COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No: BD-2020-063

IN RE: ROBERT MICHAEL GRIFFIN

ORDER OF PUBLIC REPRIMAND

This matter came before the court, on a Petition and Information of Record of Proceedings with the Vote and Recommendation of the Board of Bar Overseers filed by the Board on September 22, 2020.

After hearing and upon consideration thereof, it is ORDERED and ADJUDGED that this attorney be, and hereby is, publicly reprimanded.

By the Court, (Gaziano, J.)

/s/ Maura S. Doyle

Clerk

Entered: February 26, 2021

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. BD-2020-063

IN RE: ROBERT M. GRIFFIN

MEMORANDUM OF DECISION

This matter came before me on bar counsel's amended petition for discipline, an information and record of the proceedings, and a vote of the Board of Bar Overseers (board) recommending that the respondent be publicly reprimanded. The disciplinary proceedings stem from the respondent's representation of A.B.,[1] a patient at Bridgewater State Hospital (BSH). The board imposed a public reprimand based upon a finding that the respondent failed to communicate in writing the scope of his representation and the basis of his fee, in violation of Mass. R. Prof. C. 1.5 (b), and failed to disclose a referral fee paid to another lawyer, in violation of Mass. R. Prof. C. 1.5 (e).

[1] A pseudonym.

A four-person minority of the board disagreed with the board's factual and legal conclusions. In the dissent's view, the respondent "engaged in a scheme, behind the back of his vulnerable client, to obtain a flat fee." The dissenting members of the board assert that the respondent: failed timely to refund legal fees, in violation of Mass. R. Prof. C. 1.16 (d); shared a fee with a person who is not a lawyer, in violation of Mass. R. Prof. C. 5.4 (a); engaged in conduct involving dishonesty, fraud, deceit and misrepresentation, in violation of Mass. R. Prof. C. 8.4 (c); and engaged in conduct that adversely reflects his fitness to practice law, in violation of Mass. R. Prof. C. 8.4 (h).

In her filings in the county court, bar counsel urges this court to adopt the dissent's position, and to find that the respondent charged a clearly excessive fee, failed timely to return an unearned fee, engaged in fee-splitting with a non-lawyer, and undertook conduct that involved dishonesty, fraud, deceit, and misrepresentation. The appropriate sanction for this misconduct, bar counsel maintains, is a suspension from the practice of law in the Commonwealth for one year and one day. The respondent requests that this court leave in place the public reprimand recommended by the board. For the reasons explained below, I agree with the board's determination that the

respondent violated Mass. R. Prof. C. 1.5 (b) and (e), and that a public reprimand is an appropriate sanction.

1. Prior proceedings. On August 30, 2018, bar counsel commenced this action before the board by filing a petition for discipline. The respondent filed an answer, and, thereafter, bar counsel was allowed to amend the petition. The amended petition alleged that the respondent violated Mass. R. Prof. C. 1.5 (a), 1.5 (b), 1.5 (e), 1.16 (d), 5.4 (a), 8.4 (c), and 8.4 (h). A public hearing on the allegations was held over three days in June of 2019. On October 25, 2019, the hearing committee issued its report finding that the respondent violated the rules of professional conduct as alleged in the amended petition for discipline. The hearing committee recommended that the respondent be suspended from the practice of law for six months. The respondent appealed the findings of the hearing committee to the board. On August 10, 2020, a majority of the board found that the respondent had not violated Mass. R. Prof. C. 1.16 (d), 5.4 (a), 8.4 (c), and 8.4 (h), and recommended that the respondent be sanctioned by a public reprimand for violations of Mass. R. Prof. C. 1.5 (b) and 1.5 (e). The dissenting members of the board disagreed with the board's factual findings and legal conclusions. The dissent would have found the respondent in violation of Mass. R. Prof. C. 1.16 (d), 5.4 (a), 8.4 (c), and 8.4 (h), and therefore that a "short"

suspension was warranted. Two of the dissenters would have recommended the respondent be suspended from the practice of law for three months, and two would have issued a six-month suspension.

2. Background. I summarize the facts adopted by the board supplemented with uncontested facts contained in the record.

The respondent was admitted to the bar of the Commonwealth on June 23, 1989. Prior to his admission, the respondent had been employed by the Department of Correction (DOC) as a counsellor and corrections officer. Beginning in 1989, the respondent spent thirteen years employed as an Assistant District Attorney in Suffolk County. He advanced in rank throughout his career as a State prosecutor, eventually serving as "Chief of Superior Court Prosecutions" for the Suffolk County District Attorney's office. During that time, the respondent prosecuted and supervised homicide cases. Since leaving the District Attorney's Office in 2002, the respondent has been in private practice, focusing on criminal defense.

In early 2016, Attorney John Rull, who had worked with the respondent at the DOC and often referred cases to him, contacted the respondent about a criminal case. A mutual client of Rull and the respondent, C.D.,[2] who was incarcerated at BSH while

[2] A pseudonym.

serving a life sentence for murder, told Rull about a BSH patient. That patient, A.B., was seeking an attorney to defend him in a murder case.

A.B. was civilly committed to BSH, and housed within a locked and secured unit. His civil commitment, which began in 2008, followed a twenty-five year prison sentence for indecent assault and battery on a child under the age of fourteen. During the time period relevant to this matter, A.B. "presented as overtly psychotic a large amount of the time." He displayed varying symptoms including talking to himself, most likely in response to auditory hallucinations, and harboring grandiose delusional beliefs. One of those beliefs was that he had murdered several children when he was a minor, and that he should be held in a house of correction awaiting trial for those crimes. During their initial conversation, Rull informed the respondent that A.B. had the funds to retain private counsel. As a disabled veteran, A.B. received monthly veteran's administration payments, and social security disability payments, which were deposited in A.B.'s BSH canteen account. By 2016, A.B.'s canteen account had a balance of approximately $300,000, which greatly exceeded the sums typically held in such accounts. A.B.'s wealth was common knowledge among patients and staff at BSH. The respondent, however, did not learn about the balance in A.B.'s until sometime after he first met A.B.

Following up on Rull's referral, the respondent met with A.B. on March 29, 2016 for thirty minutes. Due to the circumstances of A.B.'s confinement, the respondent knew that A.B. had been civilly committed, and, therefore, suffered from some form of mental illness. The respondent also suspected that A.B. had served a criminal sentence prior to his commitment, but did not ask A.B. about his criminal record. During this meeting, the respondent observed that A.B. was lucid, and able to respond to questioning. A.B. told the respondent that twenty to twenty-five years ago, he had raped and murdered a thirteen or fourteen year old girl, and had deposited her body near Hadley,. A.B. also said that he recently had been questioned about the crime by two State police troopers.

The respondent found A.B.'s story plausible; he knew that investigators re-open cold cases based on newly-discovered deoxyribonucleic acid (DNA) testing and DNA database queries. The respondent did not, at that point, check A.B.'s visitor logs, or speak with the BSH Inner Perimeter Security (IPS) department, to obtain records of a visit by State police troopers.[3] The hearing committee, and the board, agreed that the

[3] The record does not indicate whether the Department of Correction would have provided this information to counsel, or if the respondent had the ability, at that stage, to compel the Department of Correction to respond to such inquiries.

lack of corroborating facts to support A.B.'s story "would not have been reasonably obvious to the respondent at the time of the March 29, 2016 interview."

The respondent informed A.B. that he would charge a flat fee of $100,000 to defend him on the murder case. The amount of the fee was based upon the respondent's reasonable belief that the matter was a complex case involving potential defenses of lack of competency and criminal responsibility.[4] The hearing committee and the board found that the amount of the fee was reasonable given the nature of the case. The respondent did not know, at that point, that A.B. had more than triple that amount of money in his canteen account. To the respondent's surprise,[5] A.B. replied that he would come up with the fee on his own, and would pay the respondent that day, or at the next available opportunity. Of that $100,000 fee, $10,000 was to be paid to Rull as a referral fee, a fact the respondent did not share with A.B.

Thereafter, and prior to receiving any fee for his services, the respondent performed perfunctory research into

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[4] According to the respondent's expert witness, the $100,000 fee was at or below the prevailing range for experienced, privately-retained criminal defense attorneys in Massachusetts. Bar counsel presented no evidence to the contrary.

[5] The hearing committee found that the respondent was "shocked" when A.B. said that he would come up with the fee on his own, and the board found that he was "surprised."

A.B.'s story. This research consisted of internet searches for both unsolved murder cases in the Hadley area and reports of missing persons reports. The respondent did not contact the State police. He believed, for good reason, that investigators would not divulge information about a re-opened cold case.

On April 8, 2016, the respondent met with A.B. for the second time. The respondent brought with him, for A.B.'s signature, a standard flat fee agreement, as well as release forms for A.B.'s medical and correctional history. In contrast to their first meeting, at this meeting, A.B. was agitated, anxious, and unwilling to engage in meaningful conversation. A.B. insisted that the respondent arrange for him to be brought into court so that he could plead not guilty to the murder charges. When presented with the release forms, A.B. stated that he refused to sign anything. The respondent therefore did not show A.B. the fee agreement. A.B. abruptly ended the meeting.

At an unspecified date in April, 2016, A.B. filled out a BSH form directing that canteen account funds in the amount of $100,000 be paid to the respondent. This large payment raised concerns among BSH staff, including by a correctional officer assigned to scrutinize and process these requests. Ultimately, after consulting with a supervisor and BSH clinicians, the officer took no action on the request. The correctional officer

declined to release the funds at A.B.'s request because he believed that there was no legitimate need for A.B. to pay a lawyer a $100,000 legal fee.

On April 12, 2016, the respondent called BSH to inquire about the release of A.B.'s canteen funds. He was informed that A.B.'s request had been denied. The respondent then reached out to the head of the DOC, someone he had known previously, before becoming involved in this matter. In response, on May 9, 2016, Phillip Silva, supervising counsel at BSH, contacted the respondent. Silva asked the respondent to explain the purpose of the fee. The respondent assured Silva that he had been retained for a legitimate reason, but that he could not disclose more given the nature of the representation. In a follow up e-mail message that same day, Silva asked the respondent to send a letter to BSH "indicating that you represent this patient, whether the matter is civil or criminal in nature[,] and that the requested retainer of $100,000 is reasonably necessary in relation to your representation."

On May 10, 2016, the respondent wrote to Silva:

> "As per our conversation on May 9, 2016 regarding [A.B.'s] request for disbursement of funds for legal services please be advised that I have met with [A.B.] at your facility. As a result of our discussions [A.B.] has sought to retain my legal representation of him for various purposes. The funds he has requested are reasonable, ethical and necessary in order for me to adequately and zealously represent [A.B.]. [A.B.] has obviously agreed to the fees

> as he has requested in writing that the Bridgewater State Hospital disburse said funds to my office."[6]

On May 16, BSH processed A.B.'s request for the release of funds and sent $100,000 to the respondent. One week later, the respondent paid Rull a $10,000 referral fee. The referral payment was made without A.B.'s knowledge or consent.

The respondent next met with A.B. on June 27, 2016, and July 13, 2016. Both meetings were similar to the one on April 8, 2016. A.B. again appeared anxious, and requested that the respondent arrange for his appearance in court to answer on the charges. He also refused to sign any paperwork. At one of these meetings, A.B. stated that he did not want a lawyer and asked for a refund of his fee. Thereafter, the respondent decided to give A.B. "some time to cool off."

On August 25, 2016, the respondent met with A.B. for the final time. A.B. told the respondent that the murder was a delusion or contrivance, and said that he had no need for legal representation. This conversation ended the respondent's

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[6] The hearing committee found the letter to be misleading. The committee concluded that the respondent engaged in dishonesty in seeking to collect the $100,000 by his letter to Silva, in which his insistence that the fee was legal and necessary for the representation improperly implied his personal knowledge that there was a real representation. The board did not adopt this finding. The board determined that the "letter was truthful, albeit slightly (but appropriately) vague. It accurately indicated to a third party, who was not part of the potential attorney-client relationship, that [A.B.] had 'sought' to retain [the respondent's] services."

engagement. The respondent informed A.B. that he would do an accounting of the work he had performed and refund the remaining portion of the $100,000 fee. The next day, after being informed by the respondent that the respondent no longer represented A.B., Rull refunded the respondent the $10,000 referral fee.

Rather than performing an accounting, the respondent ultimately refunded the entire $100,000 to A.B. He did so in four installments, starting on September 19, 2016, in a check in the amount of $60,000 which he mailed to the respondent. This was followed by payments of $15,000 on September 26, 2016; $20,000 on October 3, 2016, and $5,000 on October 7, 2016.

3. Discussion. a. Standard of review. In an attorney disciplinary proceeding, bar counsel bears the burden of proof to establish by a preponderance of the evidence that the respondent engaged in the alleged violations. See In re Driscoll, 447 Mass. 678, 685 (2006). A reviewing court affords great weight to the recommendations of the board, and upholds the board's subsidiary findings of fact if supported by substantial evidence. See Matter of Murray, 455 Mass. 872, 879 (2010); S.J.C. Rule 4:01 § 8(4). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." Matter of Angwafo, 453 Mass. 28, 34 (2009), quoting G. L. c. 30A, § 1 (6). The court, however, is not bound

by the board's ultimate findings and may reach its own conclusions. Matter of Fordham, 423 Mass. 481, 487 (1996).

Before me, bar counsel contends that the court should affirm all of the rule violations found by the hearing committee. These violation consisted of allegations that the respondent had charged and collected a clearly excessive fee, in violation of Mass. R. P. C. 1.5 (a); failed to communicate the scope of representation and the basis of the fee in writing, in violation of Mass. R. Prof. C. Rule 1.5 (b); divided the fee with another lawyer without notification to or consent of the client, in violation of Mass. R. Prof. C. 1.5 (e); shared part of the legal fee with a non-lawyer, in violation of Mass. R. Prof. C. 5.4 (a); failed timely to refund an unearned portion of a fee upon termination of the representation, in violation of Mass. R. Prof. C. 1.16 (d); and engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation, in violation of Mass. Rule Prof. C. 8.4 (c). The respondent requests that this court "leave in place" the board's determination that his conduct violated Rules 1.5 (b) and 1.5 (e), but the misconduct did not extend to any of the other asserted violations. After carefully examining each of the alleged violations and the record before the board, I conclude that substantial evidence supported a finding that the respondent violated Rules 1.5 (b) and 1.5 (e). I also agree with the board's determination that

the remaining charges were not proven by a preponderance of the evidence.

b. Violations of Mass. R. Prof. C. 1.5 (b) and 1.5 (e). I need not tarry long over the conceded violations of Mass. R. Prof. C. 1.5 (b) and 1.5 (e). The respondent violated Rule 1.5 (b) by failing to communicate to A.B. the scope of his engagement, and the basis of the $100,000 legal fee. In addition, the respondent violated Rule 1.5 (e) by not disclosing to A.B. the $10,000 referral fee he paid to Rull. These violations, as noted by the board, "evinces a lack of critical communications."

c. Violation of Mass. R. Prof. C. 1.5 (a). Mass. R. Prof. C. 1.5 (a) prohibits a lawyer from charging or collecting a "clearly excessive fee." Factors to be considered in determining whether a fee is clearly excessive include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time 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.

See Mass. R. Prof. C. 1.5 (a).

The board rejected the hearing committee's determination that the respondent charged A.B. a clearly excessive fee. The board noted that there is no allegation that the amount of the fee was clearly excessive. Indeed, the respondent's expert witness testified, without contradiction or contrary evidence, that the fee was reasonable for the defense of a homicide case involving issues of mental illness, and indeed was on the low side of the market rate for that type of case.

Bar counsel concedes that the fee was ethical and appropriate when it was set by the respondent on March 29, 2016. She argues, however, that the fee became clearly excessive a month or so later. After the initial meeting, bar counsel points out, A.B. would not sign release forms or the fee agreement, acted irrationally in subsequent interviews, and the respondent was unable independently to corroborate A.B.'s claims. Bar counsel maintains that these "changed circumstances" made the once-permissible fee impermissible. According to bar counsel, the respondent was required to have requested a smaller initial fee, conducted a preliminary

investigation into the validity of the charges, and then charged the full amount if it was warranted after the respondent completed the follow-up investigation.

Bar counsel relies on a decision of the Indiana Supreme Court, Matter of Powell, 953 N.E. 2d 1060 (2011), to support her theory of "changed circumstances" liability. That case, which of course is not binding in Massachusetts, concerned a contingent fee agreement to provide legal services for the removal of a trustee (who was already seeking to resign) in return for a fee of one third of the value of the trust. Id. at 1063. The trustee resigned within two or three days of the engagement of the attorney, and the lawyer knew that "the case did not involve any complex issues, prolonged time commitment, risk of no recovery, or even any opposition." Id. at 1064. Despite performing little work, the lawyer collected a distribution of $14,815.55, one third of the corpus of the trust. Id. at 1063. The Indiana Supreme Court found that the collection of the fee under the agreement gave the lawyer "an unconscionable windfall under the totality of the circumstances." Id. at 1064. Setting aside differences in the rules governing attorney's fees in Indiana and Massachusetts, the Powell case does not support bar counsel's contention that charging a $100,000 flat fee in a complex murder case was clearly excessive. Nor does bar counsel mention that, when the

representation was terminated and the respondent returned the fee to the client, rather than appropriately deducting the amount of time he had spent on the matter until the termination of the representation, as he had told the client he would do, the respondent actually returned the entire amount.

I agree with the board's view that bar counsel's assertion of a violation of Rule 1.5 (a) is not supported by the record. The board was justified in finding that "[n]othing significant about the case changed in the [forty-nine] days between March 29, 2016 (the day the respondent provided the fee amount to the respondent) and May 16, 2016 (the day the respondent received payment of the amount quoted). The respondent knew that he was dealing with a mentally ill client, who faced potential criminal liability for rape and murder. He had an obligation, under Mass. R. Prof. C. 1.14, to maintain "as far as reasonably possible . . . a normal client-lawyer relationship" with a mentally impaired individual. If the murder had taken place, there is no evidence that the fee was unreasonable.[7] If

[7] At a hearing before me, bar counsel argued that the respondent knew, or should have known based on his internet research, that A.B. fabricated the murder case. In asserting that any murder of a young teenager in Western Massachusetts would have been front-page news and easy to locate with internet searches, bar counsel cited as examples the tragic, and well-publicized cases, of Molly Bish and Holly Piirainen. This assertion was not part of the record before the hearing committee and the board. Bar counsel requests that I apply my experience and common sense and infer that the respondent's

the case did not exist, the respondent was obligated to return any unused portion of the fee based on the value of services provided pursuant to Mass. R. 1.16 (d) ("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 disciplinary rules allow for refundable flat fees and do not, as suggested by bar counsel, mandate installment payments.

d. Violation of Mass. R. Prof. C. 5.4 (a). Bar counsel asserts that the respondent violated Mass. R. Prof. C. 5.4 (a) by sharing his fee with a non-lawyer, C.D. The board rejected the hearing committee's finding that bar counsel established, by a preponderance of the evidence, a violation of Rule 5.4. The

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perfunctory internet research proved, conclusively, that A.B. did not murder a child in Western Massachusetts twenty or twenty-five years ago. As a former homicide prosecutor, and a judge for twenty-five years, I have prosecuted or presided over many "low profile" murder cases, where the fate of marginalized victims (such as runaways) received nary a mention in the press. Perhaps the respondent's perfunctory internet research could have made him skeptical of A.B.'s claims, but the absence of any readily-identifiable and well-publicized cases from an era before wide-spread use of the Internet, certainly was not conclusive. Also, the fact that a body would not have been found in sparsely-populated, mountainous, and wooded regions is hardly inconceivable.

board found that the allegations rested on mere "conjecture and innuendo." Bar counsel challenges that conclusion. Bar counsel argues that the surrounding facts and circumstances compel a finding that the respondent paid C.D. a "finder's fee."

I begin with the undisputed facts. C.D., a patient at BSH, brought A.B.'s case to Rull, who, in turn, referred the matter to the respondent. In 2014, the respondent had represented C.D. in connection with C.D.'s efforts to cooperate with the government in an unsolved prison murder case. C.D., who was serving a life sentence and had violated parole in the past, wanted to trade information in exchange for favorable treatment by the parole board. The respondent approached a Norfolk County prosecutor to discuss C.D.'s cooperation. The prosecutor testified before the hearing committee that these efforts began in the fall of 2014, around the time that C.D. was scheduled to appear in front of the parole board. The respondent continued to communicate with the prosecutor over the course of two years. The prosecutor recalled that she discussed C.D.'s cooperation with State police investigators in the "late spring of 2016." Thereafter, in "probably" July of 2016, the prosecutor informed the respondent that the government was uninterested in C.D.'s cooperation. This ended the respondent's representation of C.D. The prosecutor's testimony was uncontradicted by any other evidence before the hearing committee.

It also is undisputed that, on July 28, 2016, the respondent wrote a check in the amount of $7,500 to C.D.'s brother, two months after the respondent paid Rull a referral fee. On August 5, 2016, a payment of $1,750 appeared in C.D.'s canteen account. There also was evidence that C.D. telephoned the respondent in August and September of 2016. In a letter dated September 26, 2016, the respondent informed A.B. that he was conducting an accounting of the services provided thus far and that "I anticipate that to be no more than $7,500."

The hearing committee did not credit the respondent's testimony concerning the money he paid to C.D.'s brother. See In re Barrett, 447 Mass. 453, 460 (2006) (committee is sole judge of witness credibility). He testified that C.D. paid the respondent $7,500 in cash in May or June of 2015 to represent him in connection with his potential role as a cooperating witness. The respondent explained that he wrote the $7,500 check to C.D.'s brother to refund the cash fee C.D. had paid him in 2015. This coincided, he stated, with the prosecutor's final decision to reject C.D.'s proffer. As a result, the board was required to put that testimony aside, and look elsewhere for the facts. See Commonwealth v. Thomas, 439 Mass. 362, 367 (2003) (jury properly were instructed: "If you do not believe a witness's testimony that something happened, that of course, is not evidence that it did not happen. It simply means that you

must put aside that testimony and look elsewhere for credible evidence before deciding where the truth lies"); Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 224 (1992) (disbelief of evidence does not establish contrary proposition).

Bar counsel contends that she established that the respondent engaged in improper fee splitting based on the following suspicious circumstances. First, the respondent met with C.D., or spoke to C.D. by telephone, "numerous" times in the spring and summer of 2016. Second, C.D. expressed a strong interest in helping the respondent collect his $100,000 from A.B.; and, third, it was more than coincidence that the respondent paid C.D.'s brother $7,500 -- the same amount that the respondent proposed in his September 26, 2016 correspondence that he might retain.

The board, as a finder of fact, had the authority to reject the inferences of fee-splitting adopted by the hearing committee. See S.J.C. Rule 4:01 § 8(5)(a). These inferences, as the respondent points out, are permissible, but not inherent and necessary. While one fact finder might draw a particular inference from subsidiary facts; another might not. There was no error in the board's determination that the inferences were piled one atop the other, and that they did not establish proof of fee-splitting by a preponderance of the evidence.

e. Violation of Mass. R. Prof. C. 1.16 (d). Pursuant to Mass. R. Prof. C. 1.16 (d), a lawyer is required, to "take steps to the extent reasonably practicable to protect a client's interests such as . . . refunding any advance payment of fee or expense that has not been earned or incurred." The hearing committee found that A.B. unequivocally terminated the representation on August 25, 2016, and, within three weeks, on September 19, 2016, the respondent remitted $60,000 of the $100,000 fee. He refunded the remainder by payments on September 26, 2016 ($15,000), October 3, 2016 ($20,000), and October 7, 2016 ($5,000).

The board recognized that Rule 1.16 does not mandate "prompt" payment of unearned fees. Compare Mass. R. Prof. C. 1.15(c) (with respect to client trust funds held in IOLTA accounts, "[e]xcept as stated in this Rule or as otherwise permitted by law or by agreement with the client or third person on whose behalf a lawyer holds trust property, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive"). Nor does the Rule 1.16 (d) require immediate payment. I discern no reason to disturb the board's finding that the respondent's staggered refund payments, over the course of six weeks from the end of the representation, were within the scope of what may be considered "reasonably practicable," and

particularly in light of the realities of cash flow for attorneys, such as the respondent, who are in solo practice. A flat-fee properly is deposited in an attorney's working accounts, and not held in trust, to be available as soon as a client is entitled to it, in an IOLTA account.

f. Violation of Mass. R. Prof. C. 8.4 (c). Bar counsel's assertion that the respondent violated Mass. R. Prof. C. 8.4 centers around the respondent's letter, dated May 10, 2016, to BSH staff counsel Phillip Silva. In that letter, the respondent sought to persuade Silva, after BSH had declined to release A.B.'s funds to the respondent, that he had a legitimate need for the $100,000 legal fee. Bar counsel contends that the respondent's representation in his letter that the funds were "reasonable, ethical and necessary in order for me to adequately and zealously represent [A.B.]" was misleading and deceitful. In sum, bar counsel claims that on May 10, 2016, the respondent knew that A.B. was not the subject of a criminal investigation, and most likely knew that the twenty-to-twenty-five-year-old murder case was probably the product of A.B.'s mental illness.

The board rejected bar counsel's argument. The board found that the representation that the funds were "reasonable, ethical and necessary" was neither misleading nor deceitful. The board reasoned, "At the time he wrote the letter, the respondent believed (reasonably, even according to the hearing committee's

view of events) that [A.B.] faced an indictment for murder at which his mental state would likely be a key issue." Moreover, the board found that the respondent appropriately was circumspect about the information he could disclose to BSH staff, given that he owed a duty of confidentiality to A.B. The board did not interpret the May 10, 2016 letter as evasive, or as part of a scheme to obtain funds from A.B. under false pretenses.

I conclude that the board's determination is supported by substantial evidence. Nowhere did the respondent represent that he had personal knowledge that A.B., in fact, was the subject of a murder investigation. The letter states accurately that A.B. had "sought" to retain him; the record shows that, at that point, A.B. had not yet signed the fee agreement, and the requested retainer had not been provided. If the case were to proceed, the fee of $100,000 was reasonable and necessary to defend against the very serious forthcoming criminal charges.

4. Appropriate Sanction. An appropriate sanction in a bar disciplinary matter is one which is "necessary to protect the public and deter other attorneys from the same behavior." In re Foley, 439 Mass. 324, 333 (2003), quoting Matter of Concemi, 422 Mass. 326, 329 (1996). "Although the effect upon the respondent lawyer in any discipline case is an important consideration, the primary factor [in determining a bar

discipline sanction] is the effect upon, and perception of, the public and the bar." Matter of Finnerty, 418 Mass. 821, 829 (1994), citing Matter of Alter, 389 Mass. 153, 156 (1983).

Generally, in considering the appropriate sanction in a given case, "the board's recommendation is entitled to substantial deference." Matter of Tobin, 417 Mass. 81, 88 (1994). At the same time, however, "[e]ach case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of Murray, 455 Mass. 872, 883 (2010), quoting Matter of Discipline of an Attorney, 392 Mass. 827, 837 (1984). See Matter of Saab, 406 Mass. 315 (1998), quoting Matter of McInerney, 389 Mass. 528, 531 (1983) ("All bar discipline proceedings take into account the 'totality of the circumstances'"). Thus, in determining an appropriate sanction, "this court is not bound by the recommendation of either the [b]oard or [b]ar counsel." Matter of Alter, 389 Mass. 153, 157 (1983).

The board noted that violations of Rule 1.5 (b) (lack of a writing concerning the scope of engagement and fee) and Rule 1.5 (e) (failure to obtain a client's written consent to a referral fee) ordinarily would result in an admonition or a public reprimand. In recommending a public reprimand, the board concluded that the respondent's conduct was aggravated by A.B.'s status as a vulnerable victim, and the respondent's considerable

experience in the practice of law. Based on these findings, which I adopt, the appropriate sanction is a public reprimand.

5. Conclusion. Accordingly, an order shall enter that the attorney be subject to a public reprimand.

By the Court,

/s/ Frank M. Gaziano
Frank M. Gaziano
Associate Justice

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