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

FILED
May 23, 2018
Board on Professional Responsibility

In the Matter of:	:	
	:	
WARNER H. ANTHONY, JR., ESQUIRE,	:	
	:	Board Docket No. 17-BD-082
Respondent.	:	Disc. Docket No. 2017-D156
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 412731)	:	

REPORT AND RECOMMENDATION
OF THE AD HOC HEARING COMMITTEE

Respondent, Warner H. Anthony, Jr., Esquire, is charged with violations of the District of Columbia Rules of Professional Conduct ("D.C. Rules") and the American Bar Association Model Rules of Professional Conduct Rules ("Model Rules") in connection with Respondent's representation of Donald and Vickie Larcher before the U.S. Tax Court and his failure to respond to Disciplinary Counsel's investigation. For reasons described below, the following Rules of Professional Conduct apply to the alleged misconduct in the Specification of Charges: Model Rule 1.1 (competent representation), Model Rule 1.3 (diligence), D.C. Rules 1.4(a) and (b) (communication), D.C. Rule 1.5(b) (fee agreement), D.C. Rule 1.16(d) (protection of client interests upon termination), Model Rule 3.4(c) (knowingly disobeying an obligation before a tribunal), D.C. Rule 8.1(b) (failing to respond to a disciplinary matter), D.C. Rule 8.4(c) (dishonesty), D.C. Rule 8.4(d)

(serious interference with the administration of justice), and Model Rule 8.4(d) (prejudicing the administration of justice). This matter proceeded under the default procedures pursuant to Board Rule 7.8; Respondent failed to file an Answer to the Specification of Charges and did not otherwise participate at any stage of the proceedings.

The Ad Hoc Hearing Committee ("Hearing Committee") finds that Disciplinary Counsel has proven, by clear and convincing evidence, each of the relevant charged Rule violations. As to sanction, the Hearing Committee adopts Disciplinary Counsel's recommendation that Respondent's bar license be suspended for one year and that Respondent shall also be required to establish his fitness to practice law upon any application for reinstatement.

I. PROCEDURAL HISTORY

On November 28, 2017, the Specification of Charges and Petition Instituting Formal Disciplinary Proceedings were personally served on Respondent. On January 17, 2018, the Chair of the Ad Hoc Hearing Committee, Bernadette Sargeant, Esquire, held a telephonic prehearing conference during which Disciplinary Counsel was represented by Deputy Disciplinary Counsel Elizabeth A. Herman, Esquire. Respondent did not file an Answer to the Specification of Charges or participate in the scheduled telephonic prehearing conference.[1]

[1] On January 9, 2018, the Chair of the Ad Hoc Hearing Committee issued an order scheduling the telephonic prehearing conference, and a copy of the order and dial-in information for the call was served on Respondent by email and U.S. mail.

On January 24, 2018, Disciplinary Counsel filed a motion for an order of default. Respondent did not file an opposition to the motion or otherwise respond. On February 5, 2018, the Chair granted the motion and issued an order of default and ordered that the allegations be deemed admitted, subject to *ex parte* proof by Disciplinary Counsel sufficient to prove the allegations by clear and convincing evidence. *See* Board Rule 7.8(d). On February 7, 2018, a second telephonic prehearing conference took place and Respondent did not participate.[2] On February 14, 2018, the Chair issued an order scheduling a default hearing date for March 27, 2018, during which Disciplinary Counsel was to establish the sufficiency of the *ex parte* proof and present argument on its recommended sanction. In the February 14, 2018 order, the Chair informed Respondent that he could attend the default hearing and "present documentary and testimonial evidence and argument with respect to sanction," but could not present evidence or argument to contest the disciplinary charges. *See* Board Rule 7.8(e) (default hearing procedures).

The hearing on the sufficiency of the *ex parte* proof was held on March 27, 2018 before the Ad Hoc Hearing Committee consisting of the Chair; Trevor Mitchell, public member; and Sheila J. Carpenter, Esquire, attorney member. Disciplinary Counsel was represented by Ms. Herman. Respondent did not appear at the default hearing. At the hearing, Disciplinary Counsel did not present witness

[2] The February 5, 2018 order of default included notification of the date and time for the second telephonic prehearing conference, and a copy of the order and dial-in information for the call was served on Respondent by email and U.S. mail.

testimony but relied on documentary evidence and affidavits, exhibits DX[3] 1 through 11, which had been previously filed. The Committee hereby admits these exhibits into evidence.

II. FINDINGS OF FACT

The Hearing Committee has determined that the following allegations in the Petition are supported by clear and convincing evidence:

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on February 8, 1988, and assigned Bar number 412731. DX 1.[4]

2. On or about 2010, Dr. Donald Larcher and Ms. Vickie Larcher retained Respondent to represent them concerning federal tax matters.[5] Respondent failed to provide them with a writing stating the rate or basis of his fees, the scope of the representation, or the expenses for which the Larchers would be responsible. Respondent also did not orally explain how he would charge the Larchers for his services. DX 6 (Affidavit of Vickie Larcher); DX 8 (disciplinary complaint).

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[3] "DX" refers to Disciplinary Counsel's Exhibits. "Tr." refers to the March 27, 2018 transcript of proceedings. "Preh. Br." refers to Disciplinary Counsel's Pre-Hearing Brief in Support of Order of Default (filed Feb. 27, 2018). "FF" refers to the findings of fact herein.

[4] Respondent does not appear to be an active member of any other State Bar except the D.C. Bar. Respondent's office and residential addresses are located in Greensboro, North Carolina. The Larchers reside in North Carolina.

[5] Disciplinary Counsel represented to the Hearing Committee that Respondent was not paid a retainer or any advance fee for his representation of the Larchers. Tr. 15. However, Respondent filed and signed the petitions on the Larchers' behalf as their attorney, and the Larchers understood that he was acting at their attorney. *See In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015) (per curiam) ("existence of an attorney-client relationship is not solely dependent on a written agreement, [or] payment of fees").

3. On September 19, 2012, Respondent filed two petitions in the United States Tax Court on behalf of the Larchers: *Donald C. Larcher DDS v. Commissioner*, Docket No. 23413-12 and *Donald C. Larcher DDS v. Commissioner*, Docket No. 23412-12R. DX 9 at 128-29, 150-52. On March 18, 2014, Respondent filed a third petition on behalf of the Larchers, *Donald C. Larcher and Vickie M. Larcher v. Commissioner*, Docket No. 6216-14. DX 9 at 65-66.

4. The petitions sought determinations as to (1) whether Dr. Larcher's retirement plan was a qualified plan under applicable federal law; (2) whether he was liable for taxes on his contributions to the plan; and (3) whether the IRS correctly determined that there was a tax deficiency arising out of the Larchers' contributions to the plan. DX 5 (Affidavit of Gerald F. Meek, Esquire); DX 6; DX 9 at 65-66, 128-129, 150-152. The Larchers retained successor counsel, Gerald F. Meek, Esquire, who prepared an affidavit which included his professional assessment of their U.S. Tax Court petitions. Mr. Meek's expertise in tax law is described as follows:

> I am knowledgeable about tax law and procedure. In 2011, I graduated with distinction from Georgetown University School of Law with an LLM in Taxation. Since then, I have represented clients before the U.S. Tax Court, in IRS audits, and in the IRS Office of Appeals. Currently, approximately one-third of my practice is devoted to taxation, including both transactional and litigation matters.

DX 5 at ¶ 7.

5. All three of the petitions were dismissed because of Respondent's repeated failures to comply with the Tax Court's rules and orders and to advance the Larchers' interests. *See* DX 5 at ¶ 6. In his review of the U.S. Tax Court records,

Mr. Meek determined that a defense existed that may have limited their tax penalties if Respondent had properly pursued their case:

> The legal and factual positions at issue in *Donald C. Larcher DDS v. Commissioner*, Docket No. 23413-12 and *Donald C. Larcher DDS v. Commissioner*, Docket No. 23412-12R, were inconsistent, as a result of inconsistent assertions by the IRS. . . . Specifically, in Docket No. 23412-12R, the Tax Court found that the pension plan at issue was *not a qualified pension plan*. In Docket No. 23413-12, the Court found the Larchers liable for excise taxes and penalties totaling $577,159.00, which excise taxes (and related penalties) can only be imposed for excessive contributions to a *qualified* pension plan. Consequently, the Larchers had a sound legal position that, if properly handled by the Respondent, may have permitted the Larchers to avoid excise taxes and penalties which now total $582,147.10, as well as accrued interest.

DX 5 at ¶ 8 (emphasis added). All three cases were dismissed after Respondent failed to respond to orders to show cause and/or failed to include a required disclosure statement. The dismissals occurred in Docket No. 23413-12 on February 7, 2013; Docket No. 23412-12R on December 9, 2015; and Docket No. 6216-14, on December 21, 2016. The Larchers were assessed tax and penalties totaling over $577,159.00, plus interest. DX 5 at ¶¶ 8-9; DX 8 (May 9, 2017 Letter from Mr. Meek to Office of Disciplinary Counsel) at 38-40; DX 9 at 61-62, 126, 147-49.

6. In *Donald C. Larcher DDS v. Commissioner*, Docket No. 23413-12, the court dismissed Dr. Larcher's petition and found that he was liable for Internal Revenue Code § 4972 excise taxes and penalties because Respondent failed to file a required disclosure statement with the initial petition. The court also dismissed the petition for lack of prosecution. DX 9 at 126, 142.

7. In *Donald C. Larcher DDS v. Commissioner*, Docket No. 23412-12R, the court dismissed the petition after the court ordered Respondent to show cause why the matter should not be dismissed for failure to prosecute and he failed to answer. DX 9 at 149, 220-21.

8. In *Donald Larcher and Vickie M. Larcher v. Commissioner*, Docket No. 6216-14, the court dismissed the petition after receiving no response to its two show cause orders. DX 9 at 62, 120.

9. The Larchers periodically communicated with Respondent while their cases were pending, but only when *they* initiated the contact. On the occasions when they were able to reach Respondent, they asked him for information about their cases, and he either did not respond or dishonestly told them that he was properly handling their cases. Respondent did not promptly or timely tell the Larchers that their cases had been dismissed. By the time they learned the status of their cases in 2017, the time had expired for re-opening them. DX 5 at ¶ 9[6]; DX 6.

10. After all three cases had been dismissed, the Larchers hired new counsel, Mr. Meek. In April 2017, Mr. Meek attempted to obtain the Larchers' files from Respondent. On April 10, 2017, he talked to Respondent, who promised to provide the files by April 14, 2017. When that did not happen, Mr. Meek emailed and telephoned Respondent. Respondent did not answer or reply to Mr. Meek. Mr.

[6] According to Mr. Meek, the time for filing an appeal of the dismissals had passed by the time the Larchers contacted him. DX 5 at ¶ 9. He adds that: "On behalf of the Larchers, I have submitted to the IRS a request for refund of the excise taxes paid and for abatement of the penalties but, given that these matters have already been the subject of a Tax Court petition and dismissal, the chance of successfully obtaining this refund and abatement has been greatly compromised." *Id*.

Meek wrote Respondent on April 24, 2017, again requesting the files; Mr. Meek never received an answer to his letter, nor did he receive any part of the files. DX 5; DX 6.

11. On May 10, 2017, Mr. Meek filed a complaint with the Office of Disciplinary Counsel on behalf of the Larchers. DX 8. On June 28, 2017 and July 14, 2017, the Office of Disciplinary Counsel sent letters to Respondent requesting an answer to the complaint. The letters were not returned by the U.S. Postal Service. When Respondent did not answer the June 28, 2017 letter, Disciplinary Counsel emailed and telephoned him. The email did not "bounce back," and a voice mail was left on Respondent's telephone. Respondent did not reply to either communication. On July 27, 2017, Respondent was personally served with Disciplinary Counsel's previously-sent letters. He still did not respond. DX 7, 10 (attachments).

12. On August 8, 2017, Disciplinary Counsel filed a motion to compel a response with the Board on Professional Responsibility. On September 20, 2017, the Board granted the motion. On that same date, Disciplinary Counsel emailed a copy of the Board's order to Respondent. To date, Respondent still has not replied to the Board order or to Disciplinary Counsel's letters of inquiry. DX 7; DX 10; DX 11.

III. CONCLUSIONS OF LAW

A. Choice of Law

D.C. Rule 8.5(b)(1) governs choice of law and provides that a lawyer's conduct is subject to only one set of rules, and

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

In its prehearing brief, Disciplinary Counsel cited to U.S. Tax Court Rule of Practice and Procedure 201(a) and commented that "the disciplinary system may find that as to the violations that *directly and primarily* involved the U.S. Tax Court, only the Model Rules apply." Preh. Br. at 5 (emphasis added). U.S. Tax Court Rule 201(a) provides that an attorney's conduct is governed by the American Bar Association's Model Rules of Professional Conduct. It follows that for misconduct related to Respondent's representation in the U.S. Tax Court, the Model Rules would apply.[7] For the alleged misconduct not in connection with the petitions pending before the U.S. Tax Court, the D.C. Rules would apply.

Accordingly, the Committee has determined that the Model Rules apply to the allegations related to Respondent's lack of competence (Model Rule 1.1), lack of

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[7] In one of its orders to show cause, the U.S. Tax Court similarly explained that the Model Rules applied to Respondent's conduct before the court:

> Petitioner's counsel is reminded that Tax Court Rule 201(a) states that "[p]ractitioners before the Court shall carry on their practice in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association."

DX 9 at 119.

diligence (Model Rule 1.3), knowing disobedience of an obligation before a tribunal (Model Rule 3.4(c)), and prejudice to the U.S. Tax Court's administration of justice (Model Rule 8.4(d)). *See* Specification of Charges, ¶¶ 13(a), (b), (f), and (i). The D.C. Rules apply to the allegations related to Respondent's lack of communication (D.C. Rules 1.4(a) and (b)), failure to provide the basis or rate of his fee (D.C. Rule 1.5(b)), failure to protect his client's interests upon termination (D.C. Rule 1.16(d)), knowing failure to respond to Disciplinary Counsel's request for information (D.C. Rule 8.1(b)), dishonesty (D.C. Rule 8.4(c)), and serious interference with the administration of justice related to Respondent's non-response to the disciplinary investigation (D.C. Rule 8.4(d)). *See id.*, ¶ 13(c), (d), (e), (g), (h), and (i).[8]

B. Respondent Violated Model Rule 1.1 (competent representation).

Model Rule 1.1 provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[9] Comment 5 to Model Rule 1.1 provides in relevant part:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of

[8] Disciplinary Counsel asserts that Respondent prejudiced the administration of justice both in proceedings before the U.S. Tax Court and in Disciplinary Counsel's disciplinary investigation. *See* Preh. Br. at 11-12. Both types of misconduct are supported by the allegations in the Specification of Charges. *See* Specification of Charges, ¶¶ 5-8, 11-12. Accordingly, Respondent had adequate notice that ¶ 13(i) applied to two separate set of facts.

[9] D.C. Rule 1.1(a) similarly requires a lawyer to "provide competent representation to a client." D.C. 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." The Court of Appeals has determined that 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) (per curiam) (quoting Rule 1.1(a)).

> methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake . . . .

Disciplinary Counsel contends that Respondent did not competently represent the Larchers' interests in the U.S. Tax Court: "[Respondent] made initial filings in each case but then failed to respond to court orders and motions so that each matter was dismissed without a substantive ruling on the legality of the IRS's liens and decisions." Preh. Br. at 5. All three petitions filed by Respondent were dismissed for failure to prosecute. FF 6-8. Accordingly, Respondent's failure to follow up in three tax matters is clear and convincing evidence of his lack of competence and preparedness. He made initial filings in each case but then failed to respond to court orders and motions so that each matter was ultimately dismissed. Disciplinary Counsel has met its burden of proving the violation of Model Rule 1.1.

C. Respondent Violated Model Rule 1.3 (diligence).

Model Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Comment [1] to Model Rule 1.3 requires that: "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." In addition, "[a] client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed." Model Rule 1.3, cmt. [3].

Disciplinary Counsel contends that Respondent's lack of diligence directly compromised the cases pending in the U.S. Tax Court. Disciplinary Counsel points

to the following exhibits as clear and convincing evidence of the Model Rule 1.3 violation:

> Respondent must have been aware that he was neglecting the three cases because he took no action for months or even years, before or after the cases were dismissed. DX 5 at 25 (cases dismissed in 2013, 2015 and 2016); DX 9 at 61 (Docket No. 6216-14 no action taken by Respondent between 6/2/16, motion for order to show cause, and 12/21/16, final order; DX 9 at 126 (Docket No. 23413-12 no action taken by Respondent between 10/05/12 order and 2/7/13 order of dismissal); DX 9 at 147-149 (Docket No. 23412-12R no action taken by Respondent between 3/22/13 motion to enlarge time and 12/09/15 final order).

Preh. Br. at 7. In the July 26, 2016 order to show cause in Docket No. 6216-14, the U.S. Tax Court judge commented that upon its review of the record, Respondent had "not viewed *any* of the electronic filings in this case," even though Respondent had consented to eService of the documents. *See* DX 9 at 118 (emphasis added).

Here, the evidence is clear and convincing that Respondent did not act with the necessary "commitment and dedication to the interests of the client" or "with zeal in advocacy upon the client's behalf"; he also violated Model Rule 1.3 through his lack of diligence. Model Rule 1.3, cmt [1].

D. Respondent Violated D.C. Rules 1.4(a) and (b) (communication).

In determining whether Disciplinary Counsel has established a violation of D.C. Rules 1.4(a) and (b), 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]). In addition to responding to client inquiries,

a lawyer must initiate communications when necessary. *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (citing Rule 1.4, cmt. [1]).

D.C. 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." 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].

D.C. Rule 1.4(b) states than an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment [2] provides that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." The D.C. Rule places the burden on the attorney to "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." *Id*.

Here, Respondent failed to communicate the status of the petitions and failed to explain the matter to an extent necessary for the Larchers to make informed decisions. *See* FF 9. After the petitions had been dismissed, Respondent's lack of communication continued. *Id*. The Committee has no difficulty concluding that Disciplinary Counsel has met its burden of proving the violation of D.C. Rules 1.4(a) and (b) by clear and convincing evidence.

E. Respondent Violated D.C. Rule 1.5(b) (fee agreement).

In contrast with the comparable Model Rule, D.C. Rule 1.5(b) requires that the basis or rate of the fee, the scope of the representation, and the expenses for which the client will be responsible be put *in writing*.[10] The Committee understands that the Court of Appeals has not yet decided a case involving the application of choice of law for charges related to the terms or drafting of a retainer agreement where the scope of representation involves a specific tribunal. At the hearing, Disciplinary Counsel, however, asserted that because a matter was not yet "pending before the tribunal" when the Larchers sought Respondent's legal representation, the D.C. Rules should apply. Tr. 10-11. We agree that is the correct application of the choice of law analysis.

Comment [1] to D.C. Rule 1.5 explains that "[i]n a new client-lawyer relationship, . . . an understanding as to the fee should be promptly established, together with the scope of the lawyer's representation and the expenses for which the client will be responsible." While "[i]t is not necessary to recite all the factors that underlie the basis of the fee," the agreement should include the factors "that are directly involved in its computation." D.C. Rule 1.5, cmt [1]. Thus, under D.C. Rule 1.5(b), "[i]t is sufficient . . . to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee." *Id.*

[10] In its briefing, Disciplinary Counsel incorrectly stated that no material difference existed between the charged Model and D.C. Rules and omitted the distinction of a writing requirement under D.C. Rule 1.5(b).

Here, Respondent did not provide the Larchers with a written statement of the rate or basis of his fee, the scope of the representation, or what expenses would be their responsibility. FF 2. Accordingly, Disciplinary Counsel has met its burden of proving the violation of D.C. Rule 1.5(b) by clear and convincing evidence.[11]

F. Respondent Violated D.C. Rule 1.16(d).

D.C. Rule 1.16(d) provides in pertinent part that:

> Upon termination of representation, a lawyer shall take 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 lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).[12]

Furthermore, the Court of Appeals has explained that "'a client should not have to ask twice' for [her] file." *In re Thai*, 987 A.2d 428, 430 (D.C. 2009) (per curiam) (quoting *In re Landesberg*, 518 A.2d 96, 102 (D.C. 1986)).

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[11] Even if the Model Rules were to apply to this issue, the record supports the finding that Respondent's conduct also violated Model Rule 1.5(b) which, while not requiring a written communication, requires that the lawyer communicate to the client the scope of representation as well as the basis for or rate of the fee and expenses within a reasonable time after beginning the representation. According to Ms. Larcher's affidavit, Respondent never discussed how he would charge the Larchers for his work. DX 6 at ¶ 2.

[12] D.C. Rule 1.8(i) provides that:

> A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Respondent talked to Mr. Meek on April 10, 2017, promised to forward the Larchers' file by April 14, 2017, and then failed to do so even after Mr. Meek sent him a letter reminding him to do so. FF 10. The failure to turn over the Larchers' file to successor counsel, Mr. Meek, is an obvious violation of D.C. Rule 1.16(d). Even after the disciplinary complaint was filed and an investigation initiated, Respondent still has not returned the Larchers' file. *See* FF 10; Preh. Br. at 9. Accordingly, the violation of D.C. Rule 1.16(d) is supported by clear and convincing evidence.

G. Respondent Violated Model Rule 3.4(c) (knowingly disobeying an obligation of a tribunal) and Model Rule 8.4(d) (conduct prejudicial to administration of justice).

Model Rule 3.4(c) provides that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."[13] Model Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to: . . . engage in conduct that is prejudicial to the administration of justice."

Respondent failed to respond to three U.S. Tax Court orders to show cause. *See* FF 7, 8. However, the documentary evidence provided by Disciplinary Counsel raises some question as to whether Respondent "knowingly" disobeyed the first order to show cause in *Larchers v. Commissioner*, Docket No. 6216-14. In the

[13] In this instance, the D.C. Rule has identical language. *See* D.C. Rule 3.4(c).

second order to show cause filed on July 26, 2016, the U.S. Tax Court judge noted the following:

> On June 2, 2016, [the Commissioner] filed a Motion for Order to Show Cause Why Judgment Should Not Be Entered on the Basis of a Previously Decided Case. The Court on June 7, 2016, ordered petitioners to respond to [the Commissioner's] motion by July 8, 2016. The Court's records indicate that electronic service (eService) of [the Commissioner's] motion and the Court's Order dated June 7, 2016, were successfully effectuated on June 2, 2016, and June 8, 2016, respectively. Petitioners have not responded to [the Commissioner's] motion or the Court's Order.
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> Upon further review of the record in this case, it appears that, although petitioners' counsel, Warner Hale Anthony, Jr., consented to eService of documents in this case, Mr. Anthony has not viewed any of the electronic filings in this case. When a practitioner registers for electronic access, he or she must agree to the Terms of Use, which include: (1) consent to receive eService pursuant to Rule 21(b)(1) via the Court's electronic filing system, and (2) agreement to regularly check their email for notice of filing.

DX 9 at 118. It appears on this record that Respondent did not ever read the first order to show cause that issued in this particular case.

In order to prove that Respondent "knowingly" disobeyed the first U.S. Tax Court's order to show cause in Docket No. 6216-14, Disciplinary Counsel is required to present clear and convincing evidence of Respondent's knowledge. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001); *In re Luxenberg*, Board Docket No. 14-BD-083, at 15-16 (BPR July 6, 2017). While we realize knowledge can be inferred from the circumstances, *see* Model Rule 1.0(f)[14], evidence of a "knowing

[14] Model Rule 1.0(f) provides that "knowingly" means "actual knowledge of the fact in question" and that "[a] person's knowledge may be inferred from circumstances."

disobedience" of an order to show cause must be both clear and convincing. *See, e.g.*, *In re Verra*, Bar Docket No. 166-02, at 29 (BPR July 20, 2006), *recommendation adopted*, 932 A.2d 503 (D.C. 2007) (per curiam).

The same U.S. Tax Court judge, however, did not subsequently note that Respondent had not reviewed any of the subsequent pleadings, including the second order to show cause filed in the same case. *See* DX 9 at 120-25. In addition, nothing in the record suggests that Respondent had not opened other eService orders or pleadings in the other matters pending before the U.S. Tax Court. Because no contrary evidence exists related to Respondent's knowledge of the second order to show cause in *Larchers v. Commissioner*, Docket No. 6216-14, as well as the order to show cause issued in a different case, *Donald C. Larcher DDS v. Commissioner*, Docket No. 23412-12, *see* DX 9 at 141, the evidence is clear and convincing that Respondent violated Model Rule 3.4(c) on those two occasions.

H. Respondent Violated D.C. Rule 8.1(b) (failing to respond to Disciplinary Counsel) and D.C. Rule 8.4(d) (seriously interfering with the administration of justice).

D.C. Rule 8.1(b) provides that "a lawyer . . . in connection with a disciplinary matter, shall not . . . knowingly fail to respond reasonably to a lawful demand for information from . . . [a] disciplinary authority . . . ." A knowing failure to respond to a request from Disciplinary Counsel regarding a disciplinary complaint constitutes a violation of Rule 8.1(b). *See, e.g.*, *In re Beller*, 802 A.2d 340, 340 (D.C. 2002) (per curiam). "[D.C.] Rule 8.1(b) specifically addresses the requirement of responding to [Disciplinary] Counsel as opposed to the more general requirements

of Rule 8.4(d)." *In re Rivlin*, Bar Docket Nos. 436-96 *et al.*, at 41 n.20 (BPR Oct. 28, 2002), *recommendation adopted*, 856 A.2d 1086, 1086 (D.C. 2004) (per curiam).

D.C. Rule 8.4(d)'s prohibition of conduct that "seriously interferes with the administration of justice" includes conduct where a lawyer fails to cooperate with Disciplinary Counsel or fails to respond to Disciplinary Counsel's inquiries. *See* D.C. Rule 8.4, cmt. [2]; *see also In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996).

Here, in the course of its investigation, Disciplinary Counsel sent letters of inquiry to Respondent on June 28 and July 14 of 2017. FF 11. The letters were mailed to Respondent's address that is listed with his D.C. Bar membership, and they were not returned. DX 7; DX 10 at 253, 256. Disciplinary Counsel also telephoned, emailed Respondent, and then arranged for Respondent to be personally served with the two letters of inquiry on July 27, 2017. FF 11. Respondent also failed to respond to a Board order to respond to Disciplinary Counsel's letter of inquiry. FF 12.

Disciplinary Counsel has proven the violation of D.C. Rules 8.1(b) and 8.4(d) with clear and convincing evidence.

I. Respondent Violated Model Rule 8.4(d).

Disciplinary Counsel cites Respondent's failure to respond to the U.S. Tax Court's orders in the underlying tax matters which "caused extended delay in the Larchers' cases" as a basis for additional misconduct related to the administration of justice. Preh. Br. at 12. Model Rule 8.4(d) provides that it is misconduct to "engage in conduct that is prejudicial to the administration of justice."

The evidence shows that the U.S. Tax Court had to address Respondent's failures to comply with its orders on more than one occasion. All three matters were dismissed for want of prosecution after Respondent did not comply with the court orders or failed to file the required disclosure statement. FF 5-8. Accordingly, the violation of Model Rule 8.4(d) for misconduct before the U.S. Tax Court has been proven with clear and convincing evidence.

J. Respondent Violated D.C. Rule 8.4(c) (dishonesty).

D.C. Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . ." Dishonesty, the most general category in D.C. Rule 8.4(c), is defined as:

> fraudulent, deceitful, or misrepresentative behavior [and] conduct evincing a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness . . . . Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty.

In re Shorter, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (internal quotation marks and citation omitted); *see also In re Scanio*, 919 A.2d 1137, 1142-43 (D.C. 2007). Dishonesty in violation of Rule 8.4(c) does not require proof of deceptive or fraudulent intent. *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003).

Here, the record shows that:

> [Respondent] either did not respond or dishonestly told them that he was properly handling their cases. Respondent did not promptly or timely tell the Larchers that their cases had been dismissed. By the time

> they learned the status of their cases in 2017, the time had expired for re-opening them.

FF 9. Ms. Larcher's affidavit includes her statement that when she asked for information about their cases, he "either did not respond or he dishonestly told me that he was properly handing our cases and they were 'going great.'" DX 6 at 29. In 2017, Ms. Larcher met with Respondent and learned that the cases "were over" but by that point, it was too late to re-open the tax matters. *Id*. at 29-30. Respondent's dishonesty continued even after no matter involving his representation was pending in the U.S. Tax Court.

We conclude that Respondent's failure to inform the Larchers that the cases were dismissed in 2013, 2015, or 2016 was dishonest, especially since he was on notice that they were concerned and seeking information about the status of all three petitions. Respondent's "lack of fairness and straightforwardness" is also evidenced by his false statement to Ms. Larcher that the cases were "going great." The D.C. Rule 8.4(c) violation has been proven with clear and convincing evidence.

IV. SANCTION

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); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C.

2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *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)).

Disciplinary Counsel argues that Respondent should be sanctioned with a one-year suspension and a fitness requirement.

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

The Committee considers Respondent's misconduct to be extremely serious. Respondent repeatedly failed to respond to Tax Court orders and to do even the minimum of competent work to advance his clients' petitions. As a result, all three petitions were dismissed. He failed to inform his clients of these crucial developments and affirmatively lied to Ms. Larcher when she contacted him for information about the status of the cases. Respondent's lack of communication and dishonesty with his clients persisted over the course of years until, when his clients finally learned the truth, they had no way to salvage their petitions. When successor counsel contacted Respondent for his former clients' files, Respondent promised he would forward the files and then failed to do so despite repeated requests, thereby failing to protect the Larchers' interests upon his termination. Add to the conduct described, the fact that Respondent failed to respond to Disciplinary Counsel, failed to cooperate in its investigation, and failed to appear or participate in these proceedings, the degree of misconduct becomes even more egregious.

2. Prejudice to the Clients

Respondent's persistent neglect, dishonesty, and failure to protect his client's interests upon termination, severely prejudiced the Larchers. If he properly pursued their interests, the Larchers would have had an opportunity to challenge the IRS's positions and litigate in U.S. Tax Court what appeared to be an inconsistent treatment of their pension by the IRS. The Larchers now owe the IRS more than

half a million dollars in taxes and penalties plus interest, and an appeal of the petitions' dismissals is no longer available. According to Mr. Meek, the attorney the Larchers retained in April 2017 to replace Respondent as their counsel in the tax matters, "Respondent's failure to zealously, skillfully and competently prosecute the cases directly caused the Tax Court to dismiss all three petitions filed on behalf of the Larchers." DX 5 at ¶ 8. As noted earlier, Mr. Meek, who has an LLM in Taxation and devotes "approximately one-third" of his practice to tax matters and who reviewed the petitions and the Tax Court records, asserted that in Docket No. 23413-12, the IRS argued that the Larchers owed taxes because they made excess contributions to a qualified pension plan, yet in Docket No. 23412-12R, the IRS argued that the Larchers' pension plan was *not* a qualified pension plan. *See* FF 4-5. Both could not be true and represented an inconsistent characterization of their pension plan. As described by Mr. Meek, because of this inconsistency: "[T]he Larchers had a sound legal position that, if properly handled by the Respondent, may have permitted [them] to avoid . . . taxes and penalties which now total $582,147.10, as well as accrued interest." FF 5. Although Mr. Meeks had submitted a request for relief to the IRS, he believed that the Larchers' chance of relief from the IRS "has been greatly compromised" by the passage of time. FF 9 n.6.

3. Dishonesty

As detailed throughout this report, Respondent was persistently dishonest in his communications with the Larchers. Respondent made affirmative misstatements of fact (that the cases were going well), and there is no evidence in the record that

these misstatements were the result of mistake or confusion. Thus, we conclude that Respondent intentionally misled his clients in an effort to cover up his incompetence and neglect. His dishonesty was as to material aspects of his representation, and it is reasonable to infer from the record that the dishonesty was intentional and knowing. As discussed in the preceding section regarding prejudice to his clients, if Respondent had not misled the Larchers into believing that he was properly handling the petitions in U.S. Tax Court, the Larchers could have sooner substituted counsel who could have appeared at the orders to show cause or filed the appropriate papers to avoid the dismissals for failure to prosecute in all three petitions.

4. Violations of Other Disciplinary Rules

Respondent violated a number of D.C. and Model Rules of Professional Conduct. The misconduct affected three petitions before the U.S. Tax Court and adversely affected "one client" – Mr. and Ms. Larcher in a joint representation. Respondent's misconduct also prejudiced both the administration of the U.S. Tax Court proceedings and the disciplinary process.

5. Previous Disciplinary History

Respondent has no prior disciplinary history.

6. Acknowledgement of Wrongful Conduct

There is nothing in this record that indicates Respondent has acknowledged any wrongful conduct in the matter before us. In fact, he has shown a deliberate indifference to the disciplinary complaint filed by his former clients by not responding to Disciplinary Counsel's inquiry letters and in not participating in any

of these disciplinary proceedings. Accordingly, the Hearing Committee submits that this factor weighs against Respondent.

7. Other Circumstances in Aggravation and Mitigation

The only mitigating circumstance is Respondent's lack of a prior disciplinary history, but we note that the significant aggravating factors, described above, clearly outweigh that single mitigating factor.

C. Sanctions Imposed for Comparable Misconduct

The Court of Appeals has noted that "[g]enerally, absent aggravating factors, a first instance of neglect of a single client matter warrants a reprimand or public censure." *In re Chapman*, 962 A.2d 922, 926 (D.C. 2009) (per curiam) (citing *In re Schlemmer*, 870 A.2d 76, 82 (D.C. 2005) (reprimand for neglect and lack of communication); *In re Bland*, 714 A.2d 787, 788 (D.C. 1998) (public censure as sanction in a single representation involving lack of competence and diligence, lack of communication, failure to protect client interests upon termination, intentional disobedience of an obligation to a tribunal, and misleading firm letterhead)). Nevertheless, as noted in the discussion of the Standard of Review, *supra* at IV.A, 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 Respondent and other attorneys from engaging in similar misconduct. After determining which rule violations have been proven and which aggravating or mitigating factors are present, the Hearing Committee is to consider sanctions imposed for comparable conduct in other disciplinary cases.

The Court of Appeals has recognized that it is often not possible to find a prior case that is exactly comparable. "Within the limits of the mandate to achieve consistency, each case must be decided on its particular facts." *In re Haupt*, 422 A.2d 768, 771 (D.C. 1980) (per curiam); *see also Goffe*, 641 A.2d at 463 ("The imposition of sanctions in bar discipline, as with criminal punishment, is not an exact science but may depend on the facts and circumstances of each particular proceeding.").

As noted above, the Court of Appeals has noted that, absent aggravating factors, a first instance of neglect of a single client matter generally warrants a reprimand or public censure. The Court, however, has also imposed longer periods of suspension, ranging from a four-month to a two-year suspension, for an attorney's serious neglect and additional rule violations when aggravating factors exist. *See, e.g.*, *In re Sheehy*, 454 A.2d 1360, 1361 (D.C. 1983) (en banc) (reversing Board's disbarment recommendation and, instead, imposing a two-year suspension for neglect and serious dishonesty to client and Disciplinary Counsel and aggravated by prior disciplinary history); *Rodriguez-Quesada*, 122 A.3d at 921-22 (two-year suspension and fitness requirement warranted for gross and persistent negligence in four separate matters, failure to communicate, refusal to return case files, intentionally false statement to immigration judge, and false testimony at hearing); *In re Carter*, 11 A.3d 1219, 1223-24 (D.C. 2011) (per curiam) (18-month suspension and fitness requirement where prior disciplinary history; misconduct involved three matters, lack of competence and diligence, failure to communicate, failure to return

unearned fees, false statements, and failure to respond to Disciplinary Counsel); *In re Wright*, 885 A.2d 315, 317 (D.C. 2005) (per curiam) (one-year suspension with fitness requirement for pattern of dishonesty, neglect, "lack of responsibility to clients," and deficient record keeping); *In re Ryan*, 670 A.2d 375, 381 (D.C. 1996) (four-month suspension, restitution, and fitness requirement for pattern of neglect in representation of five undocumented aliens and failure to return client files and property, misconduct involving multiple clients over extended time period); *In re O'Donnell*, 517 A.2d 1069, 1070, 1072-73 (D.C. 1986) (per curiam) (appended Board Report) (one year and a day suspension and restitution where respondent had prior discipline history, falsely told client "everything had been taken care of" even though ABC license application had not been submitted, failed to respond to Disciplinary Counsel, and engaged in conduct prejudicial to the administration of justice).

In this matter, although Respondent has no prior record of discipline of which the Hearing Committee is aware, his misconduct, as described above, was of a serious nature, was extremely prejudicial to his clients, and has likely left them with no realistic chance for relief. Given that the Larchers had an opportunity to prevail had Respondent done the minimum amount for competent and diligent representation, the dismissals of the petitions were extremely prejudicial. Over half a million dollars in taxes and penalties were assessed against them, without having

had a chance to litigate the issues in the U.S. Tax Court.[15] This serious prejudice resulting from Respondent's neglect is a significant aggravating factor. An additional aggravating factor that suggests a lengthy period of suspension is warranted is the fact that Respondent completely failed to respond to the disciplinary complaint or participate in these disciplinary proceedings.

The Hearing Committee believes that Disciplinary Counsel has more than sustained the burden of establishing that its requested one-year suspension is warranted. It appears that the precedent which seems most comparable to the facts here is *Carter*, 11 A.3d at 1219, in which the respondent was suspended for 18 months with fitness and restitution for his serious neglect, among other violations, in two separate client matters, and his failure to cooperate with Disciplinary Counsel during its investigations. The respondent in *Carter*, unlike Respondent in the instant matter, had a history of prior discipline. *Id.* at 1223. Respondent does not have a disciplinary history and has also been a member of the D.C. Bar since 1988. We, accordingly, are recommending a one-year suspension which is less than the 18-month suspension in *Carter*.

[15] Because restitution in the disciplinary system does not include consequential damages, *see, e.g.*, *In re Robertson*, 612 A.2d 1236, 1241 (D.C. 1992) ("[A] disciplinary proceeding is an inappropriate forum for determining issues relevant to a client's damages resulting from attorney malpractice."), the Committee is not ordering restitution or payment of the tax penalties and interest. Disciplinary Counsel informed the Hearing Committee that no retainer or attorney fees had been paid to Respondent, both of which comply with the Court's definition of restitution under D.C. Bar R. XI, § 3(b). *See id.* at 1241. Disciplinary Counsel also has not recommended that restitution be ordered as a condition of reinstatement.

The Hearing Committee considered whether to impose a two- or three-year period of suspension. However, given "the mandate to achieve consistency," *Haupt*, 422 A.2d at 771, and our consideration of the factual circumstances in comparable cases, we have decided to adopt Disciplinary Counsel's recommendation. We note that were the Hearing Committee able to justify it, we may have imposed a lengthier suspension than one year because of the seriousness of Respondent's misconduct and his complete failure to respond to or cooperate with the investigation and proceedings in this matter.

Therefore, for the reasons stated, we believe that a suspension of one year is warranted; such a lengthy suspension is consistent with prior disciplinary cases. *See, e.g.*, *Carter*, 11 A.3d at 1223-24; *Wright*, 885 A.2d at 316-17; *O'Donnell*, 517 A.2d at 1071-72 (appended Board Report).

D. Fitness

The Court has 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." *Cater*, 887 A.2d at 6. Proof of a "serious doubt" involves "more than 'no confidence that a Respondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009) (quoting Disciplinary Counsel's brief). 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. *Cater*, 887 A.2d at 22. As the Court explained:

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

Id.

Where a respondent has not participated in disciplinary proceedings, the Court has stated three factors are relevant in determining whether a "serious doubt" exists concerning the respondent's fitness: "(1) the respondent's level of cooperation in the pending proceedings, (2) the repetitive nature of the respondent's lack of cooperation in disciplinary proceedings, and (3) 'other evidence that may reflect on fitness.'" *Id.* at 25.

Here, as detailed above in the Procedural History and Findings of Fact, Respondent has completely failed to participate in these proceedings despite repeated attempts to engage him, resulting in an order of default. *See, e.g.*, *In re Hargrove*, Board Docket No. 15-BD-060, at 23 (BPR Apr. 26, 2016) (fitness requirement warranted in a default case where the respondent showed a lack of competence, failed to acknowledge her neglect or obligation not to take actions harmful to her clients, and failed to participate in the disciplinary process),

recommendation adopted, 155 A.3d 375 (D.C. 2017) (per curiam). Respondent's failure to respond to Disciplinary Counsel or participate in any the disciplinary proceedings has been under circumstances that support the inference of a willful disregard for his obligations as a member of the Bar. They echo his troubling failures in his fulfill his obligations to his clients before the Tax Court. Under these circumstances, the Hearing Committee has a serious doubt about Respondent's continuing fitness to practice law. *See Cater*, 887 A.2d at 26-27 ("[W]e cannot ignore respondent's unexplained failure to appear at the hearing . . . . That she did not attend the rescheduled hearing is another clear indication that respondent lacked, and may still lack, the capacity to function as an effective and responsible attorney.").

Accordingly, the Committee concludes that one year's suspension and proof of fitness to practice law, upon any application for reinstatement, is an appropriate sanction for Respondent's gross neglect and violations of multiple additional D.C. and Model Rules of Professional Conduct. For the reasons stated above, we have a serious doubt as to his continuing fitness to engage in the practice of law.

V. CONCLUSION

For the foregoing reasons, the Ad Hoc Hearing Committee finds that Respondent violated ABA Model Rules 1.1, 1.3, 3.4(c), and 8.4(d) and D.C. Rules 1.4(a), 1.4(b), 1.5(b), 1.16(d), 8.1(b), 8.4(c), and 8.4(d). We recommend that Respondent receive a sanction of one year's suspension from the practice of law and

that upon any application for reinstatement, Respondent be required to prove his fitness to practice law.

Respondent's attention is directed to the requirements of D.C. Bar R. XI, § 14, and its effect on his eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

AD HOC HEARING COMMITTEE

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