DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER FOUR

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| In the Matter of: | : | |
| | : | |
| EDWARD N. MATISIK, | : | |
| | : | |
| Respondent. | : | |
| | : | Bar Docket Nos. 2005-D074; |
| An Administratively Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Membership Number: 463786) | : | 2005-D095 & 2005-D122 |

REPORT AND RECOMMENDATION

This matter involves the actions of Respondent Edward N. Matisik, a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on or about July 9, 1999 and assigned Bar number 463786, but who was administratively suspended on or about December 31, 2005, for failure to pay Bar dues. Respondent is charged with conduct that violates the standards governing the practice of law in the District of Columbia as prescribed by D.C. Bar Rule XI, § 2(b).

## I. Background

Respondent is charged with three separate instances of alleged misconduct. In each instance, Respondent is alleged to have been hired by his clients to incorporate and obtain non-profit status for each of their respective business. In each instance, Respondent was alleged to have been paid, began work on each matter, communicated sporadically with each client at the outset of the representation and then ceased communication altogether without satisfying the terms of his engagement or returning any fees paid by his clients. Each of Respondent's clients filed complaints with Bar Counsel to which Respondent responded averring, among other things,

that he failed to satisfy the terms of the representations because he was depressed due to his mother's illness and subsequent death.

Based on these three instances of alleged misconduct, Bar Counsel filed a three-count Specification of Charges, alleging for each count that Respondent: (1) violated Rule 1.1(a) by failing to provide competent representation; (2) violated Rule 1.1(b) by failing to serve his clients with skill and care; (3) violated Rule 1.3(a) by failing to represent his clients zealously and diligently; (4) violated Rule 1.3(c) by failing to act with reasonable promptness; (5) violated Rule 1.4(a) by failing to communicate with his clients and keep them reasonably informed; (6) violated Rule 1.5(b) by failing to provide his clients with an engagement letter; (7) violated Rule 1.16(a)(2) by failing to withdraw from representation when impaired; and (8) violated Rule 1.16(d) by failing to return papers and property after his termination of representation.

Bar Counsel served Respondent personally with the Specification of Charges, but Respondent never answered. Respondent also did not appear at his hearing on the charges and, in fact, has not participated in this disciplinary process other than to respond to the initial complaints filed by his former clients.

## II. Procedural History

On December 16, 2009, Bar Counsel filed a Petition Instituting Formal Disciplinary Proceedings together with the Specification of Charges, notifying Respondent that disciplinary proceedings had been instituted against him pursuant to D.C. Bar Rule XI, § 8(c).

On September 8, 2010, after failing to serve Respondent personally at his last known address of record, Bar Counsel moved the Court of Appeals to allow service by certified mail, regular mail and publication.

By order of October 1, 2010 (as amended on October 5, 2010), the Court granted Bar Counsel's motion on service, requiring Bar Counsel to serve "a certified copy of this order, the petition, and specification of charges upon respondent by (1) sending copies thereof by regular and certified mail, return receipt requested, addressed to respondent at his address of record with the District of Columbia Bar . . . and (2) by causing an announcement to be published in the Washington Post and the Daily Washington Law Reporter."

On January 19, 2011, Bar Counsel filed a Notice of Compliance, providing proof of service by publication and noting that service by regular mail was returned, stamped "Return to Sender," and service by certified mail was not signed by Respondent.

On January 24, 2011, the Board on Professional Responsibility mailed a notice of pre-hearing conference to Respondent, noting that the conference was set for March 4, 2011. The notice was sent to Respondent's last know address on file with the District of Columbia Bar.

On March 4, 2011, a pre-hearing conference was held in this matter, but neither Respondent nor any counsel on his behalf appeared. Given Respondent's failure to appear and the prior difficulties serving Respondent, the Chair of this Committee did not establish a pre-hearing schedule, and instead focused specifically on Respondent's failure to appear. Assistant Bar Counsel explained at length the significant efforts taken by the Office of Bar Counsel to serve Respondent. The Chair noted Bar Counsel's efforts, but directed Bar Counsel to attempt service at the Pennsylvania address for Respondent noted in the Specification of Charges at which service was not attempted previously.

In a March 9, 2011 Order, issued on the heels of the March 4th conference, the Chair of this Committee instructed Bar Counsel, among other things, to try to serve Respondent at the Pennsylvania address and to send copies of all documents (filings, correspondence and the like)

related to this matter to the Respondent at both the last known address on file with the District of Columbia Bar and the Pennsylvania address referenced in the Specification of Charges. The Chair also set a status conference in this matter to address the service issue on April 6, 2011.

During the April 6, 2011 status conference, Assistant Bar Counsel informed the Hearing Committee Chair that on March 17, 2011, Bar Counsel perfected service on Respondent personally at the Pennsylvania address. (Bar Counsel Exhibit ("BC Ex.") C.) The Chair then set a pre-hearing conference for May 9, 2011.

On the heels of the April 6th status conference, on or about April 11, 2011, the Chair of this Committee issued an Order noting that a pre-hearing conference would be set in May and that "[f]rom this point forward, Bar Counsel and the Board office are directed to send copies of any pleading, correspondence or other material in this matter to both Respondent's address of record with the D.C. Bar . . . and the Pennsylvania address at which Bar Counsel personally served Respondent."

On or about April 11, 2011, Respondent was mailed notice of a May 9, 2011 pre-hearing conference, consistent with the Committee's April 11, 2011 Order.

Respondent never answered the Specification of Charges.

During the May 9, 2011 pre-hearing conference, Assistant Bar Counsel was present, but neither Respondent nor any counsel on his behalf appeared. The proceeding continued in his absence. At this conference, the Chair of this Committee set a pre-hearing schedule and a July 11, 2011 hearing date, among other things, and addressed Bar Counsel's request to present witness testimony remotely.

On May 31, 2011, the Chair of this Committee issued an Order — served on all parties consistent with the service requirements in the April 11th Order — setting the hearing date and

related deadlines, and requiring Bar Counsel to make a proffer for why he needed to present three complaining, material witnesses telephonically rather than live or by video.

Upon sufficient proffer by Bar Counsel, this Hearing Committee allowed Bar Counsel to present the three witnesses' testimony via video-conference. Moreover, upon request by Bar Counsel, this Hearing Committee rescheduled the hearing from July 11, 2011 to August 22, 2011, and notice was provided to all parties consistent with the service requirements outlined in the Hearing Committee's April 11th Order.

During the August 22, 2011 hearing, neither Respondent nor counsel on his behalf appeared. (August 22, 2011 Transcript ("Tr.") at 4:9-2.) The assigned public member of this Hearing Committee, Kathy Halverson, also did not appear. The Hearing Committee proceeded without Ms. Halverson, pursuant to Board Rule 7.12, which allows a formal hearing in the presence of a quorum of two hearing committee members.[1] (*Id.* at 5:3-6:5.) Bar Counsel presented three witnesses by video conference. Each of these witnesses was the complainant for each of the three counts in the Specification of Charges. Bar Counsel presented no evidence of aggravation and no prior discipline. As for evidence of mitigation, Bar Counsel noted only the information previously provided by Respondent to Bar Counsel in his response to his clients' complaints.

## III. FINDINGS OF FACT

Based on the evidence produced at the hearing, testimony taken, arguments advanced in support thereof and the record as a whole, this Hearing Committee makes the following findings of fact:

[1] Although Bar Counsel agreed that Ms. Halverson could participate in the Hearing Committee's consideration of this case pursuant to Board Rule 7.12, Ms. Halverson declined to participate. Respondent did not attend the hearing, and has taken no position on this issue.

A. General Findings of Fact

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on July 9, 1999, and assigned Bar number 463786. (BC Ex. A.)

B. Findings of Fact as to Count I (Bena Matter: Bar Docket Number 2005-D074**)**

2. On April 19, 2004, Thomas Bena hired Respondent to apply for and obtain non-profit status for Sea the World Productions, Inc., a corporation Mr. Bena was forming that would have its principal place of business in Massachusetts. Mr. Bena paid Respondent a fee of $600 and an additional $70 for filing fees. (BC Ex. D at 1, 4, 6, 10, 12; Tr. at 14.)

3. Mr. Bena did not know Respondent personally and only spoke with him on the telephone or over electronic mail. (Tr. at 13:22-14:2.)

4. A woman on Martha's Vineyard recommended Respondent to Mr. Bena. (*Id.* at 14:3-14:6.) Respondent's rates seemed reasonable to Mr. Bena and, based upon Respondent's representations during the initial conference, Mr. Bena believed Respondent had the skill and knowledge necessary to obtain a non-profit status for his company. (*Id.* at 16 ("[Respondent] seemed comfortable doing that type of work and said he would be able to do it. . . ."), 29 ("[the IRS non-profit application] was too complicated. That's why I hired [Respondent] in the first place . . . , so I figured, by paying him the $600, he would take care of that . . . .").)

5. Respondent did not provide Mr. Bena with a written statement identifying the nature of the work or the basis for his rate or fee. (*Id.* at 23.)

6. Respondent communicated with Mr. Bena for a time, but then stopped returning Mr. Bena's telephone calls and e-mails. (BC Ex. D at 1; Tr. at 16-18). Respondent "would be out of touch for weeks at a time, if not longer" and "[t]hat was, perhaps, one of the most frustrating things" for Mr. Bena, his client. (*Id.* at 17:9-16.) Respondent never provided any indication of how Mr. Bena's matter was proceeding. (*Id.*)

7. Although Mr. Bena testified that he believed that at some point, Respondent filed "something in D.C." because the check for $70 that Mr. Bena provided was cashed, he had to hire another attorney to incorporate his business properly. (*Id.* at 17:16-22.) Respondent may have filed the necessary paperwork to incorporate Mr. Bena's business, but that formation was revoked at some point. (*Id.* at 24:3-25:8; 28:13-29:11)

8. At one point, Mr. Bena became very anxious about his case and had to "track [Respondent] down." (*Id.* at 16, 26-29.) Respondent finally contacted Mr. Bena after a long period of no communication, and said, "I'm sorry; I've had things happen in my life; but I'll get this work done." (*Id.* at 17.)

9. Nevertheless, Respondent failed to obtain non-profit status for Sea the World Productions, as he had promised to do. (BC Ex. D at 1, 2; Tr. at 16-17.) Accordingly, Mr. Bena hired new counsel to incorporate Sea the World Productions in Massachusetts, who applied to the Internal Revenue Service for non-profit status. (Tr. at 17-18, 20-21, 30.)

10. On February 14, 2005, Mr. Bena filed a complaint with Bar Counsel about Respondent's actions. (BC Ex. D at 1; Tr. at 18) (testifying as to the truth and accuracy of the Bar complaint).)

11. On November 4, 2005, Mr. Bena wrote a letter to Respondent at the Pennsylvania address, where Respondent was later served, stating:

> You have not completed the work that we paid you for. We are a non-profit and don't take losing $600 dollars plus fees, lightly. Please return our file and our retainer fee.
>
> You never finished the work that you started. We had to hire another attorney and pay [him] to do the work and re-file, more fees, etc. This is very irresponsible and wrong.
>
> Please act on this as soon as possible.

(BC Ex. D at 2; *see also* Tr. at 19.)

12. Respondent never responded and never returned Mr. Bena's fees or his file. (Tr. 19-20.)

13. On August 5, 2008, Respondent submitted his response to Mr. Bena's complaint. Respondent stated that Mr. Bena hired him in "May 2004 to incorporate his non-profit organization and file for tax-exempt status." (BC Ex. D at 3.) During the summer and fall of 2004, Respondent said, he was suffering from depression because of the illness of his mother, and he "could not function in any area of [his] life, most especially in work." (*Id.*) "I no longer practice law and have no intention of returning to the practice of law as I have found the work too stress-provoking." (*Id.* at 4.) Although Respondent said he was "still willing to refund Mr. Bena's money to him," he has not done so. (*Id.*, Tr. at 19-20.) Nor has he returned Mr. Bena's files. (Tr. at 20.)

C. Findings of Fact as to Count II (Winsryg Matter: Bar Docket Number 2005-D095**)**

14. Ms. Winsryg, a Massachusetts resident living on Martha's Vineyard, wanted to incorporate her fund-raising organization, the African Artists' Community Development Project, and apply to the IRS for non-profit status. (BC Ex. E at 3, 6, 7; Tr. at 34-35.) The organization was intended to raise money for a facility in Zambia to provide shelter for, and aid to, disabled children. (BC Ex. E at 3; Tr. at 34.)

15. The same person who referred Mr. Bena to Respondent also referred Ms. Winsryg to Respondent. (Tr. at 35.) After an initial meeting on March 16, 2004, Ms. Winsryg hired Respondent and sent him a check for $600 to incorporate and obtain non-profit status for her organization. (BC Ex. E at 3,4-5,7, 14; Tr. at 36.) Respondent did not provide Ms. Winsryg a writing setting forth the rate or basis of his fee. (Tr. at 36, 42-43.)

16. Although Respondent initially communicated with Ms. Winsryg about her matter, (BC Ex. E at 9-11 (e-mails between Respondent and Ms. Winsryg)), from late September to December 2004, Respondent would not respond to Ms. Winsryg's numerous inquiries or otherwise communicate with her. (BC Ex. E at ll-14; Tr. at 36, 44-47.)

17. On December 7, 2004, Respondent sent a letter to Ms. Winsryg acknowledging that he knew she had been attempting to contact him. (BC Ex. E at 12.) Respondent explained that he "was - and am - unavailable by phone" because he had been ill. He also described his mother's health problems. Respondent wrote that, "[d]espite my e-mails to you, I have not received a check in the amount of $70.00 made payable to 'District of Columbia Treasurer' as required. However, I will file the articles myself and pay the fee myself just to get it out of the way." (*Id.*) Respondent promised Ms. Winsryg that "[y]ou will have within two weeks the following: an approved articles of incorporation [and] a complete IRS application ready for filing." (*Id.*) Finally, Respondent scolded Ms. Winsryg for trying to reach him at his job with the Boston University alumni office, stating that: "I am also aware of your calls to Boston University. They are unnecessary and only provoke unneeded stress in me at a time when any stress is absolute torture. They must stop immediately." (BC Ex. E at 12-13; *see also* Tr. at 46-47.)

18. While Respondent had worked on Ms. Winsryg's articles of incorporation and provided her with a draft form, it is unclear whether he ever filed them. (Tr. at 44-47.) It is clear, however, that Respondent never provided Ms. Winsryg with "approved articles of incorporation" or "a complete IRS application ready for filing." (BC Ex. F at 12; Tr. at 37.) Bar Counsel proffered that Respondent never filed articles of incorporation with the District of Columbia Department of Consumer and Regulatory Affairs. (Tr. at 47, 62-63.)

19. In short, Respondent never completed the work for which Ms. Winsryg retained him. (*Id.* at 36-37.) In fact, Ms. Wingsryg had to hire other counsel to complete the incorporation of her non-profit company. (*Id.* at 45:18-46:7.)

20. On January 11, 2005, Ms. Winsryg filed a complaint with Bar Counsel. (BC Ex. E at 1-3; Tr. at 38 (testifying as to truthfulness of Bar complaint).)

21. On November 15, 2005, Ms. Winsryg wrote a letter to Respondent at the Pennsylvania address, where he was eventually served in this matter, stating: "[t]his letter is another request for you to return my file and the $600 fee we agreed upon for you to incorporate and gain tax-exempt status for the African Artists' Community Development Project, which you failed to complete." (BC Ex. E at 6.) Respondent never returned Ms. Winsryg's file or fee. (Tr. at 37-38.)

22. On August 5, 2008, Respondent responded to Mr. Winsryg's January 11, 2005 Bar complaint. (BC Ex. E at 7.) Respondent wrote that Ms. Winsryg was difficult to reach throughout the spring, summer, and fall of 2004. (*Id.*) But, Respondent also wrote that by the summer of 2004 he was suffering from depression due to his mother's illness and death, and he therefore "could not function in any area of [his] life, most especially in work." (*Id.* at 7-8.) Respondent wrote that, "I no longer practice law and have no intention of returning to the practice of law as I have found the work too stress-provoking." (*Id.* at 8.) Respondent wrote that "I am sure that I offered to refer Ms. Winsryg to another attorney and/or refund any money to her." *Id.* He also wrote that he was "still willing to refund Ms. Winsryg's money to her." (*Id.*)

23. In her August 21, 2008 reply to Respondent's response to her Bar complaint, Ms. Winsryg denied "that he could not reach me during all those months, almost a year, between June '04 to May '05. On the contrary, I phoned and e-mailed him repeatedly with no response

from September until [his] one letter in December detailing his mother's illness and then nothing until now!" (BC Ex. E at 14; Tr. at 40) (testifying as to the truth and accuracy of her August 21, 2008 reply).)

24. Since December 2004, Respondent has not returned any portion of the $600 he collected from Ms. Winsryg, and has not returned Ms. Winsryg's client file.

D. Findings of Fact as to Count III (Weichert Matter: Bar Docket Number 2005-D122)

25. Regina Weichert created a performance character called "Regina the Queen of Self-Esteem," which she used to educate children about self-worth. (Tr. at 51; BC Ex. F at 3.) When Ms. Weichert decided she wanted to hire a lawyer to help her develop this educational activity into a business and apply to the IRS for non-profit status, the same person who recommended Respondent to Mr. Bena and Ms. Winsryg, also recommended Respondent to Ms. Weichert. (BC Ex. F at 3; Tr. at 53-54.)

26. On January 6, 2004, Ms. Weichert discussed her idea with Respondent by telephone. (BC Ex. F at 3, 6 (e-mail acknowledging date of initial conversation); Tr. at 52.) During this initial conversation, Respondent recommended that Ms. Weichert incorporate her business in the District of Columbia, despite the fact that she was a resident of and intended to do business in Massachusetts. (BC Ex. F at 3 ("[Respondent] recommended incorporating in DC, saying that it was the best place to incorporate due to reporting requirements. He never told me that this would mean as [a] Massachusetts resident I would be required to pay an out of state corporation fee annually to do business in Massachusetts").) Respondent agreed to represent Ms. Weichert regarding her matter. (Tr. at 52; BC Ex. F at 24.)

27. After the January 6, 2004 telephone conversation, Respondent e-mailed Ms. Weichert and asked her to send "payment of $600.00." (BC Ex. F at 6.) The e-mail did not

explain whether this money was all or part of his fee. Nor did it set forth the rate or basis of his fee. Nor did Respondent otherwise provide this information in writing to Ms. Weichert. (BC Ex. F at 3 ("[Respondent] never mentioned any sort of written agreement. This was the first time I had worked with a lawyer on a project, and I thought he was doing the job somewhat as a favor to my friend so [I] did not ask for a written agreement."); Tr. at 53.) In his e-mail, Respondent wrote that he was General Counsel to Boston University's alumni association, and provided his office address in Washington, D.C. and a telephone number where he could be reached. (BC Ex. F at 6.)

28. On January 20, 2004, Ms. Weichert sent Respondent a check in the amount of $600 for the "501(c)(3) filing," according to the memo line on the check. (BC Ex. F at 4; Tr. at 53:11-15.)

29. On February 6, 2004, Ms. Weichert also sent Respondent a check in the amount of $70 for an "incorporation fee," according to the memo line on the check. (*Id.*)

30. For a while, Respondent communicated with Ms. Weichert about her matter. (BC Ex. F at 6-20 (e-mail messages dated Jan. 6, 2004, Jan. 12, 2004, Jan. 20, 2004, Jan. 21, 2004, Jan. 23, 2004, Jan. 29, 2004, Jan. 31, 2004, Mar. 8, 2004).)

31. On March 19, 2004, Respondent registered "The Self-Esteem Project" with the District of Columbia Corporations Division. (BC Ex. F at 3, 26.) Respondent had yet not obtained non-profit status for that corporation, however, as his engagement required.

32. Initially, Respondent communicated with Ms. Weichert regarding the information he required to file for tax-exempt status. (BC Ex. F at 6-20 (e-mail messages dated May 13, 2004, May 16, 2004, July 12, 2004).) By the middle of the summer in 2004, Respondent had

stopped responding to Ms. Weichert's e-mails and telephone messages, inquiring about the status of her case. (BC Ex. F at 3; Tr. at 54,60.)

33. Eventually, Ms. Weichert asked another attorney to contact Respondent and inquire about her matter. (BC Ex. F at 3; Tr. at 60).) Following that attorney's inquiries, Respondent contacted Ms. Weichert in late August or September, 2004, attempting to explain his lack of communication and promising to send documents for her to review before he filed them with the IRS. (*Id.*)

34. Respondent mailed IRS application forms to Ms. Weichert, but portions of the forms were left blank. (BC Ex. F at 3.) Ms. Weichert followed up with Respondent about the blank portions of the forms, but he refused to respond to her telephone calls and e-mail inquiries. (BC Ex. F at 3; Tr. at 57-58, 60-61).) Despite her numerous requests for him to complete the work for which she had paid, Respondent would not communicate with her. (*Id.*) Nor did he complete the work. (*Id.*)

35. In the fall of 2004, Ms. Weichert hired another attorney to complete the work she hired Respondent to perform. (BC Ex. F at 3, 21, 30, 31; Tr. at 58.) The new attorney advised Ms. Weichert that based on their discussion of her business goals, her business should be organized as a limited liability corporation in Massachusetts and that she should not apply for non-profit status. (BC Ex. F at 3; Tr. at 58-59 (the successor attorney "advised me that it would be better for . . . the business not to create a 501(c)(3) for it but an LLC, so that's what I did").)

36. On April 1, 2005, Ms. Weichert filed a Bar complaint with the Office of Bar Counsel with respect to Respondent's conduct in handling her matter. (BC Ex. F at 1-2; Tr. at 55-56 (testifying as to the accuracy of the Bar complaint).)

37. On October 25, 2005, Ms. Weichert wrote to Respondent at the Pennsylvania address, where he was eventually served, stating:

> I am writing for a final time to request that you refund to me the $600 that I paid you on 1/28/04 to handle 501(c)(3) filing for my self-esteem organization. I also request that you return all documents that you have in my file. This request is due to the fact that you failed to complete the filing as promised.
>
> I have found another lawyer to work with, and I do not wish you to take any further action with regard to my filing.

(BC Ex. F at 21, 30; Tr. at 55.)

38. Respondent did not respond to Ms. Weichert's October 25, 2005 letter, nor did he refund her fees or return her documents. (Tr. at 55, 61-62.)

39. However, Respondent did respond to Ms. Weichert's Bar complaint on August 5, 2008:

> During the summer of 2004, my mother became gravely ill and I was frequently in Pennsylvania to take care of her. She ended up being hospitalized and receiving treatment for heart failure, Alzheimer's and numerous other problems-in five different hospitals over the course of three months. She died on January 5, 2005. . . . The fall of 2004 through my mother's death was extremely traumatic and stressful for me, as we were very close, and I was unable to function properly. I was clinically depressed during her illness and fell even deeper into depression after her death. I could not function in any area of my life, most especially in work. My depression and mental illness continued for well over a year after her death.

(BC Ex. F at 24-25.)

40. Respondent offered to refer Ms. Weichert to another lawyer and refund Ms. Weichert's fee and he stated that he no longer practices law and has "no intention of returning to the practice of law." (*Id.*)

41. On August 18, 2008, Ms. Weichert replied. (BC Ex. F at 31.) She reiterated that she was unaware if Respondent had completed the requested IRS filing. (*Id.*; Tr. at 57-58

(adopting and clarifying her August 18, 2008 letter and explaining that Respondent told her he had completed the incorporation, but did not inform her as to the status of the IRS filing). She also disputed Respondent's claims that (i) he had offered to find her another lawyer; and (ii) that he had offered to refund her fees. (BC Ex. F at 31; Tr. at 57.) Ms. Weichert stated that because of Respondent's neglect and his failure to communicate with her, she "went through the effort required to find another attorney and . . . incurred the expense of paying him to do a whole new filing [in Massachusetts]." (BC Ex. F at 31.) Moreover, Respondent never refunded her fees. (*Id.*)

E. Findings of Fact as to the Credibility of Witnesses

42. The Committee finds each of the witnesses, all of whom testified via video conference, to be credible. The video transmission was sufficiently clear to enable the Hearing Committee to observe each witness and assess his or her demeanor, and on the basis of that observation, and the other factors discussed below, we find that each witness was credible. The witnesses testified consistent with prior statements. They did not over-reach with respect to their memories of events that occurred more than six years ago, conceding when necessary that they simply did not remember. Each witness credited Respondent, on occasion, with doing some work and communicating at the outset of the representation. The witnesses appeared to be very sincere.

F. Findings of Fact in Support of Aggravation and/or Mitigation

43. The record does not contain any evidence of aggravation or prior discipline. The record also contains no sustainable evidence of mitigation, given that Respondent refused to participate in this proceeding to substantiate the alleged stress he was enduring at the time of each of these representations.

## IV. CONCLUSIONS OF LAW

This proceeding must determine whether Respondent's actions violated numerous District of Columbia Rules of Professional Conduct. Bar Counsel bears the "burden of proving disciplinary charges and factual findings must be supported by clear and convincing evidence." *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (quoting *In re Williams*, 464 A.2d 115, 119 (D.C. 1983)); *see also* Board Rule 11.6. Clear and convincing evidence means "more than a preponderance of the evidence; [it] means 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." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (quotations, citations omitted). Based on the evidence produced at the hearing, testimony taken, arguments advanced in support thereof and the record as a whole, Bar Counsel has met his burden on the alleged violations as discussed below.

### A. Respondent Violated Rule 1.1(a) (Provide Competent Representation)

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 In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (Board Report appended) (failure to apply requisite skill and knowledge violated obligations under Rule 1.1(a)). Competent representation includes "adequate preparation, and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Comment [5] to Rule 1.1.

Here, Respondent failed to meet the standard set forth under Rule 1.1(a). Respondent did not satisfy the terms of his engagement with any of his three clients involved in these matters. He failed to incorporate Ms. Winsryg's business and failed to obtain non-profit status for all of them. Respondent failed to adequately discuss and inform Ms. Weichert about the appropriate or

best corporate form or place of incorporation. All three clients had to retain successor counsel to provide the services that Respondent had been engaged to provide. Undoubtedly, Respondent failed to provide "continuing attention to the needs of the representation to assure that there is no neglect," as Comment 5 to Rule 1.1 advises. In short, Respondent violated Rule 1.1(a).

B. Respondent Violated Rule 1.1(b) (Serve Clients with Skill and Care)

Respondent's failure to finish his engagements and to pay attention to his matters not only violates Rule 1.1(a), but also violates Rule 1.1(b). Rule 1.1(b) mandates that "[a] lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." Each of the clients were forced to engage other lawyers who completed the scope of the engagement by incorporating Respondent's former clients' businesses and where appropriate, obtaining non-profit status. Accordingly, Respondent did not serve Mr. Bena, Ms. Winsryg or Ms. Weichert with the "skill and care commensurate with that generally afforded by other lawyers in similar matters," as required by Rule 1.1(b).

C. Respondent Violated Rule 1.3(a) (Represent Clients Zealously and Diligently)

Rule 1.3(a) requires a lawyer to "represent a client zealously and diligently within the bounds of the law." An attorney who fails to communicate with the client and fails to take necessary steps in the client's matter violates the requirements of zeal and diligence. *In re Lyles*, 680 A.2d 408 (D.C. 1996) (Board Report appended). Neglect of a client matter is "a serious violation of the obligation of diligence." Comment [8] to Rule 1.3(a). Neglect is defined as "indifference and a consistent failure to carry out the obligations that the lawyer has assumed or a conscious disregard for the responsibility owed to the client." *In re Reback*, 487 A.2d 235,238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc). To find neglect, in violation of Rule 1.3(a), there must be a pattern of negligent conduct, *see In re Wright*, 702 A.2d

1251,1255 (D.C. 1997) (appended Board Report), such as failing to take action for a significant time to further a client's cause. *In re Dietz,* Bar Docket No. 298-91 at 17-19 (BPR Oct. 19, 1992), *adopted at* 633 A.2d 850 (D.C. 1993); *In re Avery,* Bar Docket No. 378-04 (Bd. Rpt. March 7, 2007) at 14-15, *adopted at* 926 A.2d 719 (D.C. 2007) (respondent represented plaintiff in a personal injury case, and violated Rule 1.3 when he failed to obtain client's medical records and failed to conduct an adequate review of the treating physician's notes); *see also In re Brown,* 912 A.2d 568, 570 (D.C. 2006) (respondent violated Rules 1.3(a) and 1.3(c) when he failed to file a real estate deed and to prepare and file related tax forms).

As Bar Counsel notes, Respondent breached his duty of zeal and diligence to Mr. Bena, Ms. Winsryg, and Ms. Weichert. Brief at 16. In each of the matters, Respondent simply stopped responding to his clients. His clients were anxious as a result. Respondent also failed to follow through on completing the terms of his engagement. At the heart of his actions, Respondent displayed a pattern of indifference to his clients' needs, which is the foundation of neglect. These actions violate the letter and spirit of Rule 1.3(a).

D. Respondent Violated Rule 1.3(c) (Act with Reasonable Care)

For the same reasons Respondent violated Rule 1.3(a), he violated Rule 1.3(c), which requires a lawyer to "act with reasonable promptness when representing a client."

E. Respondent Violated Rule 1.4(a) (Communicate with Clients)

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." *See Lewis,* 689 A.2d at 565 (respondent violated Rule 1.4(a) when "[he] failed not only to keep his client informed about the status of the case, but [also] about his own intent to abandon the representation."); *Brown,* 912 A.2d at 570 (respondent's failure to inform his clients that he had

not filed a real estate deed, which he was retained to file, and that he did not prepare and file a related tax form, constituted a violation of Rule 1.4(a)).

Here, the record is clear that each of Respondent's clients did not know the status of their respective matters and could not communicate with Respondent for long periods. In one instance, Respondent even went as far as to tell his client to stop trying to contact him at work and that attempts to contact him "only provoke unneeded stress." Respondent abandoned each of his clients, violating Rule 1.4(a).

F. Respondent Violated Rule 1.5(b) (Provide Engagement Letter)

Rule 1.5(b) in effect at the time of the events at issue provides that "[w]hen the 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." *Drew*, 693 A.2d 1127 (Board Report appended) (failure to provide client with a written disclosure of the basis or rate for the attorney's fee was a violation of Rule 1.5(b)).[2] There is no question that Respondent failed to provide any of the three clients with a writing setting forth the basis of his fee in violation of Rule 1.5(b).

G. Respondent Violated Rule 1.16(a)(2) (Withdraw When Impaired)

Rule 1.16(a)(2) provides that "a lawyer *shall* not represent a client, or where representation has commenced, *shall* withdraw from the representation of a client if . . . the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client. . . ." (Emphasis added.) In each of the three matters here, Respondent explained his

[2] In 2007, Rule 1.5(b) was amended to read as follows: "When the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation."

neglectful behavior occurred because he was depressed due to his mother's illness and subsequent death. Respondent continued explaining that he "could not function in any area of [his] life, most especially in work" because of his depression. Respondent admits the practice of law is too stressful for him and says that he has no intention of resuming the practice. Clearly, Respondent recognized not only that he was impaired but also that he could not represent his clients. He failed to withdraw from the matters in violation of Rule 1.16(a)(2).

H. Respondent Violated Rule 1.16(d) (Return papers and property)

In each instance, Respondent's clients asked that he return not only the retainer for the work Respondent failed to complete, but also the files so his former clients could engage other lawyers to complete the work. Rule 1.16(d) in effect at the time of the events at issue provides that "[i]n 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 to which the client is entitled, and refunding any advance payment of fee that has not been earned."[3] Respondent failed to return the files in violation of Rule 1.16(d).

* * *

Based on the above-analysis, it is clear that Bar Counsel has established by clear and convincing evidence that Respondent violated Rule 1.1(a), Rule 1.1(b), Rule 1.3(a), Rule 1.3(c), Rule 1.4(a), Rule 1.5(b), Rule 1.16(a)(2) and Rule 1.16(d). There is no doubt that Respondent's clients engaged him to incorporate their respective businesses and obtain non-profit status with the IRS and that Respondent failed to satisfy the terms of the engagement, failed to return his clients' money and files when asked and failed to memorialize any of the engagements with a

[3] In 2007, Rule 1.16(d) was amended to read, in relevant part, as follows: "[i]n 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 to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred."

writing. Respondent concedes as much in his replies to the respective Bar complaints. While there is no proof or allegation that Respondent's actions were intentional, it is clear that Respondent's conduct was extremely neglectful.

## V. RECOMMENDED SANCTION

Given that Bar Counsel established the subject violations, we now must determine an appropriate discipline for Respondent's misconduct. As the District of Columbia Court of Appeals has recognized, "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). We agree with Bar Counsel that:

> When attempting to determine what discipline is appropriate under the circumstances, we review the respondent's violations in light of 'the nature of the violation, the mitigating and aggravating circumstances, the need to protect the public, the courts, and the legal profession. As the Court has repeatedly stated, the purpose of imposing discipline is to serve the public and professional interests identified and to deter similar conduct in the future rather than to punish the attorney. What is the appropriate sanction necessarily turns on the nature of respondent's misconduct. The factors to be considered in determining the appropriate sanction include "the seriousness of the misconduct, sanctions for similar misconduct, prior discipline, prejudice to the client, violations of other disciplinary rules, whether the conduct involved dishonesty, the respondent's attitude, and circumstances in aggravation and/or mitigation.

Bar Counsel Brief on Proposed Findings and Conclusions ("Brief") at 21 (citations and quotations omitted).

Examining these aforementioned principles provides guidance for us in this matter. We know, for example, that the record is devoid of any evidence in aggravation or even mitigation.[4] The record also lacks any evidence of prior discipline against Respondent. Similarly, there is no

[4] Bar Counsel alleges in the Specification of Charges that in Respondent's replies to the original disciplinary complaints, he explained that he neglected his clients because he was suffering from depression and "could not function." Respondent, however, failed to participate and thus has not properly raised issues of mitigation typically associated with depression, including *In re Kersey*, 520 A.2d 321, 326 (D.C. 1987).

evidence in the record that Respondent acted dishonestly and Bar Counsel has not argued or even alleged as much. There is ample evidence in the record, however, that Respondent's misconduct was serious,[5] that his misconduct prejudiced his clients,[6] and that his misconduct violated multiple rules.[7]

A. Proposed Sanction

As Bar Counsel noted correctly in its brief, absent aggravating factors, a first instance of neglect for a single client matter generally warrants a reprimand or public censure only. Brief at 23. In cases like this one, however, where there are multiple instances of neglect and/or other aggravating factors contemporaneously, sanctions have included suspensions up to 60 days in length. *See, e.g., 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 he abandoned the case and disappeared); *In re Drew,* 693 A.2d 1127 (D.C. 1997) (two instances of failing to appeal and/or failing to seek sentence modification in criminal cases resulted in 60-day suspension); *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) (neglect of two separate legal matters warrants 60-day suspension from the practice of law).

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[5] Respondent violated basic tenets at the heart of the attorney-client relationship such as providing adequate communication and zealous representation, together with a written fee agreement and returning files when requested. Without these bedrock principles, the attorney-client relationship cannot survive.

[6] Again, the Hearing Committee agrees with Bar Counsel that the record clearly establishes that Respondent's clients incurred significant prejudice by having the requested work delayed, paying for work not received, and incurring multiple charges by hiring another attorney to complete work that they paid Respondent to perform.

[7] Respondent's misconduct constituted incompetence, neglect, and even abandonment.

Based on these cases, Bar Counsel recommends a 60-day suspension for Respondent. But, Respondent's conduct involved neglect with respect to three clients, where *Owusu* and *Steele* involved one client each and *Drew* involved two criminal appellate matters. Moreover, Respondent failed to participate materially in the disciplinary process unlike *Owusu*, *Steele*, *Drew* and even *Santana*. Still, it appears a 60-day suspension is within the appropriate range of sanctions for comparable conduct. *See, e.g., Whitehead*, 883 A.2d 13 (D.C. 2005) (per curiam) (60-day suspension where respondent neglected four separate clients with no dishonesty finding; the suspension was stayed, however, in favor of two-year probation with conditions based on *Kersey* mitigation); *see also In re Whitehead*, Bar Docket Nos. 330-02, et al., at 9-10 (BPR July 29, 2005).

B. Fitness Requirement

Bar Counsel recommends a fitness requirement under the "serious doubt" standard promulgated in *In re Cater*, 887 A.2d 1, 24 (D.C. 2005). This recommendation is based on Respondent's admission that he suffered from depression and "no longer practices law" because he finds legal work too stressful. (Bar Ex. D at 3, 7 and 24.) *Cater* requires that "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 24.

Bar Counsel cites *In re Steele*, 630 A.2d at 198-99, 201, as support for its fitness recommendation. In *Steele*, the Court imposed a fitness requirement because 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. The Court reasoned that, a short suspension alone would not address respondent's fitness to practice law,

and would leave unresolved the issue of whether the resumption of the practice of law could be detrimental to the Bar, the administration of justice, or the public. *Id.* at 201.

The Court of Appeals has noted that "where there is evidence that a respondent's misconduct is attributable to unresolved personal problems, we are more likely to conclude that a fitness requirement is warranted." *In re Guberman*, 978 A.2d 200, 211-12 (D.C. 2009) (citing *Steele*). While it could be argued that Respondent's personal problems arise from a situation unlikely to repeat itself — namely the death of his mother — the only evidence before the Hearing Committee are Respondent's statements to Bar Counsel that "I no longer practice law and have no intention of returning to the practice of law as I have found the work too stress-provoking." Because Respondent did not participate in the hearing, there is no evidence in the record that Respondent currently intends to resume the practice of law, and that it would not be too stressful for him to do so.

Although Respondent did not ignore the discipline system and responded to the Bar complaints against him, we consider Respondent's failure to participate in any part of the hearing process as among the facts bearing on his fitness. *See In re Cater*, 887 A.2d at 26-27 (considering respondent's failure to appear at her disciplinary hearing that had been rescheduled to accommodate her, along with other factors, in its fitness analysis). In considering Respondent's non-participation before the Hearing Committee, we recognize that his responses to the Bar complaints make his conduct less egregious than other cases where fitness was imposed because the respondent refused to participate in the disciplinary process at all. *See In re Wright*, 702 A.2d 1251, 1257 (D.C. 1997) (appended Board Report) (respondent's failure to cooperate with Bar Counsel, to heed a Board Order, or appear at the disciplinary hearing raises "concerns regarding his attitude toward both the underlying misconduct and his professional

responsibilities" and "creates serious doubts about his fitness to practice law"). While Respondent did not completely ignore the discipline system, he failed to file an Answer to the Specification of Charges, did not participate in the pre-hearing conference or the hearing, and did not file any briefs with the Hearing Committee.

Considering the foregoing, we are left with Respondent's words — that the practice of law is too stressful — and his actions — abandoning his clients in their time of need, and failing to participate in the disciplinary hearing — that constitute clear and convincing evidence of a serious doubt as to his fitness to practice. In light of these facts and circumstances together with applicable law, a fitness requirement appears necessary here.

C. Restitution

Bar Counsel suggests that Respondent should make restitution to his three clients. Even Respondent in his letters to Bar Counsel stated that he was willing to refund the clients' retainers and fees paid to him. (Bar Ex. D at 4, 8, 24.) Given Respondent's position, there appears to be little doubt that restitution is appropriate. Case law in this jurisdiction reaches the same conclusion. "When imposing discipline, the Court . . . may require an attorney to make restitution either to the persons financially injured by the attorney's conduct or to the Client Security Trust Fund, or both, as a condition of probation or of reinstatement." D.C. Bar R. IX, § 3(b). Rule XI, § 3(b), and even the cases cited by Bar Counsel, support a sanction recommendation that conditions reinstatement on proof that Respondent has made restitution to his former clients with interest.

Here, the clients each paid a $600 retainer to Respondent and two of the clients also paid a $70 filing fee. We recommend that Respondent be required to make restitution to the clients as follows: (a) to Mr. Bena, $670.00, plus interest at the legal rate of 6% from April 14, 2004;

(b) to Ms. Winsryg, $600.00, plus interest at the legal rate of 6% from March 16, 2004; and (c) to Ms. Weichert $600.00, plus interest at the legal rate of 6% from January 20, 2004 and $70, plus interest at the legal rate of 6% from February 6, 2004. *See In re Huber*, 708, A.2d 259, 260-261 (D.C. 1998) (directing "the respondents in disciplinary matters to make restitution not only of the principal but also of interest at the legal rate of six percent" with the obligation arising from the [date of] client's deprivation of the use of his or her money").

*** * ***

Based on the foregoing finding of facts and conclusion of law, and particularly taking into account the Court's past precedents in analogous matters, we recommend that Respondent (1) be suspended from the practice of law in this jurisdiction for 60 days, (2) be subject to a fitness requirement if he resumes his legal career, and (3) be required to pay restitution, with interest at the legal rate, as outlined herein as a condition of reinstatement.

HEARING COMMITTEE,

/TRB/
Thomas R. Bundy, III, Esquire
Chair

/AF/
Allen Feldman, Esquire

Dated: November 1, 2012