

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
EDWARD N. MATISIK,	:	D.C. App. No. 10-BG-1120
	:	Board Docket No. 09-BD-114
Respondent.	:	Bar Docket Nos. 2005-D074;
	:	2005-D095; 2005-D122
An Administratively Suspended Member of the	:	
Bar of the District of Columbia Court of Appeals	:	
(Bar Membership Number: 463786)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. BACKGROUND

On November 1, 2012, Hearing Committee Number Four¹ recommended that Respondent be suspended from the practice of law in the District of Columbia for 60 days,² be subject to a fitness requirement before resuming the practice of law, and be required to pay restitution, with interest at the legal rate, as a condition of reinstatement. These recommendations stem from findings that Respondent, in each of three matters involving three separate clients, violated Rules 1.1(a) and (b) (failure to provide competent representation and to serve the clients with skill and care), 1.3(a) and (c) (failure to represent the clients zealously and diligently and to act with reasonable promptness), 1.4(a) (failure to communicate with the clients and keep them reasonably informed), 1.5(b)

¹ The public member of Hearing Committee Number Four did not participate in the hearing or in preparation of the Hearing Committee's Report and Recommendation ("HC Rpt."). However, the quorum requirement of Board Rule 7.12 was met.

² Respondent has been administratively suspended from Bar membership since on or about December 31, 2005, for failure to pay Bar dues.

(written statement of the basis or rate of the fee), 1.16(a)(2) (failure to withdraw from representation when impaired), and 1.16(d) (failure to return papers and property after termination of representation). Neither party took exception to the Hearing Committee's Report and Recommendation.

The Hearing Committee's findings of fact are supported by substantial evidence in the record and support the Hearing Committee's conclusions that Respondent violated Rules 1.1(a) and (b), 1.3(a) and (c), 1.4(a), 1.5(b), 1.16(a)(2), and 1.16(d). Except as otherwise stated herein, the Board concurs with the findings, conclusions, and recommended sanction set forth in the Hearing Committee's Report and Recommendation, which we adopt and incorporate by reference.

II. PROCEDURAL HISTORY

Some procedural aspects of this case are noteworthy. On October 5, 2010, after being unable to accomplish personal service of its December 16, 2009, Specification of Charges and Petition Instituting Formal Disciplinary Proceedings, Bar Counsel was granted leave of the Court to serve Respondent by mail and by publication. Order, *In re Matisik*, App. No. 10-BG-1120 (D.C. Oct. 5, 2010) (per curiam). On January 19, 2011, Bar Counsel filed notice that Respondent was served by regular and certified mail at his address of record in the District of Columbia, and by publication. However, the regular mail delivery was returned to sender, and the certified mail delivery was signed for by someone other than Respondent. In a pre-hearing conference on March 4, 2011, the Chair of the Hearing Committee appropriately and conscientiously noted that the Specification of Charges also referenced an address in Pennsylvania at which Respondent might be

reached, and instructed Bar Counsel to attempt service at that address.³ The Chair's Order was successful, and on March 17, 2011, Respondent was served personally at the Pennsylvania address. On March 9 and April 11, 2011, the Chair of the Hearing Committee directed that all future papers be served on Respondent at both the D.C. and Pennsylvania addresses.

Respondent failed to answer the Specification of Charges and failed to attend the August 2011 hearing, either in person or through counsel.⁴ At the hearing, three witnesses – the three complainant-clients – testified via video-conference. Despite Respondent's assertion that he suffered from depression at the time of the misconduct, no evidence with respect to his mental condition was presented at the hearing. HC Rpt. at 2-5.

Turning to the charges, Bar Counsel's Specification of Charges is divided into three counts, one for each client. An overview of these matters can be succinctly stated, as follows: in three separate, but strikingly similar matters, Respondent in 2004 was hired by clients in Massachusetts to incorporate their businesses and obtain non-profit status for each. Respondent did not provide a writing setting forth his rate or the basis of his fee. He was paid, began work, communicated sporadically with the clients, ceased communication, failed to finish the work, and failed to return client files or monies paid to him. The clients did not benefit from any work performed by Respondent. All three clients filed Bar complaints in 2005. Respondent answered each in 2008, admitting that he failed to do the

³ At the pre-hearing conference, Assistant Bar Counsel explained that the Pennsylvania address is that of Respondent's sister.

⁴ Consistent with the Chair's Order of April 11, 2011, the Hearing Committee's Report and Recommendation was mailed on November 1, 2012, to Respondent at both his D.C. and Pennsylvania addresses. The mailing to Pennsylvania was not returned to sender.

work due to his depression. In each case, the client hired new counsel who completed the work.

III. FINDINGS OF FACT

The factual findings of the Hearing Committee, which we adopt, are as follows:

Respondent was admitted to the District of Columbia Bar on July 9, 1999. FF 1 at 6.⁵

Count One Count One pertains to Respondent's client Thomas Bena, who, on or about April 14, 2004, hired Respondent to apply for and obtain non-profit status from the Internal Revenue Service for "Sea the World Productions, Inc.," Mr. Bena's business in Massachusetts. FF 2 at 6; Tr. 14-16.⁶ Although Respondent did not provide a written statement identifying the basis for his rate or fee, Mr. Bena paid Respondent a fee of \$600 and filing fees of \$70. FF 2, 5 at 6. Respondent communicated with Mr. Bena for a time, but then stopped doing so, never indicating how the matter was proceeding, all to the client's great frustration and anxiety. FF 6, 8 at 6-7. Respondent failed to obtain non-profit status for the business, and Mr. Bena hired new counsel to do so. FF 9 at 7.

Mr. Bena filed a complaint with Bar Counsel on February 14, 2005. FF 10 at 7. Notwithstanding Mr. Bena's explicit request in a letter dated November 4, 2005, seeking

⁵ "FF" refers to the numbered findings of fact in the Hearing Committee's Report and Recommendation.

⁶ "Tr." refers to the transcript of the August 22, 2011, hearing. Although the Hearing Committee's findings of fact state that Mr. Bena hired Respondent on April 19, 2004, Mr. Bena's testimony reflects that he paid Respondent \$600 on April 14, 2004, the same date listed in that portion of the Report and Recommendation addressing the Committee's recommendation that Respondent pay restitution. This difference is immaterial to our analysis. The record does not make clear when Mr. Bena paid the additional \$70, although it is clear that he paid a total of \$670.

the return of his file and fee, Respondent failed to respond until he wrote to Bar Counsel by letter dated August 5, 2008, answering Mr. Bena's complaint. FF 11-13 at 7-8. Respondent stated in his response to the complaint that he completed the incorporation of Mr. Bena's business in the District of Columbia on June 14, 2004, and that he paid the \$70 filing fee. BX D at 3-4.⁷ Respondent further stated that during the fall of 2004, he was suffering from depression because of his mother's illness; that his mother died in January 2005; that he "could not function in any area of [his] life, most especially in work"; that he no longer practices law and has no intention of returning to practice, as he finds "the work too stress-provoking"; and that he is "still willing to refund Mr. Bena's money to him[.]" FF 13 at 8. He characterized himself as suffering from "depression and mental illness" for more than one year after his mother's death. BX D at 3.

Count Two Count Two pertains to client Marsha Winsryg. Ms. Winsryg, a resident of Massachusetts, retained Respondent on March 16, 2004, for purposes of incorporating and obtaining IRS non-profit status for her fund-raising organization, the "African Artists' Community Development Project." FF 14-15 at 8. Although Respondent did not provide a written statement identifying the basis or rate of his fee, Ms. Winsryg paid Respondent a fee of \$600. FF 15 at 8. Respondent initially communicated with Ms. Winsryg, but did not respond to her from late September until December 2004, when he wrote to her to explain, *inter alia*, that he was unavailable, that she had not sent a check to pay the articles of incorporation filing fee of \$70, and that she must stop trying to

⁷ "BX" refers to Bar Counsel's exhibits filed on June 27, 2011, in connection with the underlying hearing.

contact him at his place of employment with the Boston University alumni office. FF 16-17 at 9. Although Respondent provided Ms. Winsryg with draft articles of incorporation, he never filed them; he also did not file an IRS application. FF 18-19 at 9-10; BX E at 12-13. Ms. Winsryg hired new counsel to do the work for which she had retained Respondent. FF 19 at 10.

Ms. Winsryg filed a complaint with Bar Counsel on January 11, 2005. FF 20 at 10. Although Ms. Winsryg explicitly requested the return of her file and fee in a letter dated November 15, 2005, Respondent has failed to do either. FF 21, 24 at 10-11. By letter dated August 5, 2008, which followed the form and tracked the substance of his response to Mr. Bena's disciplinary complaint, Respondent wrote to Bar Counsel, answering Ms. Winsryg's complaint. FF 22 at 10; BX E at 7-8.

Count Three Count Three pertains to Respondent's client Regina Weichert, who in January 2004, hired Respondent to incorporate and obtain IRS non-profit status for her educational-performance venture, "Regina the Queen of Self-Esteem." FF 25-27 at 11-12. Although Respondent sent Ms. Weichert an electronic mail communication requesting \$600, he did not provide a written statement clearly communicating the basis or rate of his fee. FF 27 at 11-12. Ms. Weichert paid Respondent \$600 on January 20, 2004, for a "501(c)(3) filing," plus an "incorporation fee" of \$70 on February 6, 2004. FF 28-29 at 12. In March 2004, Respondent registered the business in the District of Columbia, but did not obtain non-profit status for it. FF 31 at 12. Respondent stopped communicating with Ms. Weichert in mid-2004. FF 32 at 12-13. After Ms. Weichert asked another attorney to communicate with Respondent, Respondent contacted Ms. Weichert in late August or

September 2004, eventually mailing to her an IRS form that did not appear to be complete. FF 33-34 at 13. Respondent failed to obtain non-profit status for the business, and Ms. Weichert hired new counsel who advised her on how to handle her business needs. FF 35 at 13.

Ms. Weichert filed a complaint with Bar Counsel on April 1, 2005. FF 36 at 13. In October and November 2005, she wrote to Respondent asking for the return of the \$600 and her file, but Respondent did not respond. FF 37-38 at 14; BX F at 21, 23. By letter dated August 5, 2008, again tracking the substance of his response to the other disciplinary complaints, Respondent answered Ms. Weichert's complaint. FF 39-40 at 14. Respondent stated that he completed the incorporation of Ms. Weichert's "The Self Esteem Project" in the District of Columbia on March 19, 2004, for which he paid a \$70 fee. BX F at 24-25.

IV. CONCLUSIONS OF LAW

We agree for the reasons set forth by the Hearing Committee that Respondent's conduct violated Rules 1.1(a) and (b); Rules 1.3(a) and (c); Rule 1.4(a); Rule 1.5(b);⁸ Rule 1.16(a)(2); and Rule 1.16(d),⁹ with one exception noted below. Although Respondent filed papers in the District of Columbia on behalf of two clients, no benefit inured to either as Respondent never advised the client that he had done so and never obtained non-profit

⁸ Rule 1.5(b) was amended in 2007, after the conduct in question. The version of Rule 1.5(b) in effect in 2004 provided as follows: "When a lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation."

⁹ Rule 1.16(d) was amended in 2007, after the conduct in question. The version of Rule 1.16(d) in effect in 2004 provided as follows: "In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property which the client is entitled, and refunding any advance payment of fee that has not been earned."

status for their businesses, the purpose for which he was retained. In all cases, after a short time, he failed to communicate adequately with any of the clients in question. Respondent admitted in his responses to the disciplinary complaints (BX D-F) that he suffered from depression, which materially impaired his ability to represent his clients; however, he failed to withdraw from the representations. Ultimately, all three clients retained successor counsel to do the work for which they had retained Respondent. Respondent, who represented these clients only on these discrete matters and never met with them in person,¹⁰ also did not communicate to them in writing the basis or rate of the fees that he charged. In the case of Ms. Weichert, he sent an e-mail that specified that she was to pay \$600, but the email did not state the basis for that charge or explain that she would owe an additional \$70 filing fee. BX F at 6; *see* Rule 1.5 Comments [1]-[2] (the written statement required by Rule 1.5(b) must state the basis for the fee and indicate what additional costs will be charged to the client). He also failed to return client files, as his clients requested.

The only aspect of the Hearing Committee's violations findings with which the Board disagrees is its determination that Respondent violated Rule 1.1(a) (competent representation) based on his failure to provide competent legal advice with respect to the incorporation of Ms. Weichert's business. *See* HC Rpt. at 16-17. The Hearing Committee appears to have based its finding of a violation on Ms. Weichert's testimony that her successor counsel advised her to create her business as a Massachusetts limited liability company, rather than as a D.C. corporation, as Respondent had recommended. *See* FF 26, 35. However, the record contains no direct evidence, such as testimony from an expert

¹⁰ Respondent, who was not known to the clients until they were referred to him by a common friend, communicated with the clients by telephone and email. (Mr. Bena, Tr. at 14; Ms. Winsryg, Tr. at 42; Ms. Weichert, Tr. at 52, 54)

witness or lawyer, about whether Respondent's advice evidenced the lack of knowledge and skill necessary to establish a violation. As a result, the Board finds that Bar Counsel failed to establish a violation of Rule 1.1(a) on this basis. With respect to the other grounds on which the Hearing Committee based its Rule 1.1(a) finding, including Respondent's failure to obtain non-profit status for his client's corporation, we conclude that Bar Counsel established a violation.

V. SANCTION

We next turn to the appropriate sanction. Bearing in mind that "the purpose of bar discipline [is] to protect the public, the courts, and the legal profession from the misconduct of individual attorneys[.]" *In re Smith*, 403 A.2d 296, 300 (D.C. 1979), the Board agrees with the Hearing Committee's recommendation of a 60-day suspension with a fitness requirement. Respondent's misconduct was serious in that, as the Hearing Committee found, it violated basic tenets of the attorney-client relationship. The misconduct prejudiced his clients, all of whom were required to retain successor counsel to do the work for which they paid Respondent, who never refunded their fees. Also, Respondent's conduct violated multiple Rules of Professional Conduct.

After answering the complaints against him, in which he admitted that he was depressed as a result of his mother's illness and later death, Respondent did not participate in the disciplinary process and thus failed to raise his mental condition in mitigation of sanction. Bar Counsel presented no evidence in aggravation.

Bar Counsel requests a 60-day suspension, and the Hearing Committee has cited to precedent supporting such a sanction. HC Rpt. at 22-23 (citing *In re Owusu*, 886 A.2d 536

(D.C. 2005) (60-day suspension with a fitness requirement where respondent received retainer fee from a single client in an immigration matter, then abandoned the case and disappeared); *In re Drew*, 693 A.2d 1127 (D.C. 1997) (per curiam) (60-day suspension for two instances of failing to appeal and/or failing to seek sentence modification in criminal cases); *In re Steele*, 630 A.2d 196 (D.C. 1993) (60-day suspension, with a fitness requirement, for neglect of a single matter, failure to co-operate with Bar Counsel, and acknowledgement of unidentified personal problems that caused attorney to abandon client's case); *In re Santana*, 583 A.2d 1011 (D.C. 1990) (per curiam) (60-day suspension for neglect of two separate legal matters); *see also In re Whitehead*, 883 A.2d 153 (D.C. 2005) (per curiam) (60-day suspension for neglect of four separate clients with no dishonesty finding, stayed in favor of a two-year probation with conditions based on *Kersey* mitigation)).

Bar Counsel also requests, and the Hearing Committee recommended, that Respondent be required to demonstrate his fitness to practice as a condition of reinstatement. To support a fitness requirement, 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.” *In re Cater*, 887 A.2d 1, 24 (D.C. 2005). The Court has noted that it is “more likely to conclude that a fitness requirement is warranted” where there is evidence that a respondent’s misconduct is attributable to unresolved personal problems. *See In re Guberman*, 978 A.2d 200, 211 (D.C. 2009); *see also In re Steele*, 630 A.2d at 198-99, 201-02 (fitness requirement imposed where respondent had informed Bar Counsel that unidentified past personal problems caused the misconduct, and she did not

provide a reasonable assurance regarding her present ability to practice law). Here, Respondent admitted that his misconduct was connected to his depression, that he finds the practice of law too stressful and that he does not intend to return to it. Respondent's mental health problems and the absence of any evidence that they have been resolved, coupled with Respondent's failure to participate in the disciplinary process after he responded to the disciplinary complaints, constitutes clear and convincing evidence that casts a serious doubt on Respondent's fitness to practice. *See Guberman*, 978 A.2d at 211; *Steele*, 630 A.2d at 198-99, 201-02; *see also In re Lea*, 969 A.2d 881, 894 (D.C. 2009) (absence from the disciplinary proceeding may properly be considered as an evidentiary fact showing that respondent does not appreciate the seriousness of the disciplinary process). The Board thus recommends that Respondent be required to demonstrate his fitness to practice as a condition of reinstatement.

Finally, Respondent received \$1,940 in total from the three clients, but no client received the services for which he or she retained Respondent. In his responses to Bar Counsel, Respondent claims to have made two corporate filings, and paid filing fees of \$140. However, these expenses did not benefit his clients. Respondent should be required to make restitution with interest at the legal rate of 6% to his clients, or to the Clients' Security Trust Fund in the event that the clients were paid from the fund, as follows:

1. To Mr. Bena, \$670.00, with interest from April 14, 2004;
2. To Ms. Winsryg, \$600.00, with interest from March 16, 2004; and
3. To Ms. Weichert, \$600.00, with interest from January 20, 2004, and \$70.00, with interest from February 6, 2004.

