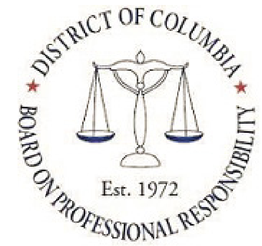
THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*



DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
July 29, 2024

In the Matter of:

STEVEN KREISS,

Respondent.

A Member of the Bar of the
District of Columbia Court of Appeals
(Bar Registration No. 58297)

Board Docket No. 23-BD-008
Disc. Docket No. 2020-D073

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

In its Report and Recommendation, an Ad Hoc Hearing Committee found that Respondent, Steven Kreiss, violated Rules 1.1(a) and (b) (competence and skill and care), 1.3(a) (diligence and zeal), 1.3(b)(2) (intentional prejudice or damage to client), 1.4(a) and (b) (failing to keep client reasonably informed and failing to explain matter to client), 1.5(a) (unreasonable fee), 1.15(a) (record-keeping), and 1.16(d) (failing to timely surrender client's papers and property) of the District of Columbia Rules of Professional Conduct ("D.C. Rules") in connection with his representation of a client who sought to become a permanent resident and to avoid deportation. The Committee found that the D.C. Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation) charge was not proven. The Committee recommended a sanction of a six-month suspension, with thirty days stayed in favor of a one-year

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

period of unsupervised probation with conditions, *inter alia*, of a ten-hour CLE requirement and the implementation of the D.C. Bar's Practice Management Advisory Service's recommendations.

Respondent did not take exception to the Committee's findings and conclusions. Disciplinary Counsel takes exception to the Committee's finding that the D.C. Rule 8.4(c) charge was not proven. Disciplinary Counsel also argues that Respondent's prolonged period of misconduct, intentional prejudice to the client, multiple Rule violations, lack of remorse, dishonest communications with his client, and prior disciplinary history warrant a sanction of a one-year suspension with a fitness requirement.[1]

For the reasons below, we agree with Disciplinary Counsel that the evidence of Respondent's dishonesty was clear and convincing. We adopt the Committee's findings of the other Rule violations, but only after concluding that Respondent is not prejudiced by the application of the D.C. Rules instead of rules that apply to conduct at issue here that occurred before other tribunals, specifically the Board of Immigration Appeals (BIA), the U.S. District Court for the District of Maryland, and the U.S. Court of Appeals for the Fourth Circuit under D.C. Rule 8.5(b)(1). *See In re Bernstein*, 774 A.2d 309, 315-16 (D.C. 2001). For the proven misconduct and the aggravating factors, we recommend a one-year suspension with a fitness requirement.

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[1] Respondent did not file a brief to the Board, and the Board granted Disciplinary Counsel's motion to submit this matter without oral argument. *See* Board Rule 13.4(a).

II. PROCEDURAL SUMMARY

On February 14, 2023, Disciplinary Counsel served Respondent with the Specification of Charges. Respondent failed to file an Answer and failed to appear at the April 27, 2023 prehearing conference. During the prehearing conference, the Chair stated on the record that she would entertain a motion to late file an Answer and that *if* no Answer was filed, Respondent would be limited to cross-examination of Disciplinary Counsel's witnesses and would not be able to call his own witnesses at the hearing. In addition, if he did not file an Answer, he would not be able to present documentary evidence. *See* Board Rule 7.7. On May 2, 2023, the Chair issued a scheduling order that was emailed to Respondent, and on May 5, 2023, Respondent was emailed a copy of the transcript of the prehearing conference.

Even though the scheduling order provided that any motion to continue the hearing had to be filed at least seven days before the hearing date and supported by good cause, Respondent filed a late motion to continue, six days before the hearing date, and without alleging good cause for a continuance. Respondent also requested an extension of time to file a witness and exhibit list and to provide proposed exhibits to Disciplinary Counsel, despite his not having filed an Answer. Disciplinary Counsel opposed the motion. The Committee denied Respondent's motion, reminding Respondent that he had been put on notice that he could not present any witnesses or exhibits at the hearing unless he filed an Answer, which he still had not done.

The hearing took place on June 16 and 20, 2023. Respondent was present, appearing *pro se.* At the hearing, Respondent testified on his own behalf and had the opportunity to cross-examine Disciplinary Counsel's witnesses. Both parties filed post-hearing briefs with the Committee.[2]

III. FACTUAL SUMMARY

Having reviewed the documentary evidence and hearing transcript, we adopt the Committee's 60 Findings of Fact ("FF") because they are supported by substantial evidence in the record as a whole. We summarize those findings below and where we have made additional findings, supported by clear and convincing evidence, we provide citations to the record. *See* Board Rule 13.7.

Respondent has been a member of the District of Columbia Bar since 1970. FF 1. As a solo practitioner for forty years, Respondent handles various immigration cases. FF 2. Respondent was retained by John Andoh to respond to a United States Citizenship and Immigration Services (USCIS) Notice of Intent to Deny an I-130 petition that had been filed by Mr. Andoh's wife, Denise Johnson. FF 3, 6-8. On January 13, 2012, Respondent submitted a substantive response to the USCIS Notice of Intent to Deny. FF 8. The USCIS denied the I-130 petition on March 26, 2012. FF 10. Respondent agreed to appeal the denial before the BIA and charged Mr.

[2] The Hearing Committee noted that Respondent's post-hearing brief did not include any legal conclusion or a sanction recommendation. HC Rpt. at 6, n.4. Respondent's sole contention in his 2 ½ page brief to the Committee was that he had filed a brief with the BIA because his Motion to Reopen and/or for Reconsideration "was most definitely in the style of a brief and is a brief." Respondent's Post Hearing Brief in Opposition to Disciplinary Counsel's Post-Hearing Brief (Aug. 8, 2023), p.1.

Andoh a flat fee of $3,500 for the representation. FF 11. Respondent told Mr. Andoh that his "case was a straight shot" and, if needed, he would take it "all the way to the Supreme Court" to ensure that Mr. Andoh prevailed. FF 12.

Inadequate Notice of Appearance. In mailing the Notice of Appeal to the USCIS office in Baltimore, Maryland, however, Respondent attached a Notice of Entry of Appearance (Form EOIR-27) that stated that he was entering his appearance on behalf of Mr. Andoh, when it should have been on behalf of Ms. Johnson. FF 15. The Notice of Appeal identified Ms. Johnson as the "Petitioner" and Mr. Andoh as the "Beneficiary" and it was signed by Respondent as "attorney or representative" of "Appellant." FF 13. Because Ms. Johnson was the I-130 Petitioner, she was the *only* party with standing to appeal the denial by USCIS. FF 15. On or about May 8, 2012, USCIS sent Respondent a receipt notice that identified Mr. Andoh as *both* the Petitioner and the Beneficiary. FF 15. Upon receiving the receipt notice, Respondent did not contact USCIS to explain that Ms. Johnson was the Petitioner and appellant or correct his Notice of Appearance to show that he was representing Ms. Johnson. *See* FF 13, 15, 30.

Failure to file brief. The Notice of Appeal Form EOIR-29 ("Notice of Appeal") includes the following statement: "*Warning: If the factual or legal basis for the appeal is not sufficiently described, the appeal may be summarily dismissed*." FF 13 (emphasis in original). In the Notice of Appeal, Respondent checked boxes that indicated that he would be filing a separate brief and was waiving oral argument. *Id*. Additionally, he attached a letter which stated that a "legal brief will follow the

filing of this appeal." FF 14. One month later, on May 21, 2012, Respondent requested a sixty-day extension in which to file the brief because he was going to have hip surgery; in his motion, Respondent stated that he would be out of the office for four to six weeks. FF 16.[3] On July 13, 2012, Respondent requested an additional fifteen-day extension to file the brief, stating that he was currently working half-days; however, he did not file a brief fifteen days later. FF 20-21. Ultimately, Respondent never filed a brief, and four months later the BIA summarily dismissed the appeal on November 23, 2012. FF 21-23.

The BIA decision and Respondent's motion to reopen. The BIA summarily dismissed the appeal for two reasons. First, because Respondent's Notice of Appearance indicated that he was only an attorney for Mr. Andoh and not for Ms. Johnson, the BIA did not have jurisdiction to consider the appeal because the record was not clear that she initiated the appeal (and she was the only one with standing to appeal); Ms. Johnson's signature was not on the Notice of Appeal and Respondent signed it as the attorney representative. FF 23; *see also* FF 13. Second, even if the

[3] Approximately three weeks after his hip surgery, Respondent agreed to represent Mr. Andoh in deportation proceedings for a fee of $3,500 and an additional $1,500 if it went to trial. FF 17-18. On June 20, 2012, Respondent entered his appearance on behalf of Mr. Andoh before the Baltimore Immigration Court. FF 19. On November 27, 2012, Respondent filed a motion to continue the proceedings, but the Baltimore Immigration Court denied the motion. FF 25. On November 29, 2012, the Court found Mr. Andoh subject to removal. FF 26. In 2019, however, AYUDA (a legal services provider for immigrants) procured a U Visa for Mr. Andoh; a U Visa holder may be able to apply for lawful permanent residence. FF 46. The record is insufficient to establish that this part of the representation involved misconduct. However, we note that by June 20, 2012, Respondent was able to enter his appearance in this matter, approximately a month after his hip surgery.

appeal had been properly filed with Ms. Johnson acting *pro se*, the BIA noted that the reasons for the appeal were not provided either in the Notice of Appeal or in a separate brief that was supposed to have been filed. *See* FF 23.

The Hearing Committee credited Mr. Andoh's testimony that Respondent did not tell him that the appeal had been dismissed nor ever explain why it was dismissed. FF 27 (noting the absence of any written documentation of an explanation provided to Mr. Andoh or any communication during the time of the dismissal); *see also* FF 28 (not crediting Respondent's inconsistent and varying explanation of whether he advised Mr. Andoh about the dismissal). The most that Respondent could recall was that he "may have indicated to [Mr. Andoh] that we were probably better off anyway by going to the District Court of Maryland." FF 28. Because Respondent never told Mr. Andoh that he failed to file a brief for the appeal before the BIA, Mr. Andoh believed that Respondent was going to file a second brief, "another brief," in a court of appeal or federal court. FF 29.

Approximately a month after the BIA dismissal of November 23, 2012, Respondent filed a Motion to Reopen and/or for Reconsideration. FF 30. At the same time, he filed a new Notice of Appearance Form (on behalf of Ms. Johnson) and a brief that included substantive arguments to support an appeal of the denial of the I-130 petition. *Id*. In the Motion to Reopen and/or for Reconsideration, Respondent did not explain why the brief had not been filed before the dismissal in November (when the surgery was in May) but argued the BIA should reopen the case because he had surgery during the briefing period and "[t]his is petitioner's last opportunity

to have her case heard before an impartial adjudicator." FF 30. On September 6, 2013, the BIA summarily denied the motion because "reopening to consider the untimely brief was not warranted" given that Respondent had failed to identify an error of fact or law and failed to submit previously unavailable evidence. FF 32.

Subsequent filings related to BIA's dismissal. Over the next six years, Respondent charged Mr. Andoh approximately $20,000 in fees for filings in the federal courts in an attempt to overturn the USCIS denial of the I-130 petition, despite the fact that only the BIA had jurisdiction to consider the merits of that denial. FF 33, 44. The BIA was the only opportunity for *de novo* review of the USCIS decision, and Respondent had lost that opportunity when he identified the wrong party in the Notice of Appearance and failed to file a brief. FF 44.

On September 26, 2013, Mr. Andoh retained Respondent, for a fee of $7,500, to file an appeal with the U.S. Court of Appeals for the Fourth Circuit. FF 34. On October 3, 2013, Respondent filed a Petition for Review with the Fourth Circuit, but the Fourth Circuit subsequently denied the appeal on the grounds that it lacked jurisdiction but "in the interest of justice" transferred the case to the District Court. FF 35. In November 2015, Mr. Andoh retained Respondent to pursue the case before the U.S. District Court for the District of Maryland, for an additional fee of $7,500. FF 36. Respondent filed the action pursuant to the Administrative Procedure Act, alleging that the BIA's dismissal was arbitrary and capricious; causes of action under the Administrative Procedure Act have a very deferential standard of review and the likelihood of success was greatly reduced given the fact-intensive nature of the case.

FF 36. In February 2016, Respondent charged Mr. Andow another $1,600 fee to file a reply brief in the case. FF 37. In June 2018 the U.S. District Court for the District of Maryland granted summary judgment for the government, noting (1) that summary dismissal is appropriate where a petitioner fails to file a brief and no sufficient statement of reasons for the appeal was in the Notice of Appeal, and (2) that the denial of the Motion to Reopen and/or for Reconsideration was also appropriate where the BIA had granted two extensions to file a brief and then waited additional months before issuing a decision. FF 38-39.

In November 2018 Respondent charged Mr. Andoh an additional $2,500 to file a "second" brief (Respondent treated the initial Petition for Review as a "brief") before the Fourth Circuit to appeal the U.S. District Court's grant of summary judgment. FF 40-41. The Fourth Circuit, however, affirmed the lower court's order granting summary judgment in an unpublished per curiam opinion. FF 42. In April 2019, Respondent filed a petition for rehearing, and the Fourth Circuit summarily denied the motion one month later. FF 43.

Respondent did not ever explain to Mr. Andoh the details of his failure to identify the correct party in the Notice of Appearance and his failure to file a timely brief in the initial appeal to the BIA. FF 48. When Mr. Andoh requested copies of the several appeals briefs, he did not receive them. FF 51. When he asked to see them, Respondent told him the briefs were filed electronically. *Id*. Respondent never explained to Mr. Andoh the difficulties in proceeding under the Administrative Procedure Act in federal court. FF 60. It was only after meeting with AYUDA

attorneys that Mr. Andoh learned that Respondent had not filed a brief with the BIA prior to its dismissal. FF 49.

With the assistance of an attorney at AYUDA, Colleen Normile, Esquire, Mr. Andoh filed the disciplinary complaint against Respondent that resulted in the charges being filed. Tr. 95-98 (Normile). Ms. Normile, representing Mr. Andoh pro bono, sent a four-page letter on January 10, 2020, to the Office of Disciplinary Counsel, explaining in detail how Respondent "never explained [to Mr. Andoh] that he had missed the briefing deadline" and how Mr. Andoh first learned of this fact when discussing his case with AYUDA attorneys. DCX 4 at 1-3. Many of the documents submitted with the disciplinary complaint were only obtained through Freedom of Information Act Requests to the USCIS and EOIR, filed by AYUDA on behalf of Mr. Andoh, because Respondent "refused to provide him with copies of briefs and decisions, even when Mr. Andoh specifically requested copies." *Id*. at 4.

Mr. Andoh paid for all the requested fees in full and toward the end of the representation in 2019, Respondent told him that he had to pay an additional $400 to close the case. FF 53.[4] Despite Mr. Andoh's request for his file at the end of the representation, Respondent never provided his client file. FF 55. It also was never provided during the disciplinary investigation despite Disciplinary Counsel's subpoena for its production. FF 56. During the hearing, Respondent admitted that he did not keep time records during his representation of Mr. Andoh. FF 57.

[4] Respondent did not refund any legal fees to Mr. Andoh—including the $3,500 fee for the appeals brief to the BIA that was not filed. FF 54.

IV. CONCLUSIONS OF LAW

A. Choice of Law

The Specification of Charges only alleged violations of the D.C. Rules, and the Hearing Committee did not consider whether the conduct connected to matters pending before non-D.C. tribunals required application of that tribunal's rules of conduct. Here, Respondent's conduct concerned matters pending before the BIA, the U.S. District Court for the District of Maryland, and the U.S. Court of Appeals for the Fourth Circuit.[5] On March 20, 2024, the Board ordered that the parties address the appropriate choice of law, as provided by D.C. Rule 8.5(b)(1), in their briefing to the Board because the alleged misconduct occurred in connection with matters pending before tribunals not located in the District of Columbia.

Choice of law is governed by D.C. Rule 8.5, which is designed to make it clear that "any particular conduct of an attorney shall be subject to only one set of rules of professional conduct." Rule 8.5, Comment [3]. D.C. Rule 8.5(b)(1) provides that

> For 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.

A tribunal "denotes a[n] . . . administrative agency, or other body acting in an adjudicative capacity" which occurs when "a neutral official, after the presentation of evidence or legal argument by a party or parties, [renders] a binding legal

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[5] As stated earlier, *see supra* n.3, we have found that Respondent's conduct before the Immigration Court in Baltimore, Maryland did not involve violations of the Rules in this case.

judgment directing affecting a party's interests in a particular matter." D.C. Rule 1.0(n); *see, e.g.*, *In re Ponds*, 888 A.2d 234, 235-36 (D.C. 2005) (applying Maryland Rules of Professional Conduct to a D.C Bar member's misconduct in a matter pending before the U.S. District Court for the District of Maryland); *In re Koeck*, Board Docket No. 14-BD-061, at 21-22 (BPR Aug. 30, 2017) (applying disciplinary rules applicable to practitioners appearing in Department of Labor proceedings to a D.C. Bar member's misconduct), *recommendation adopted where no exceptions filed*, 178 A.3d 463 (D.C 2018) (per curiam).

In its brief to the Board, Disciplinary Counsel concedes the alleged misconduct involved matters pending before tribunals located in Maryland and Virgina, *see* ODC Br. at 18. However, Disciplinary Counsel suggests that (1) D.C. Rule 8.5(b)(1) may not apply to a tribunal like the BIA that "does not conduct courtroom proceedings" and instead "decides appeals by conducting a 'paper review' of cases," *id*. at 18 (citation and quotations omitted), (2) even if the incorrect rules were charged, Respondent cannot show actual prejudice, and (3) choice of law error, if any, was waived by Respondent's failure to raise the issue. *Id*. at 19-20.

As to Disciplinary Counsel's first contention, the Court of Appeals and the Board have not limited "tribunals" to bodies that conduct a courtroom proceeding, as opposed to bodies that conduct a review of "paper." *See, e.g.*, *In re Vohra*, Bar Docket No. 324-06, at 43 (HC Rpt. Aug. 9, 2011) (adopting Disciplinary Counsel's argument that USCIS is a "tribunal" within the meaning of the D.C. Rules), *recommendation adopted*, 68 A.3d 766, 782 (D.C. 2013) (appended Board Report);

In re Cleaver-Bascombe, 892 A.2d 396, 403-04 (D.C. 2006) (Court approved Board's determination that false Criminal Justice Act voucher submitted to Accounting Unit of the District of Columbia Superior Court's Financial Operations Division is submitted to a "tribunal"). The D.C. Rules' definition of a "tribunal" includes an adjudicative body that renders a binding judgment "after the presentation of evidence *or* legal argument." D.C. Rule 1.0(n) (emphasis added). Thus, we see no basis to conclude that a "tribunal" must conduct a courtroom proceeding. Accordingly, the BIA and the U.S. Court of Appeals for the Fourth Circuit, as well as the U.S. District Court of the District of Maryland, are included as "tribunals" under our disciplinary case law.

In regard to Disciplinary Counsel's claim of waiver, it cites no authority from the Court of Appeals to support the argument that the Board should decline to consider an issue because neither party has raised the issue. Pursuant to D.C. Bar R. XI, § 9(b) and Board Rule 13.7, "the Board cannot merely rubber-stamp the Hearing Committee's report when no exceptions are filed," but "must decide the matter on the basis of the Hearing Committee record." *In re Chapman*, 284 A.3d 395, 401 (D.C. 2022) (internal quotation marks omitted); *see also In re Holdman*, 834 A.2d 887, 890 (D.C. 2003) (as the final arbiter in discipline cases, D.C. Court of Appeals may elect to reach a decision in a case "regardless of whether a respondent has preserved an issue"); *cf. In re Daniel*, 11 A.3d 291, 297 (D.C. 2011) (Court of Appeals has discretion to limit its review to issues not preserved for review).

For these reasons, we identify below the Rules applicable to proceedings before the BIA, the U.S. District Court, and the Fourth Circuit and then determine whether Respondent can show actual prejudice in the application of the D.C. Rules to his conduct. Pursuant to D.C. Rule 8.5(b)(1), we shall apply the "rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise."

8 C.F.R. § 1003.102 ("Federal Immigration Rules of Professional Conduct") applies to proceedings before the BIA. For conduct before the BIA, we apply the "Grounds" for "Professional Conduct for Practitioners—Rules and Procedures" promulgated by the Executive Office for Immigration Review (8 C.F.R. § 1003.102), except in instances where there is no analogous rule. *In re Osemene*, Board Docket No. 18-BD-105 (BPR May 31, 2022), appended HC Rpt. at 34 (Jan. 28, 2022) (finding that the BIA uses state disciplinary rules to fill gaps in its regulatory scheme), *recommendation adopted where no exceptions filed*, 277 A.3d 1271 (D.C. 2022) (per curiam); *see also Attorney Grievance Comm'n v. Tatung*, 258 A.3d 234, 261 (Md. 2021) ("[F]ederal immigration professional rules promulgated under 8 C.F.R. § 1003.102 clearly apply to the proceedings before the federal immigration tribunal."). Accordingly, for Respondent's conduct in filing a deficient Notice of Appearance and failing to file a BIA brief, and his conduct in connection with that matter (*e.g.*, dishonesty and failure to communicate), we would apply the Federal Immigration Rules of Professional Conduct. Because those do not have an analogous

rule to D.C. Rule 1.15(a) and 1.16(d), however, we apply the D.C. Rules to fill in that gap. *See infra* pp. 25-26.

The Maryland Attorneys' Rules of Professional Conduct ("MD Rules") apply to the proceedings before the U.S. District Court for the District of Maryland. *See* U.S. District Court of Maryland Local Rule 704 ("This Court shall apply the Rules of Professional Conduct as they have been adopted by the Supreme Court of Maryland") (July 1, 2023). Accordingly, for Respondent's seeking relief under the Administrative Procedure Act, and his conduct in connection with that matter (*e.g.*, failure to communicate and failure to keep records), we would apply the Maryland Rules.

The D.C. Rules apply to proceedings before the Fourth Circuit because Respondent's office is located in the District of Columbia. *See* U.S. Court of Appeals for the Fourth Circuit Local Rule 46(g)(1)(c) ("A member of the bar of this Court may be disciplined by this Court as a result of . . . [c]onduct with respect to this Court which violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction in which the attorney maintains his or her principal office . . . .") (Dec. 1, 2023). Accordingly, for Respondent's appeal before the Fourth Circuit of the U.S. District Court's grant of summary judgment, and his conduct in connection with that matter (*e.g.*, failure to communicate and failure to keep records), we apply the D.C. Rules.

Having determined which Rules applied to Respondent's conduct, we now consider whether applying the D.C. Rules to the charged misconduct before the BIA and the U.S. District Court for the District of Maryland prejudiced Respondent. *See Bernstein*, 774 A.2d at 315-16 (where another jurisdiction or tribunal's Rules of Conduct apply under choice of law, the issue is moot if the respondent cannot show that the D.C. Rules treated him less favorably).[6]

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[6] We recognize that in *Tatung*, the Court of Appeals of Maryland declined to conduct a prejudice analysis by comparing its own Rules with the other tribunal's rules:

> Although the federal regulations and the M[aryland] A[ttorney] R[ules] of P[rofessional] C[onduct] are consistent with one another, such a determination does not mean that we may ignore the plain language of the word "shall" in the choice of law provisions outlined in Rule 8.5(b). At the oral argument in this matter, Bar Counsel asserted that, where the conduct involves another tribunal or jurisdiction, it is only required to apply the rules of the alternative jurisdiction when there is a conflict. We disagree. Through the use of the word "shall," Rule 8.5(b) plainly and unambiguously mandates the application of the professional rules of the tribunal where the conduct arises in connection with a matter pending before a tribunal . . . . The rule does *not* give the disciplinary authority the discretion to apply the rules of another tribunal jurisdiction *only* in the event of a conflict.

See Tatung, 258 A.3d at 260 (emphasis in original). Absent direction from our own Court of Appeals, however, we continue to provide the prejudice analysis in *Bernstein*. To avoid future analyses of prejudice when the wrong rule is charged, we encourage the Office of Disciplinary Counsel to carefully analyze the appropriate choice of law under D.C. Rule 8.5(b) when preparing the Specification of Charges. *See, e.g.*, *Attorney Grievance Comm'n of Maryland v. Tabe*, 290 A.3d 951 (Md. 2023) (Maryland Bar Counsel charging the Maryland-barred immigration attorney with violations of Federal Immigration Rules of Professional Conduct for Practitioners, 8 CFR § 1003.102). If there is uncertainty before the factual record is fully developed, Disciplinary Counsel can charge both rules in the Specification of Charges and then identify the correct rule in its post-hearing briefing.

1. D.C. Rules 1.1(a) and (b) (competence and skill and care) are comparable to 8 C.F.R. § 1003.102(o).

D.C. Rule 1.1(a) requires a lawyer to "provide competent representation to a client." The Court 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) (lawyer who has requisite skill and knowledge, but who does not apply it for particular client, violates obligations under Rule 1.1(a)). 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 comments to D.C. Rule 1.1 state that competent representation includes "adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs." D.C. Rule 1.1, cmt. [5].

The competency rule of the Federal Immigration Rules of Professional Conduct is comparable and provides that a practitioner shall be subject to discipline if he or she

> [f]ails to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.

8 C.F.R. § 1003.102(o).

Upon our independent review of the record, we agree with the Hearing Committee that Respondent showed a lack of competence and skill and care in his

conduct before the BIA. *See* HC Rpt. at 26-28. Disciplinary Counsel should have charged a violation of 8 C.F.R. § 1003.102(o) for the lack of competence and skill and care related to Respondent's appeal before the BIA, *see* D.C. Rule 8.5(b)(1), but Respondent cannot show actual prejudice given that the Federal Immigration Rules of Professional Conduct has comparable language. Accordingly, we adopt the Committee's finding of the D.C. Rule 1.1(a) and (b) violations.

2. <u>D.C. Rule 1.3(a) (diligence and zeal) is comparable to 8 C.F.R. § 1003.102(q).</u>

D.C. Rule 1.3(a) states that an attorney "shall represent a client zealously and diligently within the bounds of the law." Failing to represent a client with zeal and diligence is neglect, which "has been defined as indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc) ("Reback II")).

The Federal Immigration Rules of Professional Conduct provide that a practitioner shall be subject to discipline if he or she "[f]ails to act with reasonable diligence and promptness in representing a client." 8 C.F.R. § 1003.102(q). The overwhelming evidence in this case supports a finding that Respondent failed to act with reasonable diligence and promptness when he did not file a brief before the BIA's decision to dismiss; Respondent would not be able to show actual prejudice from the Hearing Committee's consideration of D.C. Rule 1.3(a) because his

conduct clearly constituted a violation of 8 C.F.R. § 1003.102(q). Accordingly, we adopt the Committee's finding of the violation of D.C. Rule 1.3(a).

3. D.C. Rule 1.3(b)(2) (intentional prejudice or damage to client) is comparable to 8 C.F.R. § 1003.102(q)(1)-(2).

D.C. Rule 1.3(b)(2) provides that "[a] lawyer shall not intentionally . . . [p]rejudice or damage a client during the course of the professional relationship." "Proof of actual intent to harm . . . is not necessary to establish a violation of Rule 1.3(b)(2); but [Disciplinary] Counsel must establish that the attorney 'knowingly created a grave risk' that the client would be financially harmed and understood that financial damage was 'substantially certain to follow from his conduct.'" *In re Wright*, Bar Docket Nos. 377-99,10-00, 294-00 & 20-01, at 24-25 (BPR Apr. 14, 2004) (quoting *In re Robertson*, 612 A.2d 1236, 1250 (D.C. 1992) (appended Board Report)), *findings and recommendation adopted*, 885 A.2d 315, 316 (D.C. 2005) (per curiam); *see also Robertson*, 612 A.2d at 1250 (appended Board Report) (finding intentional damage to a client where the respondent failed to file a client's tax returns before the deadline, thus forfeiting the client's requests for tax refunds).

The Federal Immigration Rules of Professional Conduct include the following related rules under subsection (q) (diligence and promptness):

> (1) A practitioner's workload must be controlled and managed so that each matter can be handled competently.
>
> (2) A practitioner has the duty to act with reasonable promptness. *This duty includes*, but shall not be limited to, *complying with all time and filing limitations*. This duty, however, does not preclude the

> practitioner from agreeing to a reasonable request for a postponement *that will not prejudice* the practitioner's client.

8 C.F.R. § 1003.102(q)(1)-(2) (emphasis added).

The Hearing Committee concluded that Respondent intentionally prejudiced the BIA appeal "when he failed to file the BIA brief despite two extensions." *See* HC Rpt. at 31-32. Because the conduct was connected to a matter pending before the BIA, the Federal Immigration Rules of Professional Conduct should have been charged, but given the similarity in substance of the D.C. Rule and 8 C.F.R. § 1003.102(q)(1)-(2), we find no prejudice in the application of the D.C. Rules here and adopt the Committee's finding of the D.C. Rule 1.3(b)(2) violation.

4. D.C. Rules 1.4(a) and (b) (failing to keep client reasonably informed and failing to explain matter to client) are comparable to 8 C.F.R. § 1003.102(r) and MD Rule 19-301.4(a)(2)-(3).

D.C. Rule 1.4(a) (emphasis added) 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." D.C. Rule 1.4, cmt. [1]. D.C. Rule 1.4(b) states that an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

The Federal Immigration Rules of Professional Conduct provide that a practitioner shall be subject to discipline if he or she

> (r) Fails to maintain communication with the client throughout the duration of the client-practitioner relationship. It is the obligation of the practitioner to take reasonable steps to communicate with the client in a language that the client understands. A practitioner is only under the obligation to attempt to communicate with his or her client using addresses or phone numbers known to the practitioner. In order to properly maintain communication, the practitioner should:
>
> (1) Promptly inform and consult with the client concerning any decision or circumstance with respect to which the client's informed consent is reasonably required;
>
> (2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished. Reasonable consultation with the client includes the duty to meet with the client sufficiently in advance of a hearing or other matter to ensure adequate preparation of the client's case and compliance with applicable deadlines;
>
> (3) Keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation; and
>
> (4) Promptly comply with reasonable requests for information, except that when a prompt *response* is not feasible, the practitioner, or a member of the practitioner's staff, should acknowledge receipt of the request and advise the client when a *response* may be expected.

8 C.F.R. § 1003.102(r) (emphasis in original). Additionally, subsection (p) provides that a practitioner should not fail "to consult with the client as to the means by which [the objectives of the representation] are to be pursued."

Maryland Rules 19-301.4(a)(2) ("An attorney shall . . . keep the client reasonably informed about the status of the matter"), 19-301.4(a)(3) ("An attorney

shall . . . promptly comply with reasonable requests for information"), and 19-301.4(b) ("An attorney shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.") have the same language as D.C. Rules 1.4(a) and 1.4(b).

The Committee concluded that Respondent failed to tell Mr. Andoh how his own failures contributed to the decision of the BIA to dismiss the appeal and never provided Mr. Andoh with other relevant information necessary to make an informed decision about the viability of pursuing review in the U.S. District Court or the Fourth Circuit. *See* HC Rpt. at 35. A violation of the Federal Immigration Rules of Professional Conduct should have been charged for those failures in communication, but those rules are comparable to D.C. Rule 1.4(a) and (b).

The Committee also found that Respondent failed to respond to Mr. Andoh's request for copies of the filings and briefs in the U.S. District Court and the Fourth Circuit. HC Rpt. at 35. Those failures violated the comparable Maryland Rules (for the U.S. District Court) and D.C. Rules 1.4(a) and (b) (for the Fourth Circuit). We find no prejudice in the application of the D.C. Rules to each of Respondent's failures in communication. Accordingly, we adopt the Committee's finding of the D.C. Rule 1.4(a) and (b) violations.

5. D.C. Rule 1.5(a) (unreasonable fee) is comparable to 8 C.F.R. § 1003.102(a)(1).

D.C. Rule 1.5(a) provides that

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

The Federal Immigration Rule on the charging of fees uses similar "factors to consider." Under the Federal Immigration Rules of Professional Conduct, a practitioner will be subject to discipline if he or she

(a) Charges or receives, either directly or indirectly:

(1) In the case of an attorney, any fee or compensation for specific services rendered for any person *that shall be deemed to be grossly excessive*. The factors to be considered in determining whether a fee or compensation is *grossly excessive* include the following: The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client;

> and the experience, reputation, and ability of the attorney or attorneys performing the services.

8 C.F.R. § 1003.102(a)(1) (emphasis added).

The Committee found that Respondent charged an unreasonable fee for the appeal before the BIA, because he accepted $3,500 for the BIA appeal but did not file the appellate brief, or complete "the bulk of the work to be performed and essential to that appeal." *See* HC Rpt. at 36 (citing *Cleaver-Bascombe*, 892 A.2d at 403 (unreasonable fee if charged for work that was not completed). In finding an unreasonable fee, the Committee noted that Respondent claimed that he had "credited" those funds to other work completed for Mr. Andoh, but he had no documentation to show a credit having been given, and Respondent did not refund the $3,500 fee after the appeal was dismissed. *Id.*; *see also* FF 54.

Although D.C. Rule 1.5(a) uses the term "unreasonable fee" and the Federal Immigration Rules of Professional Conduct uses the term "grossly excessive fee," we find the rules comparable. For example, in *Tabe*, 290 A.3d at 967-68, the Supreme Court of Maryland found a "grossly excessive fee" in violation of 8 C.F.R. § 1003.102(a)(1) where an immigration attorney charged his client $3,000 but failed to provide legal services of value and prejudiced his client's position due to the attorney's lack of competence and diligence; in the same way, Respondent charged Mr. Andoh a grossly excessive fee of $3,500 when he filed a defective Notice of Appearance and did not file a brief in time, thereby causing the summary dismissal of the BIA appeal.

Accordingly, Respondent is not prejudiced by the application of the D.C. Rule, and we adopt the Committee's finding of a D.C. Rule 1.5(a) violation.

6. D.C. Rule 1.15(a) Applies to Respondent's Failure to Keep Records in the BIA and Fourth Circuit Representations and MD Rule 19-301.15(a), Applies to the Lack of Record-keeping in the U.S. District Court Representation Which Is Comparable to the D.C. Rule.

D.C. Rule 1.15(a) requires lawyers to keep "[c]omplete records of . . . account funds and other property" and preserve them "for a period of five years after termination of the representation." *See In re Edwards*, 990 A.2d 501, 522 (D.C. 2010) (appended Board Report). MD Rule 19-301.15(a) has the same language except that the timing of the five-year period begins to run "after the date the record was created" while under D.C. Rule 1.15(a), the five-year period begins later: "after termination of the representation."

Because the Federal Immigration Rules of Professional Conduct do not have an analogous record-keeping rule, the D.C. Rules apply for the lack of records in the BIA representation and the Fourth Circuit representation. *See Osemene*, Board Docket No. 18-BD-105, appended HC Rpt. at 34; Fourth Circuit Local Rule 46(g)(1)(c). The Hearing Committee found that Respondent maintained "no records showing the deposit" of and "handling of legal fees received from Mr. Andoh." HC Rpt. at 37. Respondent also never provided the client file to either to Mr. Andoh or to Disciplinary Counsel. *Id*.

We adopt the Hearing Committee's conclusion that D.C. Rule 1.15(a) was violated based on the dearth of any records in the representations. Because the Maryland Rule is largely identical, we further find that Respondent violated

Maryland Rule 19-301.15(a) in not keeping records relating to the U.S. District Court representation.

7. D.C. Rule 1.16(d) Applies to Respondent's Failure to Provide the Case File or to Refund a Portion of the $3,500 Flat Fee.

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

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

Failure to refund any unearned portion of a fee violates D.C. Rule 1.16(d). *See, e.g.*, *In re Samad*, 51 A.3d 486, 497 (D.C. 2012) (per curiam) (finding a violation where the respondent claimed that he did some work on the case, but did not "suggest that he earned the entire flat fee or that he returned any portion of the fee").

Because the Federal Immigration Rules of Professional Conduct do not have an analogous rule to D.C. Rule 1.16(d), we look to the D.C. Rules to fill the gap. *See Osemene*, Board Docket No. 18-BD-105, appended HC Rpt. at 34. The refund of the flat fee only relates to the conduct in connection with the BIA matter, but the failure to return the client file includes the U.S. District Court (Maryland Rule) and Fourth Circuit representations (D.C. Rule). MD Rule 19-301.16(d) includes identical language found in the D.C. Rule. Accordingly, we adopt the Hearing Committee's conclusion that Respondent violated D.C. Rule 1.16(d) when he did not provide the client file at the end of the representation and did not refund any portion of the $3,500 flat fee for the BIA Appeal. *See* HC Rpt. at 39.

8. D.C. Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation) is comparable to 8 C.F.R. § 1003.102(c).

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Dishonesty is the most general of these categories. It includes "not only fraudulent, deceitful or misrepresentative conduct, but also 'conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.'" *In re Samad*, 51 A.3d at 496 (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam)). Deceit is the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead." *Shorter*, 570 A.2d at 767 n.12 (citation omitted). The failure to disclose a material fact also constitutes a misrepresentation. *In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) ("Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation." (citations omitted)); *In re Scanio*, 919 A.2d 1137, 1139-41, 1142-44 (D.C. 2007) (respondent failed to disclose that he was salaried employee when he made a claim for lost income); *Reback*, 513 A.2d at 228-29 (respondents neglected a claim, failed to inform client of dismissal of the case, forged a client's signature onto second complaint).

Dishonest intent can be established by proof of recklessness. *See In re Romansky*, 825 A.2d 311, 315-17 (D.C. 2003). To prove recklessness, Disciplinary Counsel must establish by clear and convincing evidence that the respondent "consciously disregarded the risk" created by his actions. *Id.* at 317. The entire context of a respondent's actions, including his or her credibility at the hearing, is

relevant to a determination of intent. *See In re Ekekwe-Kauffman*, 210 A.3d 775, 796-97 (D.C. 2019) (per curiam).

The Federal Immigration Rules of Professional Conduct provides, in pertinent part, that a practitioner shall be subject to discipline if he or she . . .

> Knowingly or with reckless disregard makes a false statement of material fact or law, or willfully *misleads*, misinforms, threatens, or *deceives any person* (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence.

8 C.F.R. § 1003.102(c). Like D.C. Rule 8.4(c), the federal rule provides that the rule can be violated knowingly or recklessly.

B. The Hearing Committee Erred in Not Finding a D.C. Rule 8.4(c) Violation.

Disciplinary Counsel argues that Respondent engaged in dishonesty by (1) failing to tell Mr. Andoh that it was Respondent's own incompetence and neglect that caused the BIA to dismiss the appeal of the denial of Ms. Johnson's I-130 petition and (2) charging Mr. Andoh thousands of dollars in additional fees for "useless litigation that his own failures had already doomed." ODC Br. at 14. According to Disciplinary Counsel, it is a violation of D.C. Rule 8.4(c) to withhold information that is material to a client's decision to continue a representation while the client continues paying fees: "In short, [Respondent's] protracted failure to come clean with [Mr.] Andoh shows 'a lack of integrity and straightforwardness.'" *Id*. at 16 (quoting *In re Shorter*, 570 A.2d at 768).

The Hearing Committee made credibility findings in favor of Mr. Andoh's recollection of events and determined that Respondent's testimony was vague,

confusing, not to be credited, and contradictory, *see* FF 58-60, but ultimately decided that D.C. Rule 8.4(c) had not been proven:

> We agree that Mr. Andoh did not understand that the BIA's dismissal was because of Respondent's failures and did not understand the difficulty of prevailing under the Administrative Procedure Act in U.S. District Court. But it is not clear this was the result of intentional or reckless dishonesty by the Respondent.

HC Rpt. at 40. The Committee recognized that Respondent's communication with Mr. Andoh was limited and confusing and he may have erroneously convinced himself that they could prevail in federal court, but the Committee attributed that misconduct to a failure to communicate and lack of competence, not dishonesty. *Id*.

Based on the Committee's own credibility findings, *see, e.g.*, FF 58-60, we agree with Disciplinary Counsel that Respondent engaged in dishonesty by not disclosing that the BIA appeal had been summarily dismissed due to his own incompetence in filing an improper Notice of Appearance and his own lack of diligence in not filing a brief after two extension requests. By not disclosing the reasons for the dismissal, Respondent misled Mr. Andoh by falsely suggesting that the dismissal was due to the BIA being a difficult court and that Mr. Andoh was more likely to prevail in the U.S. District Court. The dishonesty continued as he asked for additional fees and encouraged Mr. Andoh to pursue fruitless actions and appeals in the U.S. District Court and the Fourth Circuit under the Administrative Procedure Act, all with Mr. Andoh not being told the reason why the BIA dismissed the appeal in the first place. Mr. Andoh did not know Respondent had not filed the

brief or the reasons for the BIA dismissal until he was advised by the AYUDA attorneys.

When addressing the D.C. Rule 8.4(c) charge, the Committee should have considered the fact that Respondent had a responsibility to disclose the reason for the BIA dismissal to his client. Even if he had an erroneous good faith belief (resulting from his own incompetence) that his client could prevail in the U.S. District Court, it does not erase the fact that he misled his client by not disclosing the reason for the BIA's dismissal. *See In re Carlson*, 745 A.2d 257, 258 (D.C. 2000) (per curiam) (dishonesty may consist of failure to provide information where there is duty to do so); *In re Jones-Terrell*, 712 A.2d 496, 499-500 (D.C.1998) (Rule 8.4(c) violation found despite lack of "evil or corrupt intent").

V. SANCTION

Disciplinary Counsel argues that a one-year suspension is appropriate for the Rule violations, but if the Board does not find dishonesty, a nine-month suspension would be appropriate. ODC Br. at 26-27. Disciplinary Counsel contends that in recommending a six-month suspension, the Committee erroneously found the conduct in *Askew*, *Murdter*, and *Ryan* was comparable to Respondent's violations, because in those cases, the misconduct was less serious or protracted and did not involve the aggravating factors of prior discipline and a lack of remorse. *Id*. at 26.

The sanction imposed in an attorney disciplinary matter must 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." *Reback*, 513 A.2d at 231 (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam). The sanction 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).

We look to several factors including: "(1) the seriousness of the conduct, (2) prejudice to the client, (3) whether the conduct involved dishonesty, (4) violation of other disciplinary rules, (5) the attorney's disciplinary history, (6) whether the attorney has acknowledged his or her wrongful conduct, and (7) mitigating circumstances." *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)).

A. A One-Year Suspension Is Appropriate.

We agree with Disciplinary Counsel that a one-year suspension is appropriate as a comparable sanction for Respondent's Rule violations and in consideration of the aggravating factors. We find that, like the respondent in *In re Bailey*, Respondent violated multiple rules, including dishonesty, over the course of a lengthy representation; has a discipline history; and "has downplayed and refused to accept responsibility for the ways in which he failed [his client]." *In re Bailey*, 283 A.3d 1199, 1203, 1211 (D.C. 2022) (twelve-month suspension and fitness requirement for

violations of D.C. Rules 1.4(a) and (b), 1.5(a), 1.5(e), and 8.4(c) and (d)). The seriousness of the misconduct, the prejudice to Mr. Andoh, the dishonesty toward a client, Respondent's related prior discipline (HC Rpt. at 43), and his lack of remorse are aggravating factors which suggest a one-year suspension is appropriate in this case. *See id.*; *see also In re Anthony*, Board Docket No. 17-BD-082 (BPR July 17, 2018), appended HC Rpt. at 21 (May 23, 2018) (one-year suspension with a fitness requirement where the respondent did not respond to his clients' request for information and dishonestly misled them into believing their case "was going great," when, in actuality, he had failed to respond to Tax Court orders, causing the dismissal of the clients' petitions); *recommendation adopted where no exceptions filed*, 197 A.3d 1070 (D.C. 2018) (per curiam).

B. <u>Clear and Convincing Evidence Exists in the Record that Casts a Serious Doubt on Respondent's Continuing Fitness to Practice Law.</u>

The purpose of conditioning reinstatement on proof of fitness is "conceptually different" from the basis for imposing a suspension. *Cater*, 887 A.2d at 22. The Court has observed that while a suspension represents "a 'commensurate response to the attorney's past ethical misconduct,' the fitness requirement addresses the concern 'that the attorney's resumption of the practice of law will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest.'" *In re Brown*, 310 A.3d 1036, 1050 (D.C. 2024) (quoting *In re Lattimer*, 223 A.3d 437, 452-53 (D.C. 2020) (per curiam)).

Thus, in *Cater*, the Court 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." 887 A.2d at 6. Proof of a '"serious doubt"' involves "more than 'no confidence that [a r]espondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009) (alteration in original). It connotes '"real skepticism, not just a lack of certainty."' *Id*. (quoting *Cater*, 887 A.2d at 24).

As the Court explained:

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

Cater, 887 A.2d at 22.

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

(a) the nature and circumstances of the misconduct for which the attorney was disciplined;

(b) whether the attorney recognizes the seriousness of the misconduct;

(c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;

(d) the attorney's present character; and

(e) the attorney's present qualifications and competence to practice law.

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

In this matter, we have a serious doubt about Respondent's ability to conform his conduct with the ethical rules for attorneys. First, we have no confidence in his present qualifications and competence to practice law. In addition to his failure to file a timely brief or to properly file a Notice of Appeal and Notice of Appearance before the BIA, we observe that in defending his own license to practice law, he failed to file an Answer despite being repeatedly advised of the consequences of not doing so and despite being told that the Committee would entertain a request to late file; he filed a late motion to continue the hearing unsupported by good cause; he filed a 2½ page cursory post-hearing brief with no legal conclusions; and he did not file a brief to the Board despite our Order directing him to. *See supra* pp. 2-4 and notes 1-2; *see also* HC Rpt. at 44 (Hearing Committee observing "that Respondent's conduct in the disciplinary proceedings echoed some of the issues of delay, indifference, and obfuscation raised in this matter").

Respondent apparently has not learned from his prior discipline nor has he taken adequate actions to prevent the misconduct from reoccurring. Respondent's 2005 informal admonition was for violations of D.C. Rules 1.1(a) and (b) (competence and skill and care), 1.3(a) and (c) (diligence and zeal, and reasonable promptness), and 1.4(a) and (b) (failing to keep client reasonably informed and explain matter to client). He failed to file a brief with the BIA resulting in the dismissal of the appeal, and also failed to adequately communicate with his client—

eerily similar to what occurred here. *See* HC Rpt. at 43; *In re Kreiss*, Bar Docket No. 2004-D204 (Letter of Informal Admonition Jan. 6, 2005). Respondent's 2019 public censure (with CLE) was for imposing an improper lien on a former client's file and failing to timely return the file in violation of D.C. Rules 1.8(i) and 1.16(d)—which he again violated in this matter. HC Rpt. at 43; *see also* FF 53 (charging Mr. Andoh an additional $400 to close the case); *In re Kreiss*, 219 A.3d 525 (D.C. 2019) (per curiam).

Respondent continues to fail to recognize the seriousness of his misconduct and its effect on his vulnerable immigrant clients who trust him. He never explained to Mr. Andoh the legal difficulties of prevailing under the Administrative Procedure Act in federal court, but, instead, told him that the U.S. District Court "has more of a heart." HC Rpt. at 23 (citing Respondent's hearing testimony). Trusting him, Mr. Andoh continued to pay him almost $20,000 in fees to challenge the BIA dismissal in the U.S. District Court and the Fourth Circuit, despite the fact that neither tribunal could provide *de novo* review of the USCIS's decision to deny to I-130 Petition. *See* HC Rpt. at 27, 33; FF 33, 44-45, 47. Respondent never expressed remorse or took responsibility for the summary dismissal of the BIA appeal, but, instead, made matters worse for Mr. Andoh by charging him significant fees that well surpassed the original flat fee of $3,500 for the BIA appeal, all with Mr. Andoh not knowing that Respondent's own neglect and incompetence was to blame.

For all these reasons, we recommend a fitness requirement upon any application for reinstatement. We have a real skepticism—given the seriousness of

the misconduct, the prior discipline history, the lack of remorse or acknowledgment of any wrongdoing, and his conduct in these disciplinary proceedings—that Respondent will be able to conform his practice to the standards of our Rules of Professional Conduct.

VI. CONCLUSION

For the foregoing reasons, we find that Respondent violated D.C. Rules 1.1(a) and (b) (competence and skill and care), 1.3(a) (diligence and zeal), 1.3(b)(2) (intentional prejudice or damage to client), 1.4(a) and (b) (failing to keep client reasonably informed and failing to explain matter to client), 1.5(a) (unreasonable fee), 1.15(a) (record-keeping), 1.16(d) (failing to timely surrender client's papers and property), and 8.4(c) (dishonesty).

We recommend that Respondent's license to practice law be suspended for one year, with a fitness requirement upon any application for reinstatement. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

BOARD ON PROFESSIONAL RESPONSIBILITY

By:

Sharon Rice-Hicks

All members of the Board concur in this Report and Recommendation, except Mr. Tigar, who is recused, and Dr. Hindle, who did not participate.