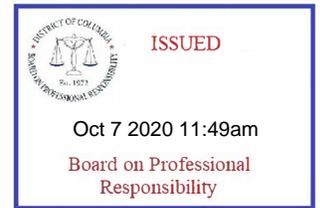


THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY



In the Matter of: :
:
ALVIN S. BROWN, :
:
Respondent. : Board Docket No. 19-BD-032
: Disciplinary Docket No. 2017-D242
A Member of the Bar of the :
District of Columbia Court of Appeals :
(Bar Registration No. 263681) :

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Respondent is, by all accounts, an experienced tax practitioner. He is not, however, an experienced New York state tax practitioner, despite the fact that he lived in New York.¹ New York’s law and procedures are different from those in the jurisdictions where Respondent has previously practiced. Respondent was hired to help a client – Ali Bahri – with a New York sales tax issue. Respondent did not realize until much too late that his prior experience did not apply to Mr. Bahri’s matter given the New York-specific tax laws and regulations. When that became clear, Respondent ignored Mr. Bahri, misled him, and refused to return a flat fee for work that provided no benefit to Mr. Bahri.

¹ Respondent is a member of the D.C. Bar, and not of the New York Bar, but was able to practice in New York under an exception to the normal unauthorized practice of law rules applicable to federal tax practitioners. Hearing Committee Finding of Fact (“FF”) 2.

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

I. FACTUAL BACKGROUND

Mr. Bahri ran a business in the United States that incurred a sales tax obligation in New York of a little less than \$15,000. Hearing Committee Findings of Fact (“FF”) 4-5. After events in his personal life changed, he closed the business and returned to France, his home country, in 2004. FF 6. He did not realize he had a sales tax obligation in New York. Since he was not in New York, Mr. Bahri did not receive notice of the tax obligation until 2011, when he returned to the United States and found that his wages were being garnished. FF 7; Hearing Transcript 38-39 (Bahri). Mr. Bahri returned to France again, and by the time he arrived back in the United States in 2015, the tax obligation had ballooned to a little more than \$68,000 with penalties and interest. FF 7-8.

Mr. Bahri paid Respondent a flat fee of \$4,000 to help with his New York sales tax liability. FF 10-11. The New York State Department of Taxation and Finance (“DTF”) recognizes two processes to challenge a sales tax obligation: an Offer in Compromise or a request for an abatement. FF 12-14; *see* FF 24. Broadly speaking, in New York, one can challenge a tax obligation through either an Offer in Compromise because the obligation imposes an undue hardship based on the taxpayer’s financial situation, or through an abatement because the taxpayer has “reasonable cause” to challenge the amount due. FF 12-14.

New York permits an abatement of a portion of a tax liability – such as the penalties and interest Mr. Bahri was subject to – if the taxpayer was “unavoidabl[y]

absen[t] from [his] usual place of business.”. FF 14 (quoting N.Y. Codes R. & Regs. tit. 20 § 2392.1(d)(1)).

Respondent was hired by Mr. Bahri in February 2016. FF 10. His engagement agreement did not clearly state which approach the representation would take. Though the title of the engagement agreement referred to an Offer in Compromise, the body of the engagement agreement requested that Mr. Bahri provide Respondent information about the “unfairness” of the penalties and interest or, in the alternative, information to show economic hardship. FF 10-11, 14; Disciplinary Counsel’s Exhibit (“DX”) 5 at 8.

Despite Mr. Bahri’s communications with Respondent, which were either ignored or met with misleading² responses that Respondent was working on Mr. Bahri’s case, Respondent did virtually nothing for Mr. Bahri until October 2016. FF 17-23. Then, eight months after he had been hired, Respondent filed an Offer in Compromise that both did not request an abatement based on the fact that Mr. Bahri was out of the country when the penalties and interests accrued, and also did not provide financial information sufficient to allow the tax obligation to be reduced based on Mr. Bahri’s financial situation. FF 24, 41.

Even though Respondent represents that some jurisdictions like Maryland, Virginia, and the District of Columbia, as well as the IRS, allow taxpayers to make

² The Hearing Committee did not find that Respondent intentionally misled Mr. Bahri by giving false status updates; rather, it allowed for the possibility that he confused Mr. Bahri with another client. HC Rpt. at 32.

both challenges on one form – for an Offer in Compromise, R. Br. to Board at 8-10 – New York does not permit a taxpayer to challenge the application of a sales tax in an Offer in Compromise, and, in New York, the abatement process is separate. FF 12-14.

The Offer in Compromise Respondent filed asserted no liability, but offered \$1,000 to settle. FF 24. When Mr. Bahri saw it, he told Respondent it was not what he wanted; he wanted to challenge the penalties and interest. FF 21, 27. Respondent did not modify the Offer in Compromise. *See* FF 31.

In response to the Offer in Compromise Respondent filed, the DTF sent Respondent a request for more information – such as Mr. Bahri’s financial information. FF 30. Respondent ignored this request, thereby allowing the Offer in Compromise to expire. FF 31.

Finally, on January 9, 2019, Mr. Bahri demanded his \$4,000 back. FF 35; DX 5 at 100. Respondent never returned the money. FF 35, 42. This disciplinary case followed. At the time of the hearing in this disciplinary matter, Mr. Bahri’s tax liability had increased to more than \$100,000. *See* FF 36.

II. PROCEDURAL BACKGROUND

An Ad Hoc Hearing Committee determined that Respondent violated a number of District of Columbia Rules of Professional Conduct (the “Rules”). Specifically, his representation of Mr. Bahri was not competent, violating Rule 1.1(a); he neglected (and intentionally neglected) Mr. Bahri’s case, in violation of Rules 1.3(a), 1.3(b)(1), and 1.3(c); he failed to adequately communicate with Mr.

Bahri, in violation of Rule 1.4(a); he charged an unreasonable fee, in violation of Rule 1.5(a); he did not put an unearned fee in his trust account, in violation of Rule 1.15(e); and he failed to return an unearned fee to the client, in violation of Rule 1.16(d). The Hearing Committee recommended that he be suspended for sixty days, and recommended that his reinstatement be conditioned on Respondent making restitution to his client and proving that he is fit to practice law.

Respondent has taken exception to the Hearing Committee Report and Recommendation, arguing that he did not engage in any misconduct and should not be sanctioned.³ Disciplinary Counsel supports the Hearing Committee's Report and Recommendation. The Board agrees with the Hearing Committee's conclusions, finding that Disciplinary Counsel has proven each rule violation by clear and convincing evidence, and agrees that Respondent should be suspended for sixty days with a requirement that he show fitness and pay restitution before being reinstated.

III. STANDARD OF REVIEW

The Hearing Committee made detailed findings of fact, which are summarized above. Respondent maintains that many of these findings are incorrect. We are required to accept the Hearing Committee's factual findings that are supported by substantial evidence in the record as a whole, even where the evidence may support

³ On September 14, 2020, Respondent filed a motion with the Board requesting the "Ad Hoc Hearing Committee [sic] to formally review respondents [sic] reply to the Report and Recommendations of the Ad Hoc [sic] Hearing Committee" based on his belief that the oral argument was not "effective, fair or reasonable." Because the Board carefully reviewed Respondent's submissions in advance of the oral argument, his motion is hereby denied as moot. To the extent that it is not moot, it is denied.

a contrary view as well. *In re Robbins*, 192 A.3d 558, 564 (D.C. 2018) (per curiam); *In re Martin*, 67 A.3d 1032, 1039 (D.C. 2013). “Substantial evidence means enough evidence for a reasonable mind to find sufficient to support the conclusion reached.” *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam).

We have reviewed the Hearing Committee’s factual findings and Respondent’s arguments, many of which are simply assertions that the Hearing Committee got it wrong, without citation to any authority. We determine that the Hearing Committee’s factual findings are supported by substantial evidence, and, as a result, adopt them here.

IV. CONCLUSIONS OF LAW

A. Rule 1.1(a)

Respondent conceded at oral argument that New York handles tax matters differently than in the jurisdictions where he regularly practices and that he simply did not learn what New York law or procedure was before agreeing to handle Mr. Bahri’s case. Respondent’s admission is accurate. Throughout the course of his representation of Mr. Bahri, he did not seem to understand the basic practice or law in New York. *See, e.g.*, FF 40. It appears that there was a procedure for Mr. Bahri to request an abatement of the penalties and interests that had accrued while he was in France. *See* FF 12-14, 40. He wanted Respondent to make that request. Instead, Respondent filed an Offer in Compromise, despite lacking requisite financial information, which he then failed to supply when the DTF asked for the information. FF 25, 30-31. Even accepting Respondent’s argument that he did so intentionally

because it was his strategy to resolve Mr. Bahri's case, he pursued an avenue of relief that was not available in New York and did not explore any other options after learning that his original offer would not be considered. Under either view, that is not competent representation, and his failure to provide it prejudiced Mr. Bahri's interests by delaying resolution of his tax liability while penalties and interest continued to accumulate. *See In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014) (A Rule 1.1 violation requires proof that the conduct constituted a "serious deficiency" in the representation and that it "prejudice[d] or could have prejudiced [the] client." (citing *In re Evans*, 902 A.2d 56, 70 (D.C. 2006) (per curiam) (appended Board Report))); *In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (appended Board Report) (finding a lawyer who has requisite skill and knowledge, but who does not apply it for a particular client, violates Rule 1.1(a)).

B. Rule 1.3

The Hearing Committee concluded that Respondent violated Rules 1.3(a), 1.3(b)(1) and 1.3(c) because he failed to take action on Mr. Bahri's tax matter for several months (while telling Mr. Bahri that a request for relief was pending), and he ignored the DTF's request for additional information because he concluded that Mr. Bahri's tax relief request was futile, without communicating that conclusion to Mr. Bahri. HC Rpt. 27-30.

Respondent argues that Mr. Bahri's case did not require his immediate attention, and that he was delayed in working on the case because other clients had pending issues and "[n]ew clients are not priority clients unless there is some

exigency that requires immediate attention.” R. Br. to Board at 24. He argues that he did not intentionally fail to seek Mr. Bahri’s lawful objective because Mr. Bahri was not legally entitled to the result he sought.

Respondent’s arguments do not succeed. The idea that “new clients are not priority clients” so they can be neglected for eight months – during which time the client has emailed the lawyer for an update and for action – is exactly the opposite of what Rule 1.3 requires.

Respondent’s conduct violated three subsections of Rule 1.3.

Rule 1.3(a) provides that an attorney “shall represent a client zealously and diligently within the bounds of the law.” By failing to request or follow through with either an abatement or an Offer in Compromise that could have liberated Mr. Bahri from the penalties and interests that accrued while he was outside of the country, Respondent failed to zealously and diligently represent his client. Thus, he violated Rule 1.3(a).

Rule 1.3(b)(1) provides that, “A lawyer shall not intentionally . . . fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules.” The DTF asked Respondent for more information as a part of his request to have Mr. Bahri’s tax liability reduced through his strategy of filing an Offer in Compromise. Respondent just ignored the DTF’s request, thereby letting the Offer in Compromise expire. By intentionally ignoring that correspondence from the DTF, without notifying Mr. Bahri, without supplying the information the DTF requested, and without pursuing another avenue of relief,

Respondent intentionally failed to seek his client's lawful objectives and thus violated Rule 1.3(b)(1).

Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." "Neglect [of client matters] has been defined as indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985) (per curiam), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc) ("*Reback II*"). For no good reason, Respondent did nothing of value on Mr. Bahri's case for eight months, despite the fact that Mr. Bahri repeatedly asked for status updates. Respondent now contends that Mr. Bahri was a low-priority client, and that he nevertheless spent eight months working on his case by looking for a form that would enable him to contest liability the way he was accustomed to doing in other jurisdictions. But identifying a proper form is not a complex task, and if he could not quickly find the information he needed, he could have asked the DTF's Taxpayer Rights Advocate for assistance. *See* FF 40. Further, he was not entitled to violate his obligations under Rule 1.3 for eight months merely because he had other clients with more urgent matters. This violated Rule 1.3(c).

C. Rule 1.4(a)

The Hearing Committee concluded that Respondent violated Rule 1.4(a) when he failed to adequately respond to Mr. Bahri's numerous requests for

information about the status of the case, and failed to tell him that the DTF needed additional information. HC Rpt. at 31-33. Respondent argues that he was in email communication with Mr. Bahri, “to solicit new facts that could satisfy ‘reasonable cause’” necessary to obtain the desired tax relief. R. Br. to Board at 29. Disciplinary Counsel supports the Hearing Committee’s conclusions that Respondent failed to tell Mr. Bahri that the DTF needed additional information, and that his emails were simply requests for irrelevant information.

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 for information.” Mr. Bahri frequently asked Respondent for information and, rather than answering his questions or, as Respondent now claims, attempting to solicit new information to assist him in carrying out the representation, Respondent either ignored or misled him. FF 25-29, 33-35. This violated Rule 1.4(a).

D. Rule 1.5(a)

Respondent charged Mr. Bahri a \$4,000 flat fee in exchange for his promise to “endeavor to get [Mr. Bahri’s] sales tax liability settled.” FF 11. Respondent did not get Mr. Bahri’s tax liability settled and did not follow up on the one submission he made to the DTF in an effort to do that. Thus, the Hearing Committee found that Respondent provided nothing of value to Mr. Bahri and, accordingly, that his \$4,000 fee was unreasonable. *See* HC Rpt. at 33-36.

Respondent argues that the Hearing Committee erred in concluding that his services were of “no value,” and that he performed extensive work on Mr. Bahri’s

behalf; work that would have exceeded \$4,000 if it had been billed at an hourly rate.

R. Br. to Board at 31-32.

Flat fees have been the subject of a number of Board reports, ethics opinions, and cases by the Court of Appeals in recent years. Flat fees provide advantages for both clients and lawyers. As the Court observed in *In re Mance*, “[f]or the client, [a flat fee] ‘eliminate[s] the uncertainty, anxiety and surprise often found with hourly rates, especially in protracted litigation’ [and for] the lawyer, it ‘reward[s] efficiency and enable[s] the attorney to concentrate on the representation instead of fighting with the client over monthly bills[, and] provide[s] certainty of payment.’” 980 A.2d 1196, 1204 (D.C. 2009) (internal citations omitted), *quoted in* D.C. Bar Legal Ethics Op. 355 (June 2010). In short, flat fees give clients predictability, can reward lawyers for efficiency, and can remove one source of friction between lawyers and their clients.

However, flat fees present ethical challenges when, as here, the lawyer does not complete the work promised under the flat fee. Ethics Opinion 355 recommends that lawyers who would charge a flat fee break the schedule for earning the fee into milestones, perhaps dependent on the likely events in the case. For example, a lawyer who would represent a client in a civil dispute may earn 10% of the fee on the filing of the complaint, 40% at the close of discovery, and the remainder after settlement or trial.

In the absence of such milestones in an engagement agreement, Opinion 355 recognizes that it can be difficult to tell when a portion of the fee is earned, for

example, if a lawyer is not able to continue in a representation for some reason, such as a conflict of interest.

Here, Respondent did file an Offer in Compromise. It was not the form that New York State required, it was not the argument the client wanted, and Respondent abandoned it shortly after he filed it. But he did file it.

Because the reasonableness of a flat fee is done by reference to the work the lawyer agreed to do for that fee, *see Mance*, 980 A.2d at 1205 (determining what portion of a flat fee has been earned should be done “in light of the scope of the representation”), we have no difficulty concluding that at least a portion of the flat fee was unearned and so, as a result, at least a portion of the flat fee was unreasonable. As a result, Respondent violated Rule 1.5(a).

In addition, we conclude that none of the fee was earned because the only work Respondent completed – filing an Offer in Compromise – was both incorrect and not pursued. Respondent did nothing to correct this mistake or to otherwise advance his client’s objectives. Filing the Offer in Compromise provided no benefit or value to the client; it was the equivalent of doing nothing. As a result, Mr. Bahri did not receive the benefit of what he had contracted for when he provided the \$4,000 flat fee. Therefore, we conclude that none of the fee was earned, and the entirety of the \$4,000 fee was unreasonable. *See In re Cleaver-Bascombe*, 892 A.2d 396, 403 (D.C. 2006) (“It cannot be reasonable to demand payment for work that an attorney has not in fact done.”).

E. Rule 1.15(e)⁴

The Hearing Committee concluded that Respondent violated Rule 1.15(e) because he did not keep the entire \$4,000 fee advance in escrow until earned, because he never earned the entire amount. Respondent argues that Rule 1.15(e) is ambiguous on its face, does not address “fixed fees,” and has not been amended to reflect the *Mance* holding. R. Br. to Board at 33. Similar arguments were explored by the Board in *In re Haar* and *In re Ponds* and were rejected there. *Haar*, Board Docket No. 17-BD-066, at 6-8 (BPR June 24, 2019), *pending review*, D.C. App. No. 19-BG-0554; *Ponds*, Board Docket No. 17-BD-015, at 3-9 (BPR June 24, 2019), *pending review*, D.C. App. No. 19-BG-0555. We reject them for the same reason here. Moreover, Respondent concedes that “Bahri owned all funds until work is performed.” R. Br. to Board at 33. Thus, his defense to the Rule 1.15(e) rests on his contention that he earned the full \$4,000. *Id.* at 33-34.

Rule 1.15(e) provides that

(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced

⁴ Disciplinary Counsel brought two of its charges – Rule 1.15(e) and Rule 1.16(d) – as “alternative charges” in case it did not succeed on the Rule 1.5 charge. HC Rpt. at 36-37. We do not understand why these were brought in the alternative; we agree with the Hearing Committee that Respondent has violated all three Rules. Though Respondent does not argue that there was a due process violation on these facts, in other circumstances, alternative charges could, perhaps, give rise to a lack of sufficient notice to a respondent and therefore possibly violate a Respondent’s due process rights. Disciplinary Counsel’s approach in this matter does not appear to be an effective use of charging in the alternative, and we decline to consider these as alternative charges.

legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

Respondent did not put the \$4,000 flat fee advanced to him in trust. As the Hearing Committee explained, Respondent took each of the four \$1,000 checks into income on the date they were received and had collected the full \$4,000 four months before he filed the Offer in Compromise. *See* HC Rpt. at 39; FF 15. As previously discussed, Respondent did not earn any portion of the \$4,000 advanced fee; moreover, he did not keep time records that might support his argument that he performed \$4,000 worth of work by June 2016. *See id.* As a result, he violated Rule 1.15(e).

F. Rule 1.16(d)

The Hearing Committee concluded that Respondent's failure to return the unearned fees violated Rule 1.16(d). Respondent argues that he earned all \$4,000, and thus there was nothing to return.

We have already rejected that argument and found that Respondent did not earn any portion of the \$4,000 fee. And he did not return it. Rule 1.16(d) says “[i]n connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to . . . refund[] any advance payment of fee . . . that has not been earned or incurred.” *See, e.g., In re Samad*, 51 A.3d 486, 497 (D.C. 2012) (per curiam) (finding a violation where the respondent claimed that he did some work on the case, but did not “suggest that he earned the entire flat fee or that he returned any portion of the fee”).

Accordingly, Respondent violated Rule 1.16(d).

V. SANCTION

The Hearing Committee recommended that Respondent be suspended for sixty days, that he make restitution to Mr. Bahri of \$4,000 (plus 6% interest since June 13, 2016), and that he prove his fitness to practice prior to resuming the practice of law. For the reasons set forth below, we agree.

A. The Period of Suspension

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g., In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *Martin*, 67 A.3d at 1053; *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). “In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney.” *Reback II*, 513 A.2d at 231 (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not “foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted.” D.C. Bar R. XI, § 9(h)(1); *see, e.g., Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous

disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g., Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers “‘the moral fitness of the attorney’ and ‘the need to protect the public, the courts, and the legal profession’” *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)). We address those factors below.

1. The Seriousness of the Misconduct

Respondent’s misconduct was serious. Not only did he fail to carry out the terms of the representation, but he hid that fact from Mr. Bahri, giving him false reassurances that his matter was in progress and failing to inform him of the DTF’s request for more information or his decision to abandon the case.

2. Prejudice to the Client

Mr. Bahri received nothing of value in exchange for his \$4,000 fee. Due in part to the time wasted by hiring Respondent, Mr. Bahri’s tax debt now exceeds \$100,000. Thus, regardless of whether Mr. Bahri is entitled to reduce his liability under New York law, he has suffered significant prejudice as a result of Respondent’s misconduct.

3. Dishonesty

Respondent gave false status updates to Mr. Bahri, which may have been a product of confusing Mr. Bahri with another client who had a similar name. While the record does not support a finding of intentional dishonesty, we consider

Respondent's dismissive attitude toward his client's reasonable requests for information, apart from any confusion, as a factor in aggravation of sanction.

4. Violations of Other Disciplinary Rules

Respondent violated eight Rules of Professional Conduct: Rules 1.1(a), 1.3(a), 1.3(b)(1), 1.3(c), 1.4(a), 1.5(a), 1.15(e), and 1.16(d).

5. Previous Disciplinary History

Respondent received an informal admonition in 2004 for neglect, failure to communicate, and failure to provide a written fee agreement in four matters, in violation of Rules 1.3(c), 1.4(a), and 1.5(b). The similarity between that conduct and the neglect and failure to communicate at issue in this case makes it a significant aggravating factor.

6. Acknowledgement of Wrongful Conduct

Respondent refuses to acknowledge any wrongdoing and maintains that his ethical obligations were limited by the terms of his engagement agreement. When asked at oral argument whether he ever explained the concepts of abatement and economic hardship to Mr. Bahri such that Mr. Bahri would be able to make an informed decision as to how to proceed, Respondent insisted that he had no obligation to do so beyond referencing them in the engagement agreement, while admitting that he himself did not understand them before agreeing to undertake the representation. In arguing that Mr. Bahri had a weak case, Respondent went so far as to accuse him of committing a crime by "stealing" money from the state of New York. R. Br. to Board at 36.

7. Other Circumstances in Aggravation and Mitigation

Like the Hearing Committee, we consider as an aggravating factor Respondent's conduct in these proceedings, particularly his submission of briefs that fail to include any citations and state as fact arguments that were rejected by the Hearing Committee.

8. Sanctions Imposed for Comparable Misconduct

Brief suspensions have been imposed in comparable cases involving lack of competence, neglect, failure to communicate, and charging an unreasonable fee. *See, e.g., In re Lattimer*, 223 A.3d 437, 451-56 (D.C. 2020) (per curiam) (sixty-day suspension with fitness for failure to communicate in two client matters as well as lack of competence, neglect, and dishonesty in a third matter, aggravated by, *inter alia*, failure to accept responsibility); *In re Francis*, Board Docket No. 13-BD-089, at 18-20 (BPR Mar. 17, 2015) (thirty-day suspension stayed in favor of six months of probation and CLE for intentional neglect and failure to communicate, aggravated by failure to accept responsibility), *recommendation adopted*, 137 A.3d 187, 192-93 (D.C. 2016) (per curiam); *In re Fox*, 35 A.3d 441, 442 (D.C. 2012) (per curiam) (forty-five-day suspension for lack of competence, neglect, and failure to communicate); *In re Cole*, 967 A.2d 1264, 1266 n.6, 1267-70 (D.C. 2009) (thirty-day suspension for lack of competence, intentional neglect, failure to communicate, and dishonesty, mitigated by subsequent efforts to assist the client); *In re Owusu*, Bar Docket No. 109-02, at 17-21 (BPR July 30, 2004) (sixty-day suspension with restitution and fitness for lack of competence, neglect, intentional neglect and

prejudice, and failure to communicate, aggravated by prior discipline for similar misconduct and failure to participate in the disciplinary proceedings), *recommendation adopted*, 886 A.2d 536, 542 (D.C. 2005); *Mance*, 869 A.2d at 341-43 (thirty-day suspension stayed in favor of one year of probation and CLE for lack of competence, intentional neglect, failure to communicate, failure to withdraw, and serious interference with the administration of justice, mitigated by the respondent’s “excellent reputation” and lack of prior discipline); *In re Ifill*, 878 A.2d 465, 476-77 (D.C. 2005) (one-year suspension with restitution for intentional neglect, failure to communicate, charging an unreasonable fee, and dishonesty to the client and Disciplinary Counsel). Given the seriousness of the misconduct and aggravating factors described above, we agree with the Hearing Committee and Disciplinary Counsel that a sixty-day suspension is appropriate.

B. Restitution

Under D.C. Bar R. XI, § 3(b), “the Court or the Board may require an attorney to make restitution . . . to persons financially injured by the attorney’s . . . conduct as a condition of probation or of reinstatement” Restitution is designed to restore to the client any unearned benefit that the client has conferred on the attorney. *In re Robertson*, 612 A.2d 1236, 1240-41 (D.C. 1992) (stating that restitution is “a payment by the respondent attorney reimbursing a former client for the money, interest, or thing of value that the client has paid or entrusted to the lawyer in the course of the representation”); *see also In re Hager*, 812 A.2d 904, 923 (D.C. 2002) (stating that restitution prevents unjust enrichment). Where restitution is ordered, the

respondent is required to pay six percent interest per annum. *See In re Edwards*, 990 A.2d 501, 530 (D.C. 2010).

As discussed above, we have already concluded that Respondent did not earn his fee of \$4,000. For that reason, restitution in that amount (plus interest at the legal rate of 6%) is appropriate.

C. Fitness

The Hearing Committee recommended that Respondent be required to prove his fitness to practice law prior to reinstatement. The Hearing Committee found clear and convincing evidence of a serious doubt about Respondent's ability to practice law within the Rules based on his failure to acknowledge his misconduct, or recognize the seriousness of his mishandling of Mr. Bahri's representation, as well as his failure to take steps to remedy his misconduct, while blaming Mr. Bahri for Respondent's own failures. Respondent argues that he should not be suspended, and thus there would be no need for a fitness requirement. Disciplinary Counsel supports the Hearing Committee's recommendation, and argues that Respondent's conduct during proceedings before the Board further support imposing a fitness requirement.

“To justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law.” *Cater*, 887 A.2d at 6. Proof of a “serious doubt” involves “more than ‘no confidence that a Respondent will not engage in similar conduct in the

future.” *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009). It connotes “real skepticism, not just a lack of certainty.” *Id.* (quoting *Cater*, 887 A.2d at 24).

The reason for conditioning reinstatement on proof of fitness is “conceptually different” from the basis for imposing a suspension. *Cater*, 887 A.2d at 22. As the Court explained:

The fixed period of suspension is intended to serve as the commensurate response to the attorney’s past ethical misconduct. In contrast, the open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run [P]roof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement

Id. *Cater* observed that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), can be useful in determining whether there is clear and convincing evidence of a “serious doubt”:

- (a) the nature and circumstances of the misconduct for which the attorney was disciplined;
- (b) whether the attorney recognizes the seriousness of the misconduct;
- (c) the attorney’s conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;
- (d) the attorney’s present character; and
- (e) the attorney’s present qualifications and competence to practice law.

Cater, 887 A.2d at 21, 25.

The Board may consider a respondent’s conduct during the disciplinary proceeding in deciding whether there is clear and convincing evidence that raises “a

serious doubt as to whether Respondent will act ethically and competently in the future.” *In re Yelverton*, Board Docket No. 11-BD-069, at 23 (BPR July 30, 2013) (citing *White*, 11 A.3d at 1252 (per curiam) (appended Board Report) (“[C]onduct in this matter does not demonstrate the ethical sensitivity required for practice, and Respondent is a prime candidate for future problems if the Bar does not intervene at this juncture.”)), *recommendation adopted*, 105 A.3d at 430-32; *In re Lea*, 969 A.2d 881, 893 (D.C. 2009) (finding respondent’s “testimony, tone, and behavior [during the disciplinary proceedings] demonstrated a lack of contrition or appreciation for the seriousness of her conduct”).

Here, we conclude that Respondent should have to demonstrate fitness. We base this on the same conclusions as the Hearing Committee, and note that Respondent’s conduct before the Board was similarly concerning. His briefs before the Board were consistent with what the Hearing Committee saw, but, more fundamentally, he simply refuses to accept responsibility for obviously wrong and prejudicial conduct.

Respondent acknowledges that he did not understand New York law or research it sufficiently, yet somehow still maintains that he did not violate Rule 1.1. He insists that this disciplinary case is all about interpreting his engagement agreement with his client, rather than his broader ethical responsibilities. R. Br. to Board at 1-7. He implies that he was entitled to set Mr. Bahri’s case aside because he was a new client and existing client matters required his attention. R. Br. to Board at 24. Worse, he tries to shift the blame for his own misconduct by attacking his

client – at one point during oral argument claiming that his client’s tax liability was because his client committed a crime. *See also* R. Br. to Board at 36. Not only is there no evidence for that, but it is separately deeply troubling to see a lawyer attack his own client baselessly merely to save his license. And, of course, even a client who has committed a crime ought to have his phone calls returned. Thus, his refusal to take responsibility also reflects poorly on his present character and qualifications and ability to behave ethically in the future. *See Lattimer*, 223 A.3d at 456 (“His blaming and shaming of his clients is ‘subversive to the public interest’ and leads us to be skeptical of his willingness to remedy past wrongs as well as his present character.” (quoting *Cater*, 887 A.2d at 22)).

For that reason, and for the reasons identified by the Hearing Committee, we agree that a fitness requirement is appropriate here.

VI. CONCLUSION

For the foregoing reasons, the Board recommends that the Court conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rules 1.1(a), 1.3(a), 1.3(b)(1), and 1.3(c), 1.4(a), 1.5(a), 1.15(e), and 1.16(d). We recommend that Respondent be suspended for sixty days with the requirements to pay \$4,000 in restitution to Mr. Bahri (plus interest at the legal rate of 6% since January 9, 2019, the date Mr. Bahri formally requested a refund) and demonstrate his fitness to practice law before reinstatement. 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



Matthew G. Kaiser, Chair

All Members of the Board concur in this Report and Recommendation.