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:	:	
	:	
ALVIN S. BROWN,	:	
	:	
Respondent.	:	Board Docket No. 19-BD-032
	:	Disc. 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 AD HOC HEARING COMMITTEE

Respondent Alvin Brown is charged with violating District of Columbia Rules of Professional Conduct (the "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), arising from Respondent's representation of a client Ali Pascal Bahri ("Mr. Bahri") in a New York state tax matter. Disciplinary Counsel contends that Respondent committed all of the charged violations and asks that this Ad Hoc Hearing Committee ("Hearing Committee") recommend that Respondent be sanctioned by a sixty-day (60) suspension from the practice of law, with reinstatement conditioned on Respondent (a) paying restitution to Mr. Bahri of Four Thousand Dollars ($4,000) plus interest running from June 13, 2016 (the date of Mr. Bahri's last payment to Respondent); and (b) demonstrating his fitness to practice.

Respondent contends that Disciplinary Counsel failed to establish any of the charged Rule violations and presents no argument about sanctions.

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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.

As set forth below, the Hearing Committee finds that Disciplinary Counsel has proven all of the charged Rule violations by clear and convincing evidence, and recommends that Respondent be suspended from the practice of law for sixty (60) days, with reinstatement conditioned on Respondent (a) paying restitution to Mr. Bahri of Four Thousand Dollars ($4,000) plus interest at the legal rate of six percent (6%) running from June 13, 2016 (the date of Mr. Bahri's last payment to Respondent) to date of payment; and (b) demonstrating his fitness to practice.

I. PROCEDURAL HISTORY

On May 2, 2019, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"). A hearing was held on July 31, 2019, before this Hearing Committee consisting of Thomas E. Gilbertsen, Esquire, Chair; Rabbi Marc Lee Raphael, Public Member; and Arlus J. Stephens, Attorney Member. Disciplinary Counsel was represented at the hearing by Hamilton P. Fox, III, Esquire. Respondent appeared *pro se*.

Prior to the hearing, Disciplinary Counsel submitted DX 1 through 11.[1] All of Disciplinary Counsel's exhibits were received into evidence without objection. Tr. 6-7. During the hearing, Disciplinary Counsel called as witnesses Respondent's former client Mr. Bahri (Tr. 33-94) and Mark Houck, manager of the Offer in Compromise Unit of the New York State Department of Taxation and Finance (Tr. 94-149).

[1] "DX" refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to the transcript of the hearing held on July 31, 2019.

Also prior to the hearing, Respondent submitted RX 1 through 3.[2] All of Respondent's exhibits were received into evidence without objection. Tr. 6-7. Respondent testified on his own behalf (Tr. 151-179).

Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the Rule violations set forth in the Specification of Charges. Tr. 200; *see* Board Rule 11.11. In the sanctions phase of the hearing, Disciplinary Counsel submitted DX 12. Respondent submitted RX 4 and 5. All of the foregoing were admitted into evidence without objection. Tr. 208-210.

By Order of August 1, 2019 (the "Briefing Order"), the Hearing Committee established a schedule for post-hearing briefs, and further ordered that "[a]ny proposed findings of fact set forth in Disciplinary Counsel's opening brief or Respondent's response brief shall contain specific references to the parts of the record that support the proposed finding." Briefing Order at 1. The Briefing Order further provided that "[i]f one party has a material disagreement with any of the other party's proposed findings of fact, the contested finding(s) of fact shall be identified by number, and the nature of the disagreement shall be clearly stated and supported by specific references to the record." *Id*.

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[2] Respondent filed an initial set of exhibits 1 through 3 on June 28, 2019. Later that same day, Respondent filed a "Corrected" set of exhibits omitting six pages, including duplicate copies of emails in RX 1 and the first two pages of the initial filing of RX 3, and a copy of N.Y. Codes R. & Regs. tit. 20 § 536.1. The Hearing Committee treats Respondent's "Corrected" exhibits as the official record in this proceeding.

On September 17, 2019, Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanctions ("Disciplinary Counsel's Post-Hearing Brief") in conformity with the Briefing Order. Thereafter on September 30, 2019, Respondent filed a Rebuttal to Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendations [sic] as to Sanctions (the "Rebuttal"), but his submission did not assert any material disagreement with any of Disciplinary Counsel's proposed findings although it argued certain inferences from Disciplinary Counsel's undisputed findings.

Disciplinary Counsel filed a Reply Brief on October 8, 2019, and briefing closed pursuant to the Briefing Order. Thereafter on October 17, 2019, Respondent filed an "Answer to Disciplinary Counsel's Reply Brief" without seeking leave to do so. Respondent's Answer to Disciplinary Counsel's Reply Brief neither acknowledged nor attempted to remedy any of the deficiencies of Respondent's Rebuttal. On October 22, 2019, the Hearing Committee Chair entered a *sua sponte* order striking Respondent's submission under Board Rule 12.1 and directing that no further post-hearing briefs be filed by either party. On November 19, 2019, Respondent submitted a Motion for Permission to Allow Respondent to Reply to Disciplinary Counsel's Reply Brief Under Board Rule 12.1 (the "Surreply"), which Disciplinary Counsel opposed by an Opposition filed on November 21, 2019. By order entered on November 22, 2019, the Hearing Committee Chair denied Respondent's motion, on grounds that Disciplinary Counsel's Reply Brief raised no

new issues justifying further post-hearing briefing. Respondent's proposed Surreply did not remedy any of the deficiencies with his Rebuttal.

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing, are not contested by Respondent's Rebuttal, and are established by clear and convincing evidence. *See* Board Rule 11.6; *In re Cater*, 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").

A. Background

1. Respondent, Alvin Brown, is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on April 6, 1979, and assigned Bar number 263681. DX 1.

2. Respondent practices tax law from his home in New York, but he is not a member of the Bar of New York. The State of New York permits persons who are not admitted to the Bar of that state to represent taxpayers before the Department of Taxation and Revenue if they are enrolled as agents to practice before the Internal Revenue Service. DX 2 at ¶ 2; DX 4 at ¶ 2.

B. The Bahri Matter

3. Mr. Bahri is a French national who became a United States citizen in 2018. Tr. 34, 65-66. From approximately 2000 through 2003, Mr. Bahri resided in New York City as a lawful permanent resident. Tr. 34-36.

4. In 2003, Mr. Bahri submitted a sales tax return to the State of New York as the president of a corporation, Purecells, Inc. ("Purecells"). DX 2 at ¶ 4; DX 4 at ¶ 4. Mr. Bahri was the 51 percent owner of Purecells, a business located in New York City. Tr. 35. Purecells collected New York State sales taxes from its customers, and the company was required to pay these collected funds to New York state tax authorities on a quarterly basis. Tr. 35-36. New York treats sales taxes as "trust taxes," such that the business collecting them holds the funds in trust to pay them to the state on behalf of the customer. If the business does not pay the taxes, certain individuals may be held personally responsible and must pay the taxes even if the business goes into bankruptcy. Under New York law, Mr. Bahri was personally responsible to pay the sales taxes collected from the company's customers, even if Purecells neglected to do so. Tr. 99-102 (Houck).

5. For 2003, Purecells did not pay approximately $14,800 of sales tax that it owed New York. DX 5 at 19.

6. Mr. Bahri experienced a number of personal and business setbacks in that same year, including a divorce. He did not renew his green card, closed Purecells, and returned to France in 2004. Tr. 36-38.

7. In 2011, Mr. Bahri returned to the United States on a tourist visa. Tr. 39-41. He got a job, but New York garnished his wages because of the unpaid Purecells sales tax liability. Tr. 39-40. Mr. Bahri returned to France and remained there until 2015, when he became eligible for and obtained another green card permitting him to live in the United States as a permanent resident. Tr. 40-41.

8. In 2015, Mr. Bahri opened a business in Connecticut. Tr. 41-42. Meanwhile, penalties and interest were mounting on the Purecells unpaid New York State sales tax liability. By February 2016, Mr. Bahri owed more than $68,000 on the 2003 New York state sales tax liability of less than $15,000. Tr. 42-43; DX 5 at 19.

9. In the Summer of 2015, Mr. Bahri tried unsuccessfully to resolve his state sales tax liability with the New York State Department of Taxation and Finance. Tr. 42-44. When those efforts failed, he looked on the internet for a tax lawyer and discovered Respondent. Tr. 44. Mr. Bahri contacted Respondent by email on February 12, 2016. Tr. 44-45; DX 5 at 2.

10. On February 18, 2016, Mr. Bahri and Respondent spoke by telephone. At most, they spoke on just one other occasion thereafter. Tr. 45-46, 84 (Bahri); DX 5 at 3-5. Respondent led Mr. Bahri to believe that he was "well versed" in sales tax issues, and Mr. Bahri engaged him. Tr. 86-87 (Bahri).

11. Respondent prepared a letter which he labeled, "ENGAGEMENT AGREEMENT FOR NY STATE SALES TAX OFFER-IN-COMPROMISE SETTLEMENT AGREEMENT." He agreed for a flat fee of $4,000 to "endeavor to get your sales tax liability settled." DX 5 at 8.

12. New York law presented at least two avenues to pursuing some tax relief for Mr. Bahri. An Offer in Compromise, referenced in the title of Respondent's engagement agreement, is designed for taxpayers who are overwhelmed by tax liabilities that they cannot pay. Tr. 97-99 (Houck). In order to

demonstrate eligibility for an Offer in Compromise, the taxpayer needs to establish his lack of wherewithal to pay the tax bill at issue. The taxpayer must submit certain documents, such as a financial statement, income tax returns, credit reports, and the like. An Offer in Compromise does not require proof that the tax is unfair or unjustified. Tr. 106-12 (Houck); *see also* RX 2, Publication 220.[3]

13. Taxpayers who are "responsible persons" for paying a business's sales tax are eligible for Offers in Compromise, but they generally must pay the full tax owed, minus penalties and interest. Tr. 107-11; RX 2, Publication 220.

14. New York also has an abatement procedure whereby persons who fail to pay their taxes on time may seek to abate penalties and reduce accrued interest if they can show the failure to pay the taxes was "due to reasonable cause and not due to willful neglect." RX 3 at 1, N.Y. Codes R. & Regs. tit. 20 § 2392.1(a)(1). Reasonable cause includes "absence" such as "the taxpayer's unavoidable absence from its [sic] usual place of business . . . ." RX 3 at 2, N.Y. Codes R. & Regs. tit. 20 § 2392.1(d)(1). This provision does not require showing financial hardship. Tr. 111-14 (Houck). "[I]f you are looking for purely penalty abatement, the standard of reasonable cause has nothing to do with your financial situation." Tr. 127 (Houck). Despite the fact that the title of the engagement agreement suggested that Respondent intended to pursue an Offer in Compromise, the body of the letter referenced the standard for abatement by expressing a need for Mr. Bahri to provide

[3] Respondent did not paginate his exhibits, but Publication 220 may be found beginning on the fourth page of RX 2.

evidence that the full sales tax amount was "unfair and/or unjustified to some extent." DX 5 at 8-9; Tr. 46-47.

15. After receiving and accepting the engagement letter (DX 5 at 8-9), Mr. Bahri paid Respondent's $4,000 flat fee in installments of four pre-dated checks for $1,000, payable on the 13th of March, April, May, and June 2016. Respondent took each check "into income"[4] on the dates listed on the checks; thus, by June 13, 2016, Mr. Bahri had paid the full fee. Tr. 47-49; DX 5 at 11, 13-14; DX 11 at 4, 36. Because of his tax problems with New York and the related threat of garnishment, Mr. Bahri could not open his own checking account. So the checks he gave Respondent were written on the account of a third party, Thomas Kraft, to whom Mr. Bahri gave the money. Tr. 48; DX 11 at 36.

16. In March 2016, Mr. Bahri provided to Respondent documents, which he believed would help make his case. Tr. 49-52; DX 5 at 17-36. In an email dated March 21, 2016, Mr. Bahri emailed Respondent, "I do not dispute the sales tax amount due but the penalties and interests I do dispute . . . ." DX 5 at 17; Tr. 50-51.

17. On May 19, 2016, Mr. Bahri emailed Respondent to "touch base" about the case. DX 5 at 38. Respondent responded, "Got a call from White. They are still waiting to hear from IRS Counsel but she expects it soon." DX 5 at 39. The reference to "White" and "IRS counsel" made no sense. There was no one named

[4] Mr. Brown wrote to Disciplinary Counsel that he took the check into income and deposited it in a TD Bank account. DX 11 at 4. However, Disciplinary Counsel did not present evidence as to whether that account was a personal, business, or trust account or whether he spent the money.

"White" involved in the matter. Mr. Bahri's tax problem was not with the IRS, but with New York State. Because he had not done anything yet to assist Mr. Bahri, such as contact someone in the Department of Taxation and Finance, there was nothing to wait to hear. Mr. Bahri did not understand this response but did not follow up at that time. Tr. 52-53, 83-84.

18. Several weeks later in July 2016, Mr. Bahri asked Respondent if there was any news about his matter from the New York State tax authority, and when Respondent thought there might be a resolution. DX 5 at 41. Respondent responded that there was nothing they could do, and that "My guess is that that office is busy." DX 5 at 42. Respondent's response was misleading because he had not yet contacted the State tax authority; "the office is busy" implied that he had done so and was waiting for a response. Mr. Bhari did not understand Respondent's response and asked, "What now?" *Id.*; Tr. 53-55. He received no answer. *See* DX 5 at 40-43; Tr. 55.

19. In August 2016, Mr. Bahri followed up with Respondent again, asking for a status update including detailed actions Respondent had performed, copies of Respondent's correspondence with the New York State tax authority, a realistic timeframe for resolution, and an action plan. Tr. 55-57; DX 5 at 45. Respondent claimed that he had sent Mr. Bahri some forms and was waiting for them to be filled out and returned. Tr. 55-57; DX 5 at 46-47. Apparently realizing that he had not sent such forms, Respondent sent another email to Mr. Bahri less than 30 minutes later – the subject of which was "My mistake" – providing a link to a Power of

Attorney form that Respondent said he needed to proceed. Tr. 56-57; DX 5 at 48-49. Mr. Bahri executed the Power of Attorney in Respondent's favor on August 8, 2016, the day after it was requested. Tr. 57-58; DX 6.

20. On August 9, 2016, Respondent sent Mr. Bahri another email in which he claimed to have "a legal memorandum that is mostly complete." DX 5 at 53. Mr. Bahri never saw such a memorandum, and there was none in the materials that Respondent produced to Disciplinary Counsel or introduced at the hearing. Tr. 58-60; *see* DX 10; DX 11. At the hearing, Respondent identified a cover letter that he sent to the State's Offer in Compromise program over two months later on October 16, 2016 (DX 5 at 67), which contained one page of argument for why Mr. Bahri qualified for no liability, as the "legal memorandum" he had in mind when he wrote the August 9th email to Mr. Bahri. Tr. 167-68, 170.

21. Respondent's August 9th email also asked Mr. Bahri a number of questions about "key facts" that he claimed he was missing. DX 5 at 53. In response, Mr. Bahri re-sent files that he had provided to Respondent several months earlier, and reiterated his earlier instruction to Respondent that Mr. Bahri did "not dispute the principle amt [sic] of sales tax owed, I am disputing all of the penalties and interest imposed . . . ." DX 5 at 54-55; Tr. 60.

22. Mr. Bahri also provided Respondent with additional copies of his green cards to demonstrate he was out of the country until 2015. DX 5 at 58; Tr. 79; *see also* DX 5 at 54-55. Respondent then advised Mr. Bahri that the tax authority would want "substantiation" and asked for proof that Mr. Bahri was working abroad

between 2004 and 2015. DX 5 at 56-57. Mr. Bahri responded that he had been barred from entering the country for ten years and promised to look for documentation of that fact. Tr. 60-62 (Bahri); DX 5 at 56.

23. A month later, Mr. Bahri again emailed Respondent asking for an update on his case. DX 5 at 60. Respondent replied, "I will check on that," even though he had not yet made any inquiry or filed any document on Mr. Bahri's behalf with the New York State taxation authority. DX 5 at 61.

24. After another month passed, Respondent sent an Offer in Compromise on behalf of Mr. Bahri to the Offer in Compromise office of the New York State Department of Taxation and Finance ("DTF") on October 16, 2016. DX 5 at 67. The offer was based on "**no liability** for the sales tax amount . . . ." DX 5 at 67 (emphasis in original). The attached Offer in Compromise form offered $1,000 in payment, despite claiming no liability. DX 5 at 68-69. The letter inaccurately stated that Mr. Bahri was "a naturalized citizen of the U.S." although at the time, Mr. Bahri was in the country on a green card. Tr. 65-66; DX 5 at 67. Respondent provided no information about Mr. Bahri's financial status. *See generally* DX 5 at 67-84. He neither showed these documents to Mr. Bahri before he sent them to the New York State tax authorities, nor did Respondent provide his client with a copy of the materials at the time it was submitted. Tr. 64-67, 88-90.

25. On October 24, 2016, Mr. Bahri emailed Mr. Brown demanding "a documented update of my case ASAP." Mr. Bahri stated that he was "close to filing a complaint with the discipline and grievance committee." He also wrote that if

Respondent was not competent to handle the case, he expected a full refund. DX 5 at 63; Tr. 63-65.

26. Respondent replied that same day: "It has been filed with NY. I included all your data and a request for full abatement." DX 5 at 64. Mr. Bahri asked again for "copies of all correspondence including dates it was filed." DX 5 at 65. In response, Respondent wrote that he had been waiting to hear from Mr. Bahri because the data was incomplete. DX 10 at 3-4. Respondent also wrote, "We should have proof of what you were doing abroad prior to 2004. Where were you living and/or working?" DX 10 at 3-4. Mr. Bahri had previously explained to Respondent that he was not out of the United States prior to 2004 (the period he was living in New York and operating Purecells) and the tax liability at issue was incurred in 2003. Tr. 34-38, 69; *see* DX 5 at 54 (showing Mr. Bahri informed Respondent that he "was not in the [United States] from 2004-2015" by email dated August 17, 2016). Moreover, in his August email, Respondent had asked for proof as to where Mr. Bahri was living and working from 2004-2015 – that was the period during which Mr. Bahri was out of the country. Tr. 67-68. Respondent attached to his email a copy of his October 16, 2016 letter to the New York DTF. DX 10 at 10-13; Tr. 64-65.

27. Mr. Bahri responded on October 25, 2016, explaining again the period during which he was out of the country. He also questioned why Respondent was seeking relief for the full tax liability (or at least for all but $1,000) when "My dispute

has ALWAYS been the penalties and interest, not the original sales tax I owe." DX 5 at 86-87 (emphasis in original); *see* Tr. 67-69.

28. In response, Respondent again changed the question for which he was seeking additional information. He asked what Mr. Bahri was doing in 2001-2003, expressed a hope that he might have been "working as a full time employee in a foreign country at the time the tax liability was incurred," and harangued Mr. Bahri: "I don't know why this point is not clear to you." DX 5 at 87; *see* Tr. 67-68. Of course, 2001-2003 was the period that Mr. Bahri was living in the United States and operating Purecells – as Mr. Bahri had already advised Respondent. Tr. 67-69.

29. The confusion evident in Respondent's communications with his client Mr. Bahri went from bad to worse at this point. Mr. Bahri asked how he could claim that he was not in the United States from 2001 to 2003, since that was the period that he was living in the United States and operating Purecells. DX 5 at 89; Tr. 69. Respondent replied that documentation such as rent receipts or wage documentation was needed. DX 5 at 91. After that October 26, 2016 email, Respondent did not communicate further with Mr. Bahri until January 2019. DX 5 at 95, 98-99; Tr. 69-70.

30. Shortly after Respondent's October 26, 2016 email to Mr. Bahri, Respondent received a letter from the New York DTF advising that his Offer in Compromise for Mr. Bahri was incomplete because it lacked certain financial data such as tax returns, bank statements, credit reports, and a DTF-5, a state form for a financial statement. DX 8. A form DTF-5 was enclosed, and contact information

was provided for Respondent's use. The requirement for submitting this data was clearly set out in the State's Publication 220, entitled "Offer in Compromise Program," under the section "What forms do taxpayers need?" RX 2 (Publication 220). The DTF's October 26th letter gave Respondent until November 15, 2016 to provide the missing information, notifying him that "[i]f the missing information is not received by [that date] your offer will not be considered." DX 8 at 2.

31. In response to the October 26, 2016 letter from the New York DTF, Respondent did nothing: he did not follow up, ask for clarification, or respond to the DTF. Tr. 115-120, 122-23; *see generally* DX 9 at 4-10 (Event Log Entries). At the hearing, Respondent claimed that responding to the DTF letter would have been detrimental to Mr. Bahri's case because the requests for financial data proved that the DTF was not correctly following its own rules and procedures, and that the agency would use the documents to find that his client was not eligible for abatement based on their mistaken interpretation. Tr. 173-74.

32. Respondent did not tell his client Mr. Bahri about the DTF's letter, nor did he ask Mr. Bahri any further questions about his financial status, nor request additional information from his client so that Respondent could provide DTF with the information its letter requested. Tr. 90-91. In one of his previous emails to Mr. Bahri, when Respondent claimed he needed additional documents, Respondent had written, "When I hear from NY, you can add to any of the data. If there are any conferences, I will bring you into the call." DX 5 at 85. But when Respondent received the letter from the New York DTF shortly after this October 26 email

exchange with the client, he told Mr. Bahri nothing. Tr. 70-72, 84-85 (Bahri). At the hearing, Respondent claims he told Mr. Bahri about the DTF's "return" of the Offer in Compromise, but there is no documented support for this assertion, Mr. Bahri denies it, and Respondent admits that he did not tell Mr. Bahri that DTF was seeking additional information. Tr. 193 (Respondent). For this reason, we find unreliable Respondent's recollection and testimony about whether he told his client anything at all about the New York DTF's response to the Offer in Compromise.

33. In February 2017, Mr. Bahri asked Respondent for "an update and related correspondence you have received and sent on my case." DX 5 at 94. Respondent did not reply to his client's inquiry. Tr. 69-70.

34. Another month passed, and Mr. Bahri inquired again in March 2017 and again received no reply from Respondent. Tr. 70; DX 5 at 95.

35. In January 2019, Mr. Bahri asked Respondent for a refund of legal fees paid. Tr. 72-73; DX 5 at 100. Respondent replied on January 18, and in apparent confusion about whether he had sought abatement or an Offer in Compromise on behalf of Mr. Bahri, stated that "[o]utside of the fact that NY State denied my application for abatement, I could find no other pathway to get that abatement." DX 5 at 99.

36. Mr. Bahri renewed his request for a refund, stating that his tax liability was now in excess of $100,000. DX 5 at 99. Respondent replied, again confusing abatement and Offer in Compromise. DX 5 at 98-99. Respondent's email contained several misstatements, claiming that:

> [T]he doubt-as-to-liability filing I prepared on your behalf was sent to NY as a pathway to get your NY tax liability fully abated. That filing was rejected by NY. NY said that they do not recognize or use that procedure, although that procedure is the one the IRS uses and accepts for challenges to any tax liability.

DX 5 at 98. In fact, Respondent made no such "doubt-as-to-liability filing," *i.e.*, a request for abatement; he filed an Offer in Compromise. *See* DX 5 at 67-84. And the New York DTF did not say it did not recognize the procedure Respondent invoked, nor did it reject the Offer in Compromise filed on behalf of Mr. Bahri. The DTF's October 2016 letter simply asked Respondent for more information, which he ignored and never reported to his client. DX 8.

37. Respondent stated in the same January 18, 2019 email, "I also tried to reach NY directly by telephone and through examiners." DX 5 at 98. Although the DTF's October 26, 2016 letter provided contact information (DX 8 at 1-2), Respondent initiated no further contact with DTF on this matter. FF 31. *See generally* DX 9 at 4-10 (Event Log shows no contact from Respondent after Offer in Compromise submitted). At the hearing, Respondent admitted that he did not attempt to contact the New York DTF again about Mr. Bahri's matter. Tr. 164-65, 173-74, 184-88.

38. Mr. Bahri replied to Respondent's email on January 19, 2019, again seeking a refund, and accusing Respondent of ignoring his requests for status updates and of having provided him no information for nearly two years. DX 5 at 97-98.

39. Respondent replied that same day by email:

> I could not find a pathway to get the sales tax liability eliminated or reduced . . . . This is not a matter in which I have been dilatory . . . . I FILED A NO-LIABILITY OFFER IN COMPROMISE IN YOUR CASE. NY REFUSED TO ACCEPT THAT PROCEDURE, ALTHOUGH THAT PROCEDURE IS ACCEPTED BY THE IRS. THAT IS SOMETHING YOU KNEW ABOUT AT THE START OF OUR ENGAGEMENT

DX 5 at 97 (emphasis in original).

40. None of Respondent's statements were accurate. There was a pathway to eliminate or substantially reduce accrued penalties and interest on Mr. Bahri's tax liability – Offer in Compromise – and perhaps a second remedy was available – abatement. Respondent was indeed dilatory when he ignored the State's request for more information and did not report that request to his client Mr. Bahri. New York did not refuse to accept the Offer in Compromise; it simply wanted more information. DX 8. There is nothing in any of the correspondence whereby Respondent told Mr. Bahri that there was some issue with or obstacle to determining the appropriate procedure to follow. Tr. 73. Moreover, the New York DTF maintains a Taxpayer Rights Advocate, which is advertised on the DTF public website, and which is available to assist taxpayers. Tr. 114-15 (Houck). Had he made further inquiries after receiving DTF's request for additional information, Respondent could have contacted this unit for assistance.

41. Throughout his representation of Mr. Bahri, Respondent never asked his client for information about his financial status. There is therefore no foundation or basis for Respondent's suggestion that Mr. Bahri's Offer in Compromise could

not establish "economic hardship" as set forth in the New York DTF's Publication 220. *See* Rebuttal Brief at 30; Disciplinary Counsel's Reply Brief at 8-9.

42. Respondent has refunded none of Mr. Bahri's money. Tr. 73. Mr. Bahri's inability to resolve his tax liability continues to this day and presents significant impediments to managing his personal finances and doing business. Mr. Bahri's tax debt to New York State continues to increase as a result of Respondent's abandoning Mr. Bahri's tax relief request. Tr. 73-74 (Bahri), 123-24 (Houck). He still cannot open a checking account and cannot build a credit history and is forced to carry out financial transactions in cash. Tr. 74 (Bahri).

III. CONCLUSIONS OF LAW

Disciplinary Counsel maintains that the record demonstrates Respondent's Rule violations. Respondent undertook an engagement to settle Mr. Bahri's sales tax liability, then waited several months to proceed, during which delay Respondent misrepresented to his client that the matter was already submitted. Once Respondent finally took action, he did not follow his client's instructions to seek relief only from accrued penalties and interest but tried to challenge the entire tax liability. When the New York DTF asked for further information, Respondent simply folded – doing nothing to inform his client of that request, nor responding further to the tax authority on his client's behalf. The foregoing conduct, according to Disciplinary Counsel, suffices to show that Respondent violated Rule 1.1(a) (competence), Rules 1.3(a) and 1.3(c) (duty to represent client zealously, diligently, and with reasonable promptness) and Rule 1.3(b)(1) (intentionally failing to seek client's lawful

objectives). Disciplinary Counsel's Post-Hearing Brief at 17-21. Disciplinary Counsel also maintains that Respondent's conduct violated Rule 1.4(a) (failure to keep client reasonably informed about the status of a matter and promptly comply with requests for information). *Id.* at 22-25. And according to Disciplinary Counsel, the foregoing conduct also establishes that Respondent charged Mr. Bahri an unreasonable fee, in violation of Rule 1.5(a). Respondent promised to '"endeavor to get [Mr. Bahri's] sales tax liability settled' in return for a $4,000 advance fee." *Id.* at 25 (quoting DX 5 at 8-9). But Respondent did not endeavor to resolve the client's tax liability: his submission of the client's Offer in Compromise to the New York DTF provided no value to Mr. Bahri because it failed to provide the necessary information, and Respondent then abandoned the endeavor when DTF simply asked for the missing information. *Id.* at 25-26. Alternatively, Disciplinary Counsel submits that if the advance fee is deemed reasonable, Respondent should be found in violation of Rule 1.15(e) (failure to treat advanced fee as entrusted funds) and Rule 1.16(d) (failure to refund advance payment of fee that has not been earned). *Id.* at 26-28, 36.

Respondent argues that any delay in proceeding on behalf of Mr. Bahri was due to the client's failure to explain certain "extenuating circumstances" surrounding the tax bill at issue, and that the process Respondent engaged in with the New York DTF was appropriate given the facts. *See* Rebuttal Brief at 27-30, 32-33. Respondent's Rebuttal brief cites no record facts to contest any of Disciplinary Counsel's proposed findings of fact. Instead, Respondent asserts that because he

made the correct judgment call about which ambiguous procedures should be followed for Mr. Bahri's tax liability, his validated legal strategy stands "in ***full rebuttal*** to the unsupported allegations and *ad hominem* allegations by Disciplinary Counsel," and that none of Disciplinary Counsel's proposed conclusions of law are supported by clear and convincing evidence. *Id.* at 19-20 (emphasis added); *see also id.* at 23 ("There is only ***one key factual and legal issue*** in the present case. That issue deals with whether Bahri can get all of the additions to his 2013 sales tax liability abated during the ten years he was living in France after 2003 because he was 'not aware' of those additions." (emphasis added)).

For the reasons that follow, we find Disciplinary Counsel has proved by clear and convincing evidence that Respondent committed all of the asserted Rule violations.

A. Respondent Violated Rule 1.1(a) by Failing to Provide Competent Representation to a Client.

Rule 1.1(a) requires a lawyer to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *See also In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (appended Board Report) (lawyer who has requisite skill and knowledge, but who does not apply it for a particular client, violates obligations under Rule 1.1(a)). The comments to Rule 1.1 state that competent representation includes "adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Rule 1.1, cmt. [5].

In *In re Evans*, the Board explained that:

> To prove a violation [of Rule 1.1(a)], [Disciplinary] Counsel must not only show that the attorney failed to apply his or her skill and knowledge, but that this failure constituted a serious deficiency in the representation . . . . The determination of what constitutes a "serious deficiency" is fact specific. It has generally been found in cases where the attorney makes an error that prejudices or could have prejudiced a client and the error was caused by a lack of competence . . . . Mere careless errors do not rise to the level of incompetence.

902 A.2d 56, 69-70 (D.C. 2006) (per curiam) (appended Board Report) (citations omitted). To prove a "serious deficiency," Disciplinary Counsel must prove that the conduct "prejudices or could have prejudiced the client." *In re Yelverton*, 105 A.3d 413, 422 (D.C. 2014).

Respondent believes all of the charges can be resolved on a single issue: whether his client would be able to get abatement of penalties and interest on Purecells's sales tax liability. Rebuttal Brief at 23. At the time he took the case, Respondent advised Mr. Bahri that there was a way to obtain the relief that his client sought. FF 10-11. After receiving DTF's letter requesting more information about the Offer in Compromise Respondent filed on behalf of his client, Respondent claims to have concluded that Mr. Bahri's circumstances do not support the "reasonable cause" standard necessary to obtain abatement of penalties and interest on this tax liability. Rebuttal Brief at 24. Significantly, Respondent reached that conclusion on his own – tacitly – without notice from the New York DTF that his client's request was denied, and without telling Mr. Bahri that Respondent had

reached new (unfounded) conclusions about the supposed futility of his client's case for tax relief. *See* FF 30-32, 36, 39-40.

Whether or not Mr. Bahri's liability for penalties and interest could be abated or reduced through a compromise, in whole or part, in any of the ways disputed at the hearing and in the briefing by Respondent and Disciplinary Counsel, it is abundantly clear from this record that in violation of Rule 1.1(a), Respondent failed to provide competent representation to Mr. Bahri, and did so in a way that constituted a serious deficiency.

Respondent undertook to pursue resolution of Mr. Bahri's New York sales tax liability – collecting an advance flat fee for his engagement – but the only thing he did was submit an Offer in Compromise and then ignore the tax authority's response, and his client, thereafter. The record amply demonstrates Respondent's pervasive confusion, delays, misrepresentations, and failures to act on behalf of his client.

Respondent presented himself to Mr. Bahri as an attorney well-versed in sales tax matters. FF 10. Respondent's engagement letter defined the scope of his work as "endeavor to get your sales tax liability settled." FF 11. Mr. Bahri paid Respondent a $4,000 flat fee – in advance – for this endeavor and provided Respondent with requested documentation. FF 15-16.

Respondent sat on the matter for months thereafter, while misrepresenting to his client that it was already submitted and pending action by the New York authorities. FF 17-18. When Respondent finally started to devote attention to Mr. Bahri's matter in August 2016, Respondent's email correspondence demonstrated

significant confusion about the underlying facts and the remedy his client had directed him to seek. FF 19-22. When another month passed with no word from Respondent, Mr. Bahri asked him about the status of his submission to the New York authorities and Respondent told his client he would "check on that." FF 23. This response was misleading because there was nothing to "check" – Respondent still had not contacted the New York tax authorities about his client's matter. *Id.*

Another month passed before Respondent finally submitted an Offer in Compromise on behalf of Mr. Bahri to the Offer in Compromise Unit of the New York State Department of Taxation and Finance, but Respondent's offer – which was not provided to Mr. Bahri for review beforehand – contradicted his client's clear instructions. FF 24. Mr. Bahri had repeatedly told Respondent that he was not seeking relief for his sales tax liability, only from the penalties and interest. FF 16, 21. Yet, Respondent's Offer in Compromise challenged the entire liability while offering to pay just $1,000 of a total tax bill exceeding $68,000. FF 24.

Although resolution of the question is not necessary to our conclusions, the Hearing Committee has substantial doubts about whether Respondent pursued the appropriate relief for his client in this matter. At the hearing and in the underlying representation, Respondent often confused the difference between an Offer in Compromise – which may provide tax relief based solely on the taxpayer's inability to pay – and a tax abatement which may be granted if the assessment is somehow unfair or unreasonable. Respondent's actual approach conflated procedures for filing an Offer in Compromise, requesting a tax abatement, and negotiating with the

IRS, with which he admittedly was more familiar. *See* FF 24; Rebuttal Brief at 4-12, 22-23. Respondent's 2019 communications with Mr. Bahri and his statements at the hearing are indicative of such confusion. FF 34-35; Tr. 19-25 (Respondent's Opening Statement). If Respondent did not understand the New York DTF procedures, it was his obligation to conduct the "necessary study" to learn them. *See* Rule 1.1, cmt. [2]; *see also Evans*, 902 A.2d at 72 (Respondent violated Rule 1.1(a) in a probate matter in which "[r]espondent failed to make a basic assessment of the factual and legal issues implicated by the proposed transfer of legal title to [his client]" and as such "was unable to properly advise his client.").

In response to the Offer in Compromise that Respondent submitted for Mr. Bahri, the New York DTF asked for further information – information which according to its own Publication 220 was required to be submitted – but Respondent did nothing. FF 31. The DTF's letter provided contact information, but Respondent never used it. FF 37; DX 8 at 1-2. The New York DTF maintains an Office of Taxpayer Rights Advocate, to which Respondent never availed himself although he claimed at the hearing that DTF was not following its own procedures in handling Mr. Bahri's Offer in Compromise. Tr. 173-74. Respondent claims that after receiving the New York DTF's response, he concluded that producing the requested documents would be counterproductive because the state taxing authorities were not correctly following their own rules and procedures, or his client was not eligible for abatement, or both. FF 31; Tr. 154-55, 173-75. But Respondent did not inform Mr. Bahri of his decision to not proceed until more than two years later, despite the fact

that Mr. Bahri requested additional information twice in the interim. FF 33-35. Respondent's conclusion that all was lost – evidently mistaken – was no excuse for him to simply do nothing. *See* Respondent's Pers. Statement at 2, ¶ 1(g).

To be clear, the validation of Respondent's legal strategies does ***not*** present the sole key issue in this disciplinary proceeding. Even if Respondent had correctly identified the right relief to pursue from DTF for this client at the outset of the representation, doing nothing in response to the DTF's request for information – failing to inquire or respond in any fashion to that request and failing to timely inform his client about it – suffices here to find that Respondent failed to provide competent representation to Mr. Bahri and prejudiced him by delaying the resolution of his tax liability. FF 42. And the totality of this largely undisputed record – Respondent's unreasonable delays, miscues, misrepresentations to his client, pervasive confusion about the status of his client's matter and appropriate relief available, together with Respondent's repeated failures to perform as directed and in response to the New York DTF's request for additional information – demonstrate by clear and convincing evidence Respondent's lack of competency in this matter. *See In re Carter*, 11 A.3d 1219, 1222-23 (D.C. 2011) (per curiam) (Respondent violated 1.1(a) for failing to attend court hearings, failing to file a response to show-cause order that resulted in summary judgment against the client, and for failing to make submission to agency that might have prevented client from being suspended at work.).

B. Respondent Violated Rules 1.3(a), (b)(1), and (c) by Failing to Represent a Client Zealously, Diligently and with Reasonable Promptness, and by Intentionally Failing to Seek the Lawful Objectives of Mr. Bahri.

Disciplinary Counsel's Post-Hearing Brief asserts that Respondent's conduct also violated Rule 1.3 in several related ways. Rule 1.3(a) states that an attorney "shall represent a client zealously and diligently within the bounds of the law." "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), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc) ("*Reback II*")). Rule 1.3(a) "does not require proof of intent, but only that the attorney has not taken action necessary to further the client's interests, whether or not legal prejudice arises from such inaction." *In re Bradley*, Bar Docket Nos. 2004-D240 & 2004-D302, at 17 (BPR July 31, 2012), *adopted in relevant part*, 70 A.3d 1189, 1191 (D.C. 2013) (per curiam); *see also In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (*per curiam*) (appended Board Report) (Rule 1.3(a) violated even where "[t]he failure to take action for a significant time to further a client's cause . . . [does] not [result in] prejudice to the client").

The Court has found neglect in violation of Rule 1.3(a) where an attorney persistently and repeatedly failed to fulfill duties owed to the client over a period of time. *See, e.g.*, *In re Ukwu*, 926 A.2d 1106, 1135 (D.C. 2007) (appended Board Report) (respondent violated Rule 1.3(a) when he repeatedly failed to inform his

clients about the status of their cases, prepare his clients for hearings and interviews with immigration officials, or prepare himself for court appearances); *Wright*, 702 A.2d at 1255 (appended Board Report) (respondent violated Rule 1.3(a) by failing to respond to discovery requests, a motion to compel, and a show cause order); *In re Chapman*, Bar Docket No. 055-02, at 19-20 (BPR July 30, 2007) (respondent violated Rule 1.3(a) where he did virtually no work on the client's case during the eight-month term of the representation, failed to conduct any discovery, and did not respond to discovery requests from the opposing party), *recommendation adopted*, 962 A.2d 922, 923-24 (D.C. 2009) (per curiam).

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." A "[k]nowing abandonment of a client is the classic case of a Rule 1.3(b)(1) violation," *Lewis*, 689 A.2d at 564 (appended Board Report), and "failure to communicate important case developments to a client" has also been found to violate this duty. *In re Starnes*, 829 A.2d 488, 504 (D.C. 2003) (per curiam). Even a negligent failure to pursue a client's interest is deemed intentional when "the neglect is so pervasive that the lawyer must be aware of it" or "when a lawyer's inaction coexists with an awareness of his obligations to his client." *Ukwu*, 926 A.2d at 1116 (citations omitted). "Neglect of a client's matter, often through procrastination, can 'ripen into . . . intentional' neglect in violation of Rule 1.3(b) 'when the lawyer is aware of his neglect' but nonetheless continues to neglect the

client's matter." *In re Vohra*, 68 A.3d 766, 781 (D.C. 2013) (appended Board Report) (quoting *In re Mance*, 869 A.2d 339, 341 n.2 (D.C. 2005) (per curiam)).

Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." Perhaps no professional shortcoming is more widely resented by clients than procrastination, and "in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed." Rule 1.3, cmt. [8]. Our Court of Appeals holds that failure to take action for a significant time to further a client's cause – ***whether or not prejudice to the client results*** – violates Rule 1.3(c). *See In re Speights*, 173 A.3d 96, 101 (D.C. 2017) (per curiam). As Comment [8] to Rule 1.3 provides: "Even when the client's interests are not affected in substance . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness," making such delay a "serious violation."

In support of its Rule 1.3 violation charges, Disciplinary Counsel emphasizes the several instances of neglect and failures to take action that characterized Respondent's representation of Mr. Bahri. Disciplinary Counsel's Post-Hearing Brief at 20-21; *see* FF 15-34. From the very onset of this engagement, Respondent sat on Mr. Bahri's matter for several months and did not take action – all the while telling the client that his tax relief request was pending with New York DTF when it was not. FF 17-18. After Respondent submitted Mr. Bahri's Offer in Compromise, the New York DTF promptly responded with a request for information which Respondent ignored. FF 30-31.

At the hearing, Respondent testified that he ignored the agency's request and took no steps to communicate its request to his client because he concluded that the DTF was mistaken about its handling of the Offer in Compromise, but that Mr. Bahri's tax relief request was futile. Tr. 173-75; Rebuttal Brief at 18-19. Respondent's testimony alone establishes that he knowingly abandoned Mr. Bahri in violation of Rule 1.3(b)(1).

Without offering to explain the above pattern of persistent delay, failures to communicate, and neglect in the record, Respondent argues that the correctness of his legal strategies remains the sole key legal and factual issue, constituting a complete rebuttal in this case. Rebuttal Brief at 27-33. By this argument, Respondent suggests that his client Mr. Bahri suffered no prejudice because his request for tax relief from the New York DTF was futile. But as the above-cited cases amply demonstrate, prejudice is not an element of these Rule 1.3 violations. Moreover, Respondent did not timely notify Mr. Bahri of his view that the request for tax relief was futile. Thus, Respondent intentionally abandoned the case because he believed that he could not obtain the requested relief, without notifying Mr. Bahri, who continued to believe that Respondent was pursuing the tax relief. Based on the undisputed record of neglect, unexcused delays, and failures to communicate in the record, we find that Disciplinary Counsel established all of Respondent's Rule 1.3 violations (Rules 1.3(a), (b)(1), and (c)) by clear and convincing evidence.

C. Respondent Violated Rule 1.4(a), by Failing to Keep a Client Reasonably Informed About the Status of a Matter and to Promptly Comply with Reasonable Requests for 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." Under Rule 1.4(a), an attorney must not only respond to client inquiries, but must also initiate contact to provide information when needed. *See, e.g.*, *In re Robbins*, 192 A.3d 558, 564-65 (D.C. 2018) (per curiam); *In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998). The purpose of this Rule is to enable clients to "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Rule 1.4, cmt. [1]. To meet his obligations under this Rule, an attorney "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).

In determining whether Disciplinary Counsel has established a violation of Rule 1.4(a), the question is whether Respondent fulfilled his client's reasonable expectations for information. *See In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001) (citing Rule 1.4, cmt. [3]). Attorneys are obligated to respond to client requests for information even when there are no new developments to report. *See In re Lattimer*, No. 18-BG-338, slip op. at 11 (D.C. Jan. 16, 2020) (per curiam).

The above-cited record facts demonstrate by clear and convincing evidence that Respondent violated his Rule 1.4 obligations throughout his work for Mr. Bahri. After the initial telephone conversation with his client, Respondent spoke to his

client, at most, just once more, despite several client requests for information. FF 10, 17-19, 23, 25, 33-34. For several months after paying Respondent's advance fee, Mr. Bahri asked for information about his matter, and did not receive an honest answer. Respondent replied to his client's status requests by falsely claiming that the matter was pending. FF 17-18. Respondent's responses to his client during this extended period were designed to either put Mr. Bahri off (by falsely claiming that he had begun work or that a claim for tax relief was actually pending with New York's DTF) or the result of Respondent's confusing Mr. Bahri's matter with another client's. Tr. 178-79, 192. In either instance, Respondent's pervasive client miscommunications misled Mr. Bahri about the status of his matter and effectively prevented him from participating intelligently in decisions about the objectives of the representation and the means by which they are to be pursued, resulting in a violation of Rule 1.4.

Respondent also violated Rule 1.4 when he failed to keep his client informed about the New York DTF's request for additional information necessary to process his Offer in Compromise. The DTF's October 26, 2016 letter to Respondent imposed a deadline of November 15 to receive additional information and notified Respondent that his offer could be rejected if the information was not provided by that date. FF 30. Respondent failed to keep his client Mr. Bahri informed about the status of the Offer in Compromise to DTF, and thereby plainly violated Rule 1.4. Nor is this failure excused by any of Respondent's proffered defenses that Mr. Bahri's claim for tax relief was futile, or that DTF was mistaken in asking for more

information. Whatever the reason Respondent failed to keep Mr. Bahri apprised of the status of his tax relief claim at DTF, they were reasons within Respondent's exclusive control, and he has offered no reason for failing to communicate with his client for over a year after receiving DTF's letter.

The record amply demonstrates that Disciplinary Counsel established Respondent's Rule 1.4(a) violation by clear and convincing evidence.

D. <u>Respondent Violated Rule 1.5(a), by Charging an Unreasonable Fee.</u>

Rule 1.5(a) provides that:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> > (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> > (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> > (3) The fee customarily charged in the locality for similar legal services;
> > (4) The amount involved and the results obtained;
> > (5) The limitations imposed by the client or by the circumstances;
> > (6) The nature and length of the professional relationship with the client;
> > (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
> > (8) Whether the fee is fixed or contingent.

The Court of Appeals has held that "Rule 1.5(a) can be violated by the act of charging an unreasonable fee without regard to whether the fee is collected." *In re Cleaver-Bascombe*, 892 A.2d 396, 403 (D.C. 2006). "The prototypical circumstance

of charging an unreasonable fee is undoubtedly one in which an attorney did the work that he or she claimed to have done, but charged the client too much for doing it." *Id.* However, "[i]t cannot be reasonable to demand payment for work that an attorney has not in fact done." *Id.*

When a lawyer charges a fee based on an hourly rate or on a contingency, the measure of reasonableness is determined by assessing whether the time spent and hourly rate charged was reasonable – or whether the contingency was unreasonably high – in light of the Rule 1.5(a) factors cited above. *See, e.g.*, *In re Martin*, 67 A.3d 1032, 1041 (D.C. 2013) (contingency fee gave the respondent a greater interest in the outcome of the litigation than the client); *In re McClure*, Board Docket No. 13-BD-018, at 23 (BPR Dec. 31, 2015) (hourly fees were "clearly disproportionate to the services provided"), *recommendation adopted*, 144 A.3d 570, 572 (D.C. 2016) (per curiam).

Flat fees, of the type at issue here, are different. "A flat fee is one that embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted." *In re Ekekwe-Kauffman*, 210 A.3d 775, 791 (D.C. 2019) (quoting *Mance*, 980 A.2d at 1202).

Under these authorities and basic contract law, a lawyer who charges a flat fee promises to perform a described service in return for a sum certain. Under this type of arrangement, the lawyer assumes the risk that the amount of work necessary to complete the undertaken engagement may exceed the parties' expectations and assumptions underlying the flat fee, *i.e.*, the risk of underpayment. *See Ekekwe-*

Kauffman, 210 A.3d at 791. The client assumes the risk that the matter will be resolved with less effort, *i.e.*, the risk of overpayment relative to what might have been charged on an hourly basis. But if the lawyer does not completely perform that service or the client receives no value from the work performed, the fee is *per se* unreasonable no matter how much time the lawyer claims to have spent on the matter. *See Mance*, 980 A.2d at 1202 (explaining that a flat fee is "earned 'only to the degree that the attorney actually performs the agreed-upon services'" (quoting Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where Should it be Deposited?*, 1 Fla. Coastal L.J. 293, 347 (1999))); *In re Ponds*, Board Docket No. 17-BD-015, at 23-24 (BPR June 24, 2019) (providing that, even if it is unclear what percentage of a flat fee has been earned, it is *per se* unreasonable to collect the entire fee without completing the agreed-upon tasks), *pending review*, D.C. App. No. 19-BG-0555.

A client is robbed of the bargained-for exchange if a lawyer accepting a flat fee spends time on the engagement but delivers no value to the client or abandons the engagement before it is completed. A lawyer is breaching his flat fee contract in these circumstances, rendering the fee unreasonable when the client has paid the flat fee in advance. *See Mance*, 980 A.2d at 1202-03.

That is precisely what happened here: Respondent promised to "endeavor to get [Mr. Bahri's] sales tax liability settled" in return for a $4,000 fee. DX 5 at 8-9. Mr. Bahri paid the money, but Respondent did not endeavor to resolve the tax liability beyond his initial Offer in Compromise submission. His engagement letter

contemplated more than that, but Respondent's filing of the Offer in Compromise provided no value to Mr. Bahri because Respondent failed to follow-up on the submission. Respondent neither asked his client for nor provided necessary information the New York DTF specified in Publication 220 (FF 12), and which the DTF specifically requested from Respondent. FF 30-32. Respondent's $4,000 fee may have been eminently reasonable had Respondent done what he promised, but it was unreasonable to charge that amount and then make no meaningful effort to resolve his client's sales tax liability after submitting the initial Offer in Compromise. The record demonstrates by clear and convincing evidence that Respondent charged an unreasonable fee to Mr. Bahri, in violation of Rule 1.5(a).

E. <u>The "Alternative" Charges.</u>

The Specification of Charges asserts:

> Alternatively, if the fee is determined to be reasonable, by converting to his own use the entire fee before performing the full services for which he was engaged, [Respondent violated:]
>
> > g. Rule 1.15(e), failure to treat an advanced fee as property of the client until it was earned; and
> >
> > h. Rule 1.16(d), failure to return the unearned portion of an advanced fee that was not earned.

Specification at 4. It is not clear why these were brought as "alternative" charges. *See Mance*, 980 A.2d at 1204 (flat fees must be held in trust until earned absent client consent, must be reasonable, and must be returned if unearned). Disciplinary Counsel argues in its brief that Respondent violated both Rules 1.15(e) and 1.16(d), though still in the alternative. Disciplinary Counsel's Post-Hearing Brief at 26-28.

Respondent does not address either Rule in his brief. Although this may raise a question as to whether Respondent understood whether these Rule violations were in or out of the case, we will address them because they are clearly charged in the Specification of Charges, and argued in Disciplinary Counsel's brief. *See In re Austin*, 858 A.2d 969, 976 (D.C. 2004) (due process satisfied when the Specification of Charges and Disciplinary Counsel's post-hearing filings fairly put the respondent on notice of the charges against him).

Thus, we consider each alleged Rule violation separately, leaving it to the Board and the Court to determine whether these should properly be considered only "in the alternative."

1. Respondent Violated Rule 1.15(e), by Failing to Treat an Advanced Fee as Property of the Client Until Earned.

Rule 1.15(e) provides that "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement." The Court has held that "when an attorney receives payment of a flat fee at the outset of a representation, the payment is an 'advance[ ] of unearned fees'" and must be held as property of the client in a trust account pursuant to Rule 1.15(e). *Mance*, 980 A.2d at 1202-03.

The Court, citing the Rule 1.0 definition of informed consent, stated "[i]nformed consent [is] . . . the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation

about the material risks of and reasonable available alternatives to the proposed course of conduct." *Id.* at 1206. The Court further held an

> attorney must expressly communicate to the client verbally and in writing that the attorney will treat the advance fee as the attorney's property upon receipt; that the client must understand the attorney can keep the fee only by providing a benefit or providing a service for which the client has contracted; that the fee agreement must spell out the terms of the benefit to be conferred upon the client; and that the client must be aware of the attorney's obligation to refund any amount of advance funds to the extent that they are unreasonable or unearned if the representation is terminated by the client. *In re Sather*, 3 P.3d 403, 413 (Colo. 2000). We agree, and add that the client should be informed that, unless there is agreement otherwise, the attorney must, under [then] Rule 1.15(d), hold the flat fee in escrow until it is earned by the lawyer's provision of legal services.

Mance, 980 A.2d at 1206-07. The Court further stated that: "Where there is no discussion regarding the fee arrangement besides merely stating the overall fee, and no mention of the escrow account option, a client cannot be said to have a sufficient basis to give informed consent to waive the requirements of a rule designed to protect the client's interests." *Id.* at 1207.

These requirements were further explained in a June 2010 Ethics Committee Opinion, shortly after the *Mance* decision. D.C. Bar Ethics Opinion 355 provides that the

> bare mention of 'the escrow account option' *will usually be insufficient unless accompanied by some explanation of the features that distinguish a trust account from an operating account*: *i.e.*, that trust funds are generally protected from a lawyer's creditors and that trust funds cannot be spent until earned and thus are more readily available for refund to the client.

(emphasis added). It held that the "lawyer must explain that, in contrast to a trust account, funds in an operating account are 'lawyer's property upon receipt,' *with the caveat that they can be retained only by providing the agreed upon services*." (emphasis added) (quoting *Mance*, 980 A.2d at 1207). The Legal Ethics Committee went on to note that "the client must be aware of the attorney's obligation to refund any amount of advance funds to the extent that they are unreasonable or unearned if the representation is terminated by the client . . . ." (quoting *Mance*, 980 A.2d at 1207).

The recommended method of determining when a portion of an advance fee is earned is to agree upon milestones in the representation, which when completed entitles the lawyer to take payment of part of the fee. The entire fee should not be taken until the representation is completed. *See* D.C. Legal Ethics Op. 355 (June 2010). The advanced fee in this case was paid in installments, concluding in June 2016. FF 15. Respondent kept no time records but claims that he spent sufficient time when he filed the Offer in Compromise – in October 2016 – to earn the $4,000 fee paid by his client. Tr. 156-57 (Respondent). But Respondent took this money as income on the date of the pre-dated checks which Mr. Bahri paid to him several months earlier. FF 15. Clearly, Respondent had not earned the full fee by June 2016, when he deposited the last of Mr. Bahri's checks, approximately four months before sending the Offer in Compromise.[5] In fact, he had not earned it in October

[5] The Specification of Charges alleges that, in connection with the Rule 1.15(e) charge, Respondent "convert[ed] to his own use the entire fee before performing the full services for which he was

when he filed the Offer in Compromise, since he never completed that process by responding to the State's inquires and thus did not fulfill his promise to endeavor to resolve his client's sales tax liability.

By accepting a flat fee in exchange for his services, Respondent bore the risk of the entire fee becoming refundable in the event he did not deliver any value to the client. Accordingly, even if Respondent performed ***some*** work under the engagement, he did not earn the entire flat fee his client paid in exchange for complete services. Any unearned fee should have been escrowed until it was earned, and Respondent's admitted failure to do so violated Rule 1.15(e). *See* FF 15; *Ekekwe-Kauffman*, 210 A.3d at 792-93 (respondent was found to violate Rule 1.15(e) by failing to hold unearned portion of client's payments in trust).

2. Respondent Violated Rule 1.16(d), by Failing to Return the Unearned Portion of an Advanced Fee.

Rule 1.16(d) provides:

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

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engaged." If proven, this theory could support a finding of misappropriation, which would dramatically increase the recommended sanction. *See In re Nave*, 197 A.3d 511, 518 (D.C. 2018) (per curiam) (defining misappropriation as "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" (quoting *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (alterations in original))). However, Disciplinary Counsel confirmed at the hearing that it was not alleging misappropriation, and as noted above, it did not present evidence as to what Respondent did with the money after depositing it into a bank account. *See* Tr. 18; FF 15 & n.4.

> lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

Failure to refund any unearned portion of a fee violates Rule 1.16(d). *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"); *Carter*, 11 A.3d at 1223 (finding a violation of Rule 1.16(d) where the attorney failed to pay an Attorney-Client Arbitration Board award for unearned fees); *In re Kanu*, 5 A.3d 1, 2-3, 10 (D.C. 2010) (finding a violation of Rule 1.16(d) where the attorney failed to abide by a clause in her retainer agreement promising a refund if she failed to meet her clients' objectives).

When Respondent unilaterally decided that the representation was ended before completing his responsibilities under the retainer agreement, he should have refunded at least some portion of the flat fee that Mr. Bahri paid in advance. Under the terms of Respondent's flat fee agreement letter, the entirety of the flat fee was subject to reimbursement because Respondent failed to perform as agreed. *See Hallmark*, 831 A.2d at 372 (respondent violated Rule 1.16(d) by accepting a flat fee from a client for performing two agreed-upon services, which she failed to complete, and then failing to return some portion of the flat fee). Respondent's failure to refund any of the fee violated Rule 1.16(d), as the record here demonstrates by clear and convincing evidence.

IV. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend that Respondent be suspended from the practice of law for sixty (60) days, and that as a condition of reinstatement he be required to (a) make restitution to his client Mr. Bahri in the amount of $4,000 plus interest calculated at the legal rate running from June 13, 2016 to the date of payment; and (b) make a demonstration of fitness before being readmitted to the practice of law. Respondent makes no submission on the issue of sanction, but rests on his arguments that no Rule violations are established in the record.

For the reasons described below, we adopt Disciplinary Counsel's request and recommend that Respondent Alvin S. Brown be suspended from the practice of law for sixty (60) days, and that as a condition of reinstatement, Respondent be required to (a) make restitution to his client Mr. Bahri in the amount of $4000 plus interest calculated at the legal rate running from June 13, 2016 to the date of payment; and (b) make a demonstration of fitness before being readmitted to the practice of law.

A. Standard of Review

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; *Cater*, 887 A.2d at 17. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than

to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction 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)).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

The misconduct at issue in Respondent's mishandling of Mr. Bahri's tax relief claim was serious and pervasive. As demonstrated above, Respondent took his client's fee and then did nothing for several months while either ignoring or

misleading his client when asked for information about the status of his matter. When Respondent finally acted, he submitted an Offer in Compromise that contradicted his client's instructions and the DTF's rules and guidelines, and then Respondent failed to complete the representation when DTF asked for additional information. FF 29, 31-32. Respondent willfully failed to inform his client – for over a year – about the DTF's request for additional information. *See* FF 35; Tr. 71-72. Respondent violated multiple disciplinary rules, and under circumstances demonstrating Respondent's dishonesty toward his client.

2. Prejudice to the Client

Respondent's client Mr. Bahri was prejudiced as a direct result of the Rule violations at issue. Mr. Bahri received no value for an advance flat fee that he had to scrape up in installments, and his continuing tax problems have had a major impact on his life. Two and one-half years after retaining Respondent, without any progress on his attempts to reduce his tax liability, interest and penalties on Mr. Bahri's tax debt continue to compound, such that he now owes over $100,000 on an original sales tax liability of less than $15,000. FF 5, 36. Respondent's client cannot open a checking account, and he is seriously handicapped in operating his business, as a direct result of this unresolved tax liability. Had Respondent sufficiently attempted to achieve his client's goals by making an Offer in Compromise for the full tax liability and following up to ascertain and demonstrate Mr. Bahri's financial circumstances, the New York DTF may have substantially mitigated or eliminated the compound interest and penalties.

3. Dishonesty

The record demonstrates instances of Respondent being dismissive toward his client's requests for information, and often conveying false information, which may have been a result of confusion. *See* FF 17-18, 36-37, 39.

4. Violations of Other Disciplinary Rules

The record demonstrates Respondent's violation of multiple disciplinary Rules during the Bahri engagement: Rules 1.1(a); 1.3(a), (b)(1), and (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 involving similar misconduct: neglecting cases and failing to communicate with clients in four matters, in violation of Rules 1.3(c), 1.4(a), and 1.5(b). DX 12.

6. Acknowledgement of Wrongful Conduct

Significantly, Respondent steadfastly refuses to acknowledge any wrongdoing or negligence in this matter and continues to refuse to refund Mr. Bahri's flat fee payment. FF 41. At times, Respondent seemed to blame his client for not choosing the right legal position to advocate for tax relief from New York DTF. *See* Tr.155-56, 211-12; DX 11 at 3-4; *see also* Rebuttal Brief at 7-9.

7. Other Circumstances in Aggravation and Mitigation

This Hearing Committee is also entitled to take into consideration the behavior of Respondent during the course of disciplinary proceedings. *See*

Yelverton, 105 A.3d at 428; *In re White*, 11 A.3d 1226, 1252 (D.C. 2011) (per curiam).

At the hearing and in his written submissions in this disciplinary proceeding, Respondent appeared genuinely confused about the nature of the charges at issue, the rules governing briefs and other written submissions, and salient facts of the underlying matter. *See, e.g.*, Tr. 222-25; Rebuttal Brief at 31-32 (arguing at length that his client Mr. Bahri "loses on every issue" and "cannot establish" any basis to eliminate his tax liability; therefore, Respondent claims there is no Rule 1.3(b)(2) violation). Further, Respondent's post-hearing brief is devoted to confusing attempts to validate his legal theories about Mr. Bahri's tax relief claim, while essentially ignoring the disciplinary proceeding's fundamental issues about Respondent's misleading emails and failures to communicate with his client, and his abandonment of Mr. Bahri's Offer in Compromise before the New York DTF. *See, e.g.*, Rebuttal Brief at 6-12 (arguing that his interpretation of the New York tax law was accurate), 33-38 (arguing that he could not effectively communicate with Mr. Bahri due to the complexity of the subject matter and Mr. Bahri's supposed difficulty with English language, while acknowledging "a couple communication errors" due to confusing Mr. Bahri with another client). And as discussed above, Respondent demonstrated confusion about straightforward rules and orders governing the disciplinary proceeding, failed to follow the Committee Chair's order setting forth requirements for briefing, and filed numerous materials – including a "Personal Statement" – for which no Board Rule provides.

His confusion was also evident during the course of his representation of Mr. Bahri. The record demonstrates Respondent being confused about the status of Mr. Bahri's tax relief matter when asked about it on numerous occasions by his client (FF 19, 21, 24, 26, 28-29), and he appeared confused about the two potential forms of tax relief offered by the New York DTF. FF 35. The DTF offers at least two forms of relief – an Offer in Compromise for cases of financial hardship, and an abatement procedure to remove penalties and lower interest rates when a taxpayer can show a reasonable cause for not making timely payments. Respondent's approach seemed to conflate these two forms of relief, arguing that he could not obtain an Offer in Compromise because he could not show a reasonable basis to abate the penalties. *See* Tr. 211-12; DX 11 at 3-4 ("Even for the penalties subject to abatement for 'reasonable cause,' the NY statutes set very high standards to abate penalties. Further, Bahri gave me no facts that would be probative to 'reasonable cause'. . . ."); Rebuttal Brief at 32 (although Respondent filed an Offer in Compromise for his client, his post-hearing brief argues that "Bahri and Respondent both interpreted and applied the Engagement Letter as a contract to help Bahri ***abate*** his tax debt for "reasonable case. [sic]" (emphasis added)).

C. Sanctions Imposed for Comparable Misconduct

In cases involving intentional failure to seek the lawful objectives of a client, other issues with the adequacy of representation, and fee complications, the Court of Appeals has imposed discipline ranging from public censure to suspension for a period of two years. *See, e.g.*, *In re Untalan*, 174 A.3d 259 (D.C. 2017) (per curiam)

(six-month suspension with all but sixty-days stayed in favor of one year probation for lack of competence, neglect, intentional neglect, failure to obey obligation under the rules of a tribunal, and serious interference with the administration of justice, aggravated by prejudice to the clients but mitigated by marital problems and stress at the time of the misconduct); *In re Francis*, Board Docket No. 13-BD-089, at 18-20 (BPR Mar. 17, 2015), *recommendation adopted*, 137 A.3d 187 (D.C. 2016) (per curiam) (thirty-day suspension stayed in favor of six months of probation and CLE for intentional neglect and failure to communicate, aggravated by failure to acknowledge wrongfulness of conduct); *In re Bradley*, 70 A.3d 1189 (D.C. 2013) (per curiam) (two-year suspension with fitness for lack of competence, neglect, intentional neglect, and serious interference with the administration of justice, aggravated by false testimony to the Hearing Committee and three prior informal admonitions for similar misconduct); *In re Kaufman*, 14 A.3d 1136 (D.C. 2011) (per curiam) (public censure for lack of competence, intentional neglect, failure to communicate, and failure to return client file, aggravated by prior discipline but mitigated by, *inter alia*, non-*Kersey* disability evidence); *In re Owusu*, Bar Docket No. 109-02, at 17-20 (BPR July 30, 2004), *recommendation adopted*, 886 A.2d 536 (D.C. 2005) (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).

In light of the above-discussed sanction factors and comparable cases, the Hearing Committee agrees with Disciplinary Counsel that the appropriate sanction is a sixty-day suspension with the additional restitution and fitness requirements noted below.

D. 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 . . . ." "[I]t is the general rule . . . that where an attorney violates his or her ethical duties to the client, the attorney is not entitled to a fee for his or her services." *In re Hager*, 812 A.2d 904, 923 (D.C. 2002). In cases where the Board recommends restitution,

> it is not sufficient for Respondent simply to return the money paid to him by his client. That money ought to be returned at a reasonable rate of interest, say seven percent a year compounded annually, so that the client is in fact made whole. Lawyers are not entitled to interest-free loans from their clients, and clients are entitled to have the full value of their money refunded.

In re Solomon, 599 A.2d 799, 810 (D.C. 1991).

Generally, the Court of Appeals has set the interest rate for restitution at the legal rate of six percent. *See In re Edwards*, 990 A.2d 501, 530 (D.C. 2010) (The Court ordered respondent to pay restitution as a condition of reinstatement with interest at the legal rate of 6%); *Wright*, 702 A.2d at 1255-58 (same).

In this case, Mr. Bahri was financially injured when he paid $4,000 for legal services that Respondent never performed or earned. In his Engagement Agreement,

Respondent promised Mr. Bahri to endeavor to get Mr. Bahri's sales tax liability settled. DX 5 at 8-9. While Respondent did submit an initial Offer in Compromise with multiple errors in October 2016, he ignored the New York DTF's request for further information, made no further contact with that agency although they provided him with contact information, and ultimately failed to complete the Offer in Compromise.

As Respondent failed to perform his legal services and Mr. Bahri received nothing of value for his advance flat fee payments, Respondent should be ordered to pay restitution. *See Hallmark*, 831 A.2d at 372, 375 n.9, 378 (respondent ordered to return unearned portion of flat fee to client as restitution for not completing legal services); *Kanu*, 5 A.3d at 2, 18 (respondent failed to properly prepare visa applications for two clients, which resulted in the clients not obtaining "the immigration status for which they sought her services.")

E. <u>Fitness</u>

A fitness showing is a substantial undertaking. *Cater*, 887 A.2d at 20. Thus, in *Cater*, the Court of Appeals held that "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." *Id*. 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).

In articulating this standard, the Court observed that the reason for conditioning reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. 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 . . . .

Cater, 887 A.2d at 22.

In addition, the Court of Appeals held that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), should be used in applying the *Cater* fitness standard. The *Roundtree* factors include:

> (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.

In circumstances where the respondent's conduct during the disciplinary hearing raises "a serious doubt as to whether Respondent will act ethically and competently in the future," the Board has concluded that "a fitness requirement should be imposed." *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) ("conduct 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.")); *In re Lea*, 969 A.2d 881, 893 (D.C. 2009) (respondent's "testimony, tone, and behavior [during the disciplinary proceedings] demonstrated a lack of contrition or appreciation for the seriousness of her conduct.")), *recommendation adopted*, 105 A.3d 413, 430-31 (D.C. 2014).

As set forth above at Part IV.B, by clear and convincing evidence the record raises serious doubts about Respondent's ongoing fitness to practice law. Respondent does not acknowledge, much less recognize the seriousness of his mishandling of Mr. Bahri's tax relief matter. Respondent has taken no steps to remedy his past conduct, but simply abandoned Mr. Bahri without notice or explanation, and steadfastly refuses to refund his client's advance flat fee that has not been earned, while blaming the client for his own failures. *See Lattimer*, No. 18-BG-338, slip op. at 38-39 (imposing a fitness requirement where, inter alia, the respondent sought to blame his clients instead of accepting responsibility for his misconduct). Respondent's confused mishandling of Mr. Bahri's matter and his similar confused conduct – at the hearing and throughout this disciplinary matter –

raise substantial doubts about whether Respondent remains competent to practice law. *See In re Lyles*, 680 A.2d 408, 418 (D.C. 1996) (per curiam) (appended Board Report) (imposing a fitness requirement where the respondent "demonstrated no remorse or understanding that she had lapsed in her obligations to [her] clients").

Respondent's post-hearing brief argues that Disciplinary Counsel's concerns about Respondent's continued competency to practice law amount to unfair age discrimination in this proceeding. *See, e.g.*, Rebuttal Brief at 19-21. But as Disciplinary Counsel stated,

> When a highly experienced tax lawyer can no longer figure out 'an administrative pathway to get the NY Department of Finance to reconsider the sales tax liability of Bahri . . .' (DX 11 at 2), despite the existence of two such paths set forth in the very materials that [Respondent] submitted as exhibits (RX 2; RX 3), and despite a State website that offers taxpayer assistance, there is a substantial doubt that [Respondent] continues to be competent to practice law.

Disciplinary Counsel's Post-Hearing Brief at 35; *see also* Disciplinary Counsel's Reply Brief at 10-11 (noting several instances of Respondent's confusion during the disciplinary proceeding).

The Committee understands that Respondent enjoyed an estimable law practice, beginning in 1963 and continuing through several decades, that included admirable public service within the Internal Revenue Service Office of Chief Counsel. *See* Rebuttal Brief at 22-23 (detailing non-sequitous employment history). Yet, laws proscribing age discrimination do not compel this Committee to overlook the many instances of Respondent's confusion in the record. Were he a lawyer aged

only thirty-five years, the record would still raise substantial doubts about Respondent's fitness to practice.

Respondent should be required to demonstrate fitness before he resumes the practice of law.

V. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated Rules 1.1(a) (failure to provide competent representation); 1.3(a) (failure to represent a client with zeal and diligence); 1.3(b)(1) (intentional failure to seek lawful objectives of a client); 1.3(c) (failure to represent a client with reasonable promptness); 1.4(a) (failure to keep client reasonably informed); 1.5(a) (charging unreasonable fee); 1.15(e) (failure to treat advance fee as property of client); and 1.16(d) (failure to take reasonable steps to protect client's interests in event of termination, and refund unearned fees).

We recommend that Respondent Alvin S. Brown be suspended from the practice of law for sixty (60) days, and that as a condition of reinstatement Respondent be required to (a) make restitution to his client Mr. Bahri in the amount of $4,000 plus interest calculated at the legal rate (6%) running from June 13, 2016 to the date of payment; and (b) make a demonstration of fitness before being readmitted to the practice of law. 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).

AD HOC HEARING COMMITTEE

Thomas E. Gilbertsen, Chair

Rabbi Marc Lee Raphael, Public Member

Arlus J. Stephens, Attorney Member