr. Joselson at his DOHA hearing, the entire fee was removed from the trust account.

Moreover, when Respondent's law firm removed $6,000 from the IOLTA account on May 18, 2017, that constituted not only "extreme front-loading of payment milestones," but also put at risk the money that would have to be refunded to Mr. Joselson if the Agreement was prematurely terminated, as it was. *Mance*, 980 A.2d 1204-05. It left a balance of only $200 in the trust account. FF 40. Since, however, "a flat fee is an advance of unearned fees, . . . the fee must be held as client

funds in a client's trust or escrow account until they are earned by the lawyer's performance of legal services." *Mance*, 980 A.2d at 1203.

This constitutes "misappropriation" because it was the "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 . . . ." *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001). Evidence of misappropriation occurs "'when the balance in [the attorney's] trust account falls below the amount due the client,' *In re Moore*, 704 A.2d 1187, 1191 (D.C. 1997), whether or not the attorney 'derives any personal gain or benefit' by misusing the money, *In re Pleshaw*, 2 A.3d 169, 173 (D.C. 2010) . . . ." *In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013). Here, the withdrawn funds were transferred to pay credit card bills for Respondent or his wife, providing a clear monetary benefit to Respondent. FF 42.

Because his partner moved the funds out of the IOLTA account, Respondent might argue he was not responsible for the misappropriation. This is particularly true in the absence of a charge that Respondent violated Rule 5.1 alongside Rule 1.15. *See* Rule 5.1 (holding a lawyer accountable for Rules violations by other lawyers in a partnership if the lawyer ratified the conduct, ordered the conduct, or was a partner who failed to ensure reasonable compliance with the Rules). Although a violation of Rule 5.1 is not alleged, the principle of Rule 5.1 is that partners at a law firm should be responsible for the conduct of people with whom they are professionally associated, especially when they direct that conduct.

Here, Respondent bears joint responsibility for misappropriating Mr. Joselson's funds because Respondent's partner consulted with him before withdrawing the funds from the trust account and Respondent's partner followed his guidance to withdraw client funds that Mr. Joselson had entrusted with Respondent. FF 40-41; *see Nave*, 197 A.3d at 514. Respondent had a fiduciary duty to Mr. Joselson to ensure that his client's funds were not misappropriated, and Respondent failed to fulfil that duty. *See In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (per curiam).

This is the case even if Respondent was not technically the one who moved the funds or managed the trust account because Mr. Joselson entrusted the funds to Respondent. The Court focuses more on the attorney to whom the client entrusted the funds rather than the person who had operational control over the trust account in question. *See Nave*, 197 A.3d at 514 (holding that misappropriation is the "unauthorized use of [a] client's funds *entrusted to [the lawyer]*" (emphasis added)).

b. Analysis Under Maryland Rules

Under the Maryland Rules, Respondent misappropriated client funds in violation of Md. Rule 19-301.15.

Similar to the D.C. Rule, Maryland bars lawyers from commingling client funds and property with the lawyer's funds and property. Md. Rule 19-301.15(a). The Maryland Rule also directs lawyers to deposit client funds into trust accounts and keep complete records of client funds. *Id.* "[M]isappropriation is 'any unauthorized use by an attorney of a client's funds entrusted to him or her, whether

or not temporary or for personal gain or benefit.'" *Att'y Grievance Comm'n v. Culberson*, 292 A.3d 274, 288 (Md. 2023) (quoting *Att'y Grievance Comm'n v. Goodman*, 43 A.3d 988, 996 (Md. 2012)).

Based on this definition of misappropriation, the Maryland court has held that "[w]hen Respondent's escrow account balance fell below the amount required to satisfy the obligations due to [his clients], and he failed to provide a satisfactory explanation, he misappropriated their funds." *Att'y Grievance Comm'n v. Gelb*, 102 A.3d 344, 351 (Md. 2014) (quoting *Att'y Grievance Comm'n v. Glenn*, 671 A.2d 463, 481 (Md. 1996)).

Maryland also has a Rule similar to D.C. Rule 5.1: Md. Rule 19-305.1. Even though the Amended Specification did not allege a violation of Md. Rule 19-305.1, like D.C. Rule 5.1, it shows that there is an established principle that partners at a law firm should be responsible for the conduct of people with whom they are professionally associated, especially when they direct that conduct. Similarly, Respondent would be found to have violated Md. Rule 19-301.15(a) because he instructed and allowed the misappropriation of client funds entrusted to him. *See Culberson*, 292 A.3d at 288. Like the escrow account in *Gelb*, Respondent was instrumental in reducing the trust account here to below the amount required to satisfy obligations to his client. *See Gelb*, 102 A.3d at 351. Respondent was not a passive agent in this transaction. He asserted to his partner that he had worked at least sixteen hours for Mr. Joselson and that permitted him, through instruction to his partner, to withdraw the entire $4,000 from the trust account. FF 35, 40-41.

Thus, a Maryland tribunal would be likely to find Respondent liable for misappropriating client funds. This is the case even if he was not technically the one who moved the funds or managed the trust fund because Mr. Joselson entrusted the funds to Respondent. The Maryland court focuses more on with whom the client entrusted the funds than who had operational control over the trust account in question. *See Culberson*, 292 A.3d at 288 (holding that misappropriation is the "unauthorized use by an attorney of a client's funds entrusted to him or her"). In this case, Mr. Joselson entrusted the trust funds to Respondent, and it was only upon Respondent's information and advice that Respondent's partner transferred Mr. Joselson's funds to the firm's operating account. FF 40-41.

c. Analysis Under Virginia Rules

Under the Virginia Rules, a court is likely to find that Respondent misappropriated client funds in violation of Rule 1.15. In Virginia, "[a]ll funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable trust accounts." Va. Rule 1.15(a)(1). Specifically, the rule requires lawyers to "not disburse funds . . . of a client . . . without their consent or convert funds . . . of a client . . . except as directed by a tribunal." Va. Rule 1.15(b)(5).

Applying these Rules, the Virginia Supreme Court has held that an attorney violated Va. Rule 1.15 when he was given money to work on a divorce case, took the money out of the trust account before doing much work on the matter, and did

not respond to a request for an itemization of his expenses from his client. *Green v. Va. State Bar*, 652 S.E.2d 118, 121, 126 (Va. 2007).

Virginia has a Rule 5.1 like D.C.'s and Maryland's, which shows the importance of the principle that partners and people in a law firm who direct others to do things that violate the rules should be liable for those things themselves. *See* Va. Rule 5.1. Even though a violation of that Rule is not alleged here, this principle should still be taken into account when considering Respondent's liability under Va. Rule 1.15.

Like the attorney in *Green*, Respondent had the money taken from the trust account before completing the work on the matter. *See Green*, 652 S.E.2d at 121, 126.

d. Conclusion of Law Regarding Misappropriation

Under D.C. Rule 1.15, Md. Rule 19-301.15, and Va. Rule 1.15, Respondent misappropriated Mr. Joselson's fee by withdrawing it in its entirety on May 18, 2017, contrary to the terms of the Agreement and significantly prior to fulfilling Respondent's obligations under the Agreement. FF 29, 78. The Hearing Committee discerns no meaningful difference in the application of this requirement among the three jurisdictions under the Rules of all three jurisdictions, and their relevant case law.

Whether the Hearing Committee concludes that misappropriation was negligent, reckless, or intentional is discussed in the Sanction section below.

iii. Charge that Respondent Failed to Keep Records of Client Funds

Respondent's law partner maintained the IOLTA records for Respondent's law firm. Although he is a partner in his law firm, Respondent does not know how to transfer money in and out of the IOLTA account and does not have the software application (or "app") for the Wells Fargo bank – where the IOLTA account is maintained – on his computer. FF 137-138. The Office of Disciplinary Counsel subpoenaed and obtained copies of the law firm's bank records for both the IOLTA and operating accounts (DCX 10; DCX 12), which allowed Disciplinary Counsel to exhibit, in tabular form, the inflow and outflow of money in the IOLTA account. DCX 34. Disciplinary Counsel, however, could not determine from the bank records whether the Joselson fee had been withdrawn from the trust account the same day (when $7,500 was withdrawn from the account) or during later withdrawals. FF 139-140, 144; *see* DCX 34 (showing $7,500 transfer from IOLTA to operating account on March 16, 2017, the same day Mr. Joselson's funds were deposited). Respondent offered to meet with Disciplinary Counsel to answer any questions Disciplinary Counsel might have, but Disciplinary Counsel did not invite him to do so. FF 143.

Respondent contends that Disciplinary Counsel cannot contest the failure to have an audit of the funds taken out of the IOLTA account because he failed to accept Respondent's offer to provide additional information in a meeting. In addition, Respondent contends that his law partner was the person responsible for maintaining the IOLTA account and Disciplinary Counsel declined to interview or seek records from her. Respondent argues that his partner, not he, was responsible

for maintaining the financial records of the firm. Respondent's Brief at 34-36. Therefore, Respondent contends, he could not have violated D.C. Rule 1.15(a), or the corresponding Maryland Rule, for failing to keep adequate records of entrusted funds. *Id.*

a. Analysis Under District of Columbia Rules

D.C. Rule 1.15 requires client property, including client funds, to be kept separate from the lawyer's property. Rule 1.15(a). Under that Rule, "[c]omplete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation." *Id.* "Financial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" *Edwards*, 990 A.2d at 522 (quoting *Clower*, 831 A.2d at 1034). Here, it was not possible from the records alone to determine the extent to which the Joselson fee was withdrawn as part of the $6,000 May 2017 withdrawal from the firm's IOLTA account or whether it was withdrawn at an earlier time. *See* FF 144; DCX 34. Thus, Respondent (or his law partner) failed to keep records "sufficient to demonstrate [his] compliance with his ethical duties." *Edwards*, 990 A.2d at 522.

Like the attorney in *Clower*, who did not keep complete records of the settlement funds, Respondent did not keep complete records of the flat fee paid by the client and withdrawals made by his partner from the IOLTA account on his behalf. *See Clower*, 831 A.2d at 1034. Respondent failed to keep documents "sufficient to demonstrate [his] compliance with his ethical duties." *See Edwards*,

990 A.2d at 522 (quoting *Clower*, 831 A.2d at 1034). Thus, Respondent's conduct violated D.C. Rule 1.15(a)'s recordkeeping requirements.

A lingering issue, raised obliquely by Respondent (Respondent's Brief at 35-36) is whether Respondent's lack of control of the IOLTA account absolved him from responsibility for failing to maintain adequate records. Respondent acknowledges he had a responsibility, as a partner in his law firm, to keep records of deposits and withdrawals from the IOLTA account. *Id.* at 36. He asserts, however, that he was not the managing partner of his firm "nor could he transfer any fees, was not responsible for monthly expenditures, nor was [he] the custodian of any financial records." *Id.* at 35-36.

The Amended Specification does not allege a violation of Rule 5.1, which, if alleged, may have recognized the responsibility of Respondent's law partner for Respondent's violations of the Rules, since she ratified Respondent's conduct and failed to ensure compliance with the Rules. *See, e.g.*, *In re Dickens*, 174 A.3d 283, 301 (D.C. 2017). In *Dickens*, while the managing partner (Luxenberg) was found to have violated Rule 5.1 for failing to properly supervise the activities of her partner, he (Dickens) was disbarred for his Rule violations, although he did not respond to Disciplinary Counsel's charges or otherwise participate in the proceeding.

While Respondent's partner was responsible for handling the accounting for the IOLTA account, it was with Respondent that Mr. Joselson entrusted his funds and the failure to bring charges against Respondent's partner does not absolve Respondent of liability. Mr. Joselson understood Respondent to be a partner in his

law firm and could reasonably expect Respondent to ensure the law firm properly managed his retainer payment in compliance with the Rules. It was not up to Mr. Joselson to determine the minutiae of which partner was responsible for which administrative task in their law firm. He should not lose the protections of the Rules because he may have guessed incorrectly how Respondent's law firm was managed. The responsibility for compliance with Rule 1.15 lies with the partner to whom the client entrusted the funds. *See Nave*, 197 A.3d at 514. Accordingly, Respondent violated Rule 1.15(a)'s recordkeeping requirements by failing to maintain adequate records of the distribution of Mr. Joselson's funds from the firm's IOLTA account.

b. Analysis Under Maryland Rules

The Maryland court has held that, under Md. Rule 19-301.15, lawyers have an "obligation to maintain records for receipt and distribution of trust funds in order to explain, verify, or corroborate [their] handling of client funds when requested by Bar Counsel to do so." *Att'y Grievance Comm'n v. Khandpur*, 25 A.3d 165, 173 (Md. 2011). Thus, an attorney violated this rule when "he could not account for every single cent in the trust account at month's end." *Att'y Grievance Comm'n v. Fineblum*, 250 A.3d 148, 157 (Md. 2021). In *Khandpur*, the attorney's recordkeeping was insufficient when he was unable "to identify what happened to the first $750 paid by" the client. *Khandpur*, 25 A.3d at 173.

c. Analysis Under Virginia Rules

Under Virginia Rule 1.15, Respondent (in coordination with his partner) failed to "maintain complete records of all funds . . . of a client coming into the

possession of the lawyer and render appropriate accountings to the client regarding them." Va. Rule 1.15(b)(3). Specific recordkeeping requirements are outlined in subsections (c)(1) through (c)(4). Va. Rule 1.15(c).

Applying these rules, the Virginia Supreme Court held that an attorney did not keep complete records because he failed to maintain a subsidiary ledger card or an equivalent for a real estate transaction. *Motley v. Virginia State Bar*, 536 S.E.2d 101, 108 (Va. 2000).

d. Conclusion of Law Regarding Failure to Maintain Complete Records

Disciplinary Counsel has proved by clear and convincing evidence that, under D.C. Rule 1.15, Md. Rule 19-301.15, and Va. Rule 1.15, Respondent, or his partner, failed to maintain a complete accounting of Mr. Joselson's funds. Although Respondent's law partner had primary responsibility for maintaining the accounting records of the IOLTA account, Mr. Joselson could reasonably expect that Respondent – to whom he had entrusted his flat fee payment – would comply with the applicable professional ethics rules that applied to his retention of Respondent. The Hearing Committee discerns no meaningful difference in the application of this requirement among the three jurisdictions.

iv. Charge that Respondent Failed to Provide an Accounting

The Hearing Committee found that Disciplinary Counsel had proved by clear and convincing evidence that, upon being requested to do so by Mr. Joselson, Respondent failed to provide an accounting to Mr. Joselson for the time he claims he spent working on Mr. Joselson's behalf. Respondent testified he did not keep

time records and could provide, at best, only a verbal accounting. FF 129-130. (Such a "verbal accounting" was insufficient in the view of the Maryland courts that heard the subsequent fee dispute litigation between Respondent and Mr. Joselson. FF 131-133.)

Respondent does not regularly keep time records, and he kept none in the Joselson matter. Tr. 445 (Respondent); FF 129. Normally, Respondent would make a refund to a client when a flat fee agreement was terminated prematurely or the client's issue was resolved before all the anticipated effort occurs – for example, an expected event, such as an anticipated hearing or trial, did not occur. *See* FF 6. To calculate how much of the fee to refund to a client in those circumstances, Respondent normally relies on "reasonable guideposts." Tr. 445 (Respondent). Respondent considers the issue to be one of "fundamental fairness": "it's impossible to draw bright lines as far as what is appropriate and what is not." Tr. 450-51 (Respondent); *see* Tr. 446-454 (Respondent).

Although Respondent claimed at the hearing that he treated the first sixteen-plus hours of his work on Mr. Joselson's behalf as having been performed on an hourly basis, he failed to maintain or to provide to Mr. Joselson, when requested, any accounting for those hours of claimed legal work. FF 136.

a. Analysis Under District of Columbia Rules

Advanced payments of fees, whether in the form of a flat fee or an advance of fees for hourly billing, are client property entrusted to the attorney. Rule 1.15(a), (e); *Mance*, 980 A.2d at 1204. Upon termination of the Agreement, Mr. Joselson

requested an accounting. FF 16. Rule 1.15(c) provides that, "upon request," an attorney must "promptly render a full accounting" of those funds to the client. Respondent's failure to provide such an accounting violated Rule 1.15(c).

b. Analysis Under Maryland Rules

Md. Rule 19-301.15 similarly requires an attorney, "upon request by the client or third person, [to] render promptly a full accounting" of the client's property, including client funds in a client trust account. Md. Rule 19-301.15(d). Failure to provide an itemized accounting of the attorney's billable hours, when requested, is a violation of that Rule. *Att'y Grievance Comm'n v. Stinson*, 50 A.3d 1222, 1249 (Md. 2012) (per curiam).

c. Analysis Under Virginia Rules

The Virginia Rules do not specify a requirement that the client request an accounting. They require an attorney to "maintain complete records of all funds . . . of a client . . . and render appropriate accountings to the client regarding them." Va. Rule 1.15(b)(3). Failure to render such an accounting, even if not requested, is a Virginia Rule violation. *See In re Lormand*, VSB Docket No. 18-031-112311, at 4 (July 6, 2018).

d. Conclusion of Law Regarding Failure to Provide an Accounting

Under D.C. Rule 1.15(a), Md. Rule 19-301.15(d), and Va. Rule 1.15(b)(3), Respondent failed to provide to Mr. Joselson an accounting of his hours worked or his fees held by Respondent in his firm's trust account, after being requested to do so by Mr. Joselson. The Hearing Committee discerns no meaningful difference in

the application of this requirement among the three jurisdictions. Disciplinary Counsel has proved by clear and convincing evidence that Respondent failed to provide a full accounting to Mr. Joselson, as required by the Rules of D.C., Maryland, and Virginia.

v. Charge that Respondent Failed to Turn Over the Client File

Because there is not clear and convincing evidence that Respondent failed to turn over the client file to Mr. Joselson's successor attorney (FF 102), the Hearing committee concludes that Disciplinary counsel failed to prove a violation of Rule 1.16(d), Md. Rule 19-301.16(d), or Va. Rule 1.16(d) or (e), on this ground.

vi. Charge that Respondent Failed to Refund an Unearned Fee

On May 18, 2017, Respondent's law firm withdrew from the trust account all $4,000 of the fee Mr. Joselson had paid for Respondent to represent Mr. Joselson through the DOHA hearing. FF 22-24. Five months later, Mr. Joselson terminated his Agreement with Respondent and demanded a refund of the entire $4,000 he had paid Respondent. FF 12, 16. Mr. Joselson claimed that Respondent did not provide to him all of the services which Respondent agreed to provide, including preparing him for the DOHA hearing and representing him at the hearing. FF 24, 27, 43.

Respondent originally declined to provide any refund to Mr. Joselson. A day later, Respondent offered to refund to Mr. Joselson $1,000 if Mr. Joselson would accept that in resolution of their dispute. Mr. Joselson declined that offer. Tr. 62 (Joselson); DCX 27 at 78, 88-89; FF 16. More than three months after termination of the Agreement and Mr. Joselson's demand for a full refund of his $4,000

advanced fee, Respondent, on or about January 19, 2018, refunded $2,000 to Mr. Joselson. FF 16. A year and a half later, Respondent filed a counterclaim in the Maryland fee dispute litigation, demanding return of that $2,000; that counterclaim was dismissed as untimely. FF 18. Not until January 6, 2020, almost two and a half years after Mr. Joselson terminated the Agreement with Respondent, did Respondent's law firm refund to Mr. Joselson an additional $1,750. That was only after an arbitrator and two courts determined that, of the $4,000 fee paid by Mr. Joselson, Respondent had earned only $250. FF 17-21. Respondent had maintained no records of his work on Mr. Joselson's behalf and Respondent's claim of having performed that work could not be established and was rejected by the Maryland courts considering the fee dispute. FF 20; *see* FF 131-133.

a. Analysis Under D.C. Rules

Respondent was required, under D.C. Rule 1.16(d) to "refund[] any advance payment of fee . . . that has not been earned . . . ." This includes "mak[ing] timely return to the client of any property or money 'to which the client is entitled.'" Rule 1.16, cmt. [11]. Failure to refund any unearned portion of the fee violates Rule 1.16(d). *See, e.g.*, *In re Samad*, 51 A.3d 486, 497 (D.C. 2012) (finding a violation where the respondent claimed that he did some work on the matter, but did not suggest he had earned the entire fee); *In re Carter*, 11 A.3d 1219, 1222-23 (D.C. 2011) (per curiam) (finding a violation of Rule 1.16(d) where the attorney did not pay an ACAB award and settlement agreement for unearned fees); *In re Kanu*, 5

A.3d 1, 10, 15 (D.C. 2010) (finding a violation of Rule 1.16(d) where an attorney failed to provide a refund, as agreed, when she failed to fulfill her client's goals).

The parties have unpersuasively sought to demonstrate two different views of the time spent by Respondent on Mr. Joselson's behalf. The most conclusive evidence in the record stems from the Maryland litigation. The Maryland courts awarded to Respondent only $250. *See* FF 18-20. Disciplinary Counsel does not claim the findings of those courts to be *res judicata*. Tr. 988-89 (Disciplinary Counsel). Unlike the Maryland litigation, in this disciplinary proceeding, Disciplinary Counsel has the burden to prove by clear and convincing evidence that Respondent failed to refund an unearned fee when requested. As discussed in the Hearing Committee's Findings of Fact, Disciplinary Counsel has failed to prove by clear and convincing evidence that the fee was unearned. FF 150.

b. Analysis Under Maryland Rules

An attorney violates Md. Rule 19-301.16(d) if he or she fails to return unearned fees to the client. *Stinson*, 50 A.3d at 1234; *see also Att'y Grievance Comm'n v. Kremer*, 68 A.3d 862, 867 (Md. 2013) (finding respondent violated Maryland Rule 19-301.16(d) when he "did not return, in a timely manner, the . . . fees" of the client).

Determining the amount to be refunded, as well as the amount of the fee the attorney may retain, is determined on a case-by-case basis. For example, in *Att'y Grievance Comm'n v. McCulloch*, 946 A.2d 1009 (Md. 2008), the attorney received a flat fee of $750 to handle a divorce case, but the attorney terminated the

representation before the complaint had been served. The court held: "It is without argument that [the attorney] did not earn the entire fee and was not entitled to retain all of it. Her failure to refund a portion of it violates Rule 1.16(d)." 946 A.2d at 1016; *see also Att'y Grievance Comm'n v. Rose*, 892 A.2d 469, 473-75 (Md. 2006) (failure to refund unearned fee for more than one year after discharge violates Rule 19-301.16(d)).

c. Analysis Under Virginia Rules

In Virginia, "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, such as . . . refunding any advance payment of fee that has not been earned . . . ." Va. Rule 1.16(d); *see Pollack v. Va. State Bar*, 2023 WL 3749882, at *10-11 (Va. June 1, 2023) ("Pollack conceded at trial that approximately half of the advanced fees . . . were unearned . . . [but held] those funds for nearly two years. It is hard to imagine a starker violation of [Va. Rule] 1.16(d).").

d. Conclusion of Law Regarding Failure to Refund Unearned Fee

Under D.C. Rule 1.16(d), Md. Rule 19-301.16(d), and Va. Rule 1.16(d), Respondent failed to refund promptly to Mr. Joselson funds which Mr. Joselson requested. Disciplinary Counsel, however, failed to prove by clear and convincing evidence that those fees were unearned, due in large part to the difficulty Disciplinary Counsel naturally encountered in the absence of billing records. *See* FF 148-150. As discussed above, this conclusion is based solely on the applicable burden of proof, as the Hearing Committee has found that Respondent's testimony

concerning the sixteen hours he allegedly worked on Mr. Joselson's behalf was not credible. *See, e.g.*, FF 79.

vii. Charge that Respondent Engaged in Conduct Involving Misrepresentation and Dishonesty

Under Md. Rule 19-308.4(c), "[i]t is professional misconduct for an attorney to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Hearing Committee found that Disciplinary Counsel proved by clear and convincing evidence that Respondent made false and misleading statements to the Maryland District Court in both a filing and at a trial, and to the Maryland Circuit Court in a filing, regarding the status of the investigation by the D.C. Office of Disciplinary Counsel regarding Respondent's dealings with Mr. Joselson. FF 114-115, 120, 122-126.

Under Maryland law, Disciplinary Counsel must also prove that the dishonesty was intentional, making a statement "knowing that it is untrue." *Att'y Grievance Comm'n v. Stanalonis*, 126 A.3d 6, 17 (Md. 2015); *see also Att'y Grievance Comm'n v. Moore*, 152 A.3d 639, 657 (Md. 2017). To violate Rule 19-308.4(c), the attorney's alleged dishonesty must not be "the product of mistake, misunderstanding, or inadvertency." *Att'y Grievance Comm'n v. Rheinstein*, 223 A.3d 505, 546 (Md. 2020).

Respondent clearly made false and misleading statements in the Maryland courts in claiming that the investigation by the D.C. Office of Disciplinary Counsel had been resolved in his favor. The Hearing Committee also concludes that

Disciplinary Counsel proved by clear and convincing evidence that Respondent knew his statements were untrue, in violation of Maryland Rule 19-308.4(c).

While "intent" is often established by circumstantial evidence, the Hearing Committee members are "not precluded from using their common sense in evaluating the record." *In re Krame*, 284 A.3d 745, 764-65 (D.C. 2022) (quoting *In re Godette*, 919 A.2d 1157, 1165-66 (D.C. 2007)); *see also Att'y Grievance Comm'n v. Walter*, 967 A.2d 783, 788 (Md. 2009) (noting hearing judges "routinely apply their common sense, powers of logic, and accumulated experiences in life to arrive at conclusions from demonstrated sets of facts" (quoting *Robinson v. State*, 554 A.2d 395, 399 (Md. 1989))). The record demonstrates clearly and convincingly that Respondent knew at the time of his false representations to the Maryland courts that the D.C. investigation was ongoing. The documentary record establishes conclusively that the D.C. investigation did not conclude and was not resolved in Respondent's favor after Respondent provided information to Assistant Disciplinary Counsel Bowman in early April 2019 about the status of the investigation with the Office of Bar Counsel for the Attorney Grievance Commission of Maryland. To the contrary, the record of communications between Disciplinary Counsel and Respondent establishes that the D.C. investigation continued after April 2019. Indeed, Assistant Disciplinary Counsel Bowman continued to request documents and information from Respondent *after* their alleged conversation regarding reciprocity. *See* FF 107-110. In fact, Respondent continued to provide documents and information to Mr. Bowman regarding the ongoing investigation in April 2019,

without ever suggesting that the continued correspondence and document production were unnecessary because the disciplinary investigation had been dismissed. *See* FF 107, 109-110.

On April 12, 2019, Assistant Disciplinary Counsel Lowery wrote to Respondent to inform him that he, Mr. Lowery, had taken over the investigation and that the investigation was ongoing. FF 112. Respondent does not dispute that the letter was sent and contends only that he does not recall receiving it. FF 113. There is no evidence in the record that Respondent received any written notification that the D.C. investigation had been dismissed or resolved in his favor before he made his false representations to the Maryland courts. Nor is there any evidence that Respondent sought or received any written confirmation from D.C. Disciplinary Counsel about the purported conclusion of the investigation.

The Hearing Committee does not find credible Respondent's assertion that he believed that the investigation by the Office of Disciplinary Counsel had been completed at the times of his statements to the Maryland courts. Respondent is an experienced lawyer who was facing the possibility in D.C. of potentially severe sanctions. It defies belief to assume that Respondent would be so cavalier as to believe the D.C. Office of Disciplinary Counsel's investigation was completed, and to so represent to a court, on the basis of an alleged vague verbal representation about reciprocity with the Maryland investigation, without ever seeking some form of confirmation, written or otherwise, from Disciplinary Counsel. FF 123. Further, Respondent's claim is not credible because he continued to receive correspondence

and inquiries from Mr. Bowman concerning the ongoing D.C. investigation after he had informed Mr. Bowman of the outcome of the Maryland inquiry. *See* FF 107-110.

Respondent also claims to not remember Mr. Lowery's formal letter in April 2019, marked "PERSONAL AND CONFIDENTIAL" and identified as coming from the Office of Disciplinary Counsel, which he claims he probably considered to be regular D.C. Bar "stuff." FF 113, 124. This testimony is not credible.

Even if Respondent somehow missed or failed to receive Mr. Lowery's letter of April 12, 2019, however, he could not reasonably have failed to recall his own letter to Mr. Lowery dated July 15, 2019, confirming Respondent's understanding that the investigation continued and that he should expect to receive a subpoena for his case file regarding Mr. Joselson. DCX 33 at 7. Respondent recognized, in his letter to Mr. Lowery, that there would be no resolution of the D.C. investigation at least until sometime in August 2019. *Id.* Nonetheless, three weeks later, on August 8, 2019, Respondent represented to the Circuit Court that "[t]he [attorney grievance] *complaints* against [Respondent] were resolved in [Respondent's] favor." DCX 26 at 1 (emphasis added); *see* FF 120. Respondent had to know this assertion was false.

Before the Hearing Committee, Respondent sought to defend his statements by claiming that Disciplinary Counsel had said he is "going to review the case in August [2019], and that's what I put in my letter. And I heard nothing, August, September, October, November. . . . So I mean, I assumed . . . that it was done." Tr. 394 (Respondent); *see* FF 121, 126. The Hearing Committee does not find that

testimony to be credible because it would apply only if he waited until after November 2019 to make false statements to the Maryland court. To the contrary, Respondent's false statement to the Circuit Court that the "complaints" against him had been "resolved in [his] favor" was made on August 8, 2019, less than one month – not four months – after Respondent confirmed to Mr. Lowery that he understood that the investigation was ongoing. *See* FF 120, 126.

The Hearing Committee finds that Disciplinary Counsel has proved, by clear and convincing evidence, that Respondent knowingly lied to or misled the Maryland courts as to the status of the investigation by the D.C. Office of Disciplinary Counsel in violation of Rule 19-308.4(c) of the Maryland Rules.

IV. RECOMMENDED SANCTION

The Hearing Committee has found that Disciplinary Counsel proved by clear and convincing evidence that Respondent misappropriated Mr. Joselson's funds when Respondent's law firm removed from its IOLTA account $6,000, including all of Mr. Joselson's $4,000 flat fee payment, before Respondent had represented Mr. Joselson at his DOHA hearing or completed all of the tasks contemplated to be accomplished by the engagement. FF 22-29.

Respondent claims the withdrawal of the funds from the trust account was done not by him but by his law partner. Respondent's Brief at 19-20, 29. Respondent's partner took that action, however, only after consulting with Respondent and being told by Respondent that it was appropriate to do so. FF 40-41. Respondent cannot avoid responsibility for his actions by pointing to his partner

as the person who exercised control over the IOLTA account: "holding money in trust for clients [is] a nondelegable, fiduciary responsibility that cannot be transferred . . . ." *In re Gregory*, 790 A.2d 573, 578 (D.C. 2002) (per curiam) (quoting Ann. Model Rules of Prof'l Conduct R. 5.3 cmt. (1983)).

Whether that misappropriation was negligent, reckless, or intentional depends on the circumstances. *See Anderson*, 778 A.2d at 338-39. When an attorney engages in reckless or intentional misappropriation, the sanction is "virtually automatic disbarment." *In re Gray*, 224 A.3d 1222, 1229 (D.C. 2020) (per curiam). When misappropriation is found to be negligent, the "ordinary sanction" will not exceed six months. *In re Kline*, 11 A.3d 261, 265 (D.C. 2011). Misappropriation is "intentional" when the attorney "treat[s] the funds as the attorney's own." *Anderson*, 778 A.2d at 339. Misappropriation is reckless when the attorney shows "'an unacceptable disregard for the safety and welfare of the entrusted funds.'" *Ahaghotu*, 75 A.3d at 256 (D.C. 2013) (quoting *Anderson*, 778 A.2d at 338).

Respondent claims he "did not intentionally misappropriate any funds [but] believed he had earned the funds and was not required to return any funds." Respondent's Brief at 41. The line between negligent and other more serious forms of misappropriation is "objective reasonableness." *See Gray*, 224 A.3d at 1233. In this case, Respondent's action in May 2017 in taking Mr. Joselson's full fee was not objectively reasonable. It was an obvious violation of the clear meaning of the Agreement. Respondent admitted in sworn testimony before the Maryland courts in 2019 that the Agreement was a flat fee agreement. FF 53. The Agreement required

Respondent to perform all of the services contemplated by the Agreement – including representing Mr. Joselson at his DOHA hearing – before the full fee would be earned. Respondent clearly was not entitled to take Mr. Joselson's full fee in May 2017, early in the representation and well before any DOHA hearing had taken place. Indeed, Respondent has admitted that, if the Agreement was a flat fee agreement – which he conceded in 2019 before the Maryland courts it was – he was not entitled to take the full fee in May 2017. FF 59-60. Respondent's current claim that the Agreement was not a flat fee agreement, but rather a "hybrid" agreement that permitted him to take Mr. Joselson's full fee in May 2017 after sixteen alleged hours of work is a fabulation invented to respond to the current charges that is directly contradicted by Respondent's own sworn testimony before the Maryland courts.

Respondent, after informing his law partner, encouraged his law firm to withdraw the funds from the trust account and to pay those funds to a credit card company, apparently to pay off a credit card bill for which Respondent was responsible. This is the definition of "intentional misappropriation" (*Anderson*, 778 A.2d at 339), and the appropriate sanction in this jurisdiction is disbarment (*Kline*, 11 A.3d at 265).

Accordingly, the Hearing Committee is bound by its findings and the law of the D.C. Court of Appeals to recommend Respondent be disbarred.

If, however, the Board and the Court determine that Respondent's misappropriation was merely negligent, the standard sanction would be suspension for a period of six months. *See In re Edwards*, 870 A.2d 90, 94 (D.C. 2005) ("A six-

month suspension without a fitness requirement is the norm for attorneys who have committed negligent misappropriation of entrusted funds together with the related violations (commingling, deficient record keeping) exhibited here."); *see also In re Wyatt*, Board Docket No. 10-BD-123 (BPR July 7, 2014) (six-month suspension for negligent misappropriation, failure to serve client with skill and care, failure to communicate, commingling, and failure to maintain adequate records), *recommendation adopted where no exceptions filed*, 111 A.3d 635 (D.C. 2015) (per curiam); *In re Ray*, 675 A.2d 1381 (D.C. 1996) (six-month suspension for negligent misappropriation, unauthorized practice of law, failure to provide competent representation, and collecting an unreasonable fee).

In considering the remaining violations and mitigating factors, the Hearing Committee urges the Board and the Court to consider what the Hearing Committee concludes has been dishonest testimony by Respondent. As the Hearing Committee concluded (FF 62-63), the Agreement between Respondent and Mr. Joselson was clearly a flat fee agreement, to which Mr. Joselson added a provision, to which Respondent agreed, that provided that, should the engagement end prematurely, Respondent was entitled to be paid $250-per-hour. Throughout his testimony in three forums in Maryland, Respondent identified the Agreement as a flat fee agreement. *See, e.g.*, FF 49. In an apparent effort to put forward a justification for his actions, however, Respondent claimed before the Hearing Committee that the Agreement was a "hybrid agreement" – neither fixed fee nor hourly – for which there is no basis in the record before the Hearing Committee. *See* FF 55-58. In the opinion

of the Hearing Committee, Respondent's testimony on this critical issue was manufactured with no basis in fact, and was clearly false and deliberately dishonest.

In another specific example of Respondent's dishonest testimony, he testified to the Hearing Committee that his attorney in the Maryland Circuit Court had failed to ask about his work for Mr. Joselson. He went on to claim that is why the Circuit Court ruled against him and testified that his attorney subsequently apologized to him for failing to do so. FF 76. Yet, a review of the transcript of that hearing makes clear Respondent's attorney did ask him questions about his work for Mr. Joselson and he gave responsive testimony. FF 77. There is no explanation for this false testimony other than Respondent's incorrect belief that he could testify before the Hearing Committee about that Circuit Court hearing and the Hearing Committee would not carefully review all of the evidence put before it by both parties, including the transcript of the Circuit Court proceeding.

Under these circumstances, the Hearing Committee urges the Board and the Court to consider Respondent's dishonest testimony before the Hearing Committee to be a "significant aggravating factor" in any sanction that may be issued to Respondent. *See In re Chapman*, 962 A.2d 922, 925 (D.C. 2009) (per curium) ("Deliberately dishonest testimony receives great weight in sanctioning determinations because a respondent's truthfulness or mendacity while testifying on his [or her] own behalf, almost without exception, is probative of his attitudes toward society and prospects of rehabilitation . . . .") *quoted in In re Wilson*, 241 A.3d 309, 313 (D.C. 2020) (per curiam).

Respondent argued, in mitigation, that he no longer accepts fee agreements of the type he entered into with Mr. Joselson and that the entire payments made in fixed or flat fee agreements are now maintained in the trust account until the representation is completed. Respondent stated he had never been the subject of disciplinary action by any Bar and that he had made refunds of portions of flat fees when appropriate. Tr. 1100-1126 (Respondent). Respondent does not claim a disability mitigation due to PTSD. Tr. 1126 (Counsel for Respondent).

V. CONCLUSION

For the foregoing reasons, the Hearing Committee finds that Respondent violated D.C. (or the corresponding Maryland or Virginia) Rules 1.4(a), 1.15(c), and 1.15(a) (recordkeeping and intentional misappropriation), and Maryland Rule 19-308.4(c), and recommends that Respondent be disbarred.

AD HOC HEARING COMMITTEE

Daniel C. Schwartz

Daniel C. Schwartz, Chair

Marcie Ziegler

Marcie Ziegler, Attorney Member

Cecilia DC Monahan

Cecelia Carter Monahan, Public Member