COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, *ss.* SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2021-070

MATTER OF PETER T. SLIPP

MEMORANDUM OF DECISION

This matter came before the court, Cypher, J., on an information filed by the Board of Bar Overseers (board) under S.J.C. Rule 4:01, § 8 (6), as appearing in 453 Mass. 1310 (2009), regarding the character and conduct of the respondent, Peter T. Slipp, who was admitted to the bar of the Commonwealth on December 18, 1974. The respondent was charged with two counts of violating disciplinary rules, each related to his representation of a different client or set of clients. The hearing committee determined that the respondent had committed a number of violations. As to count 1, the hearing committee found that the respondent intentionally misused client funds, in violation of Mass. R. Prof. C. 1.15 (b), as appearing in 471 Mass. 1380 (2015); made cash withdrawals from an IOLTA account, in violation of Mass. R. Prof. C. 1.15 (e) (4); failed to deposit client funds in a separate interest-bearing account, in violation of Mass. R. Prof. C. 1.15 (e) (6); failed to provide his clients with a writing stating the basis for his fees and expenses, see Mass. R. Prof. C. 1.5 (b), as appearing in 463 Mass. 1302 (2012); failed to provide competent representation, to seek the lawful objectives of his clients and to perform the contracted services with reasonable diligence, in violation of Mass. R. Prof. C. 1.1, as appearing in 471 Mass. 1311 (2015); Mass. R. Prof. C. 1.2 (a), as appearing in 471 Mass. 1313 (2015); and Mass. R. Prof. C. 1.3, as appearing in 471 Mass. 1318 (2015); and engaged in conduct involving dishonesty and reflecting adversely on his fitness to practice law, see Mass. R. Prof. C. 8.4 (c),

(h), as appearing in 471 Mass. 1483 (2015). With respect to count 2, the hearing committee found that the respondent failed to provide his client with a written contingent fee agreement, see Mass. R. Prof. C. 1.5 (c), as amended, 480 Mass. 1315 (2018), and engaged in conduct prejudicial to administration of justice and adversely reflecting on his fitness to practice law see Mass. R. Prof. C. 8.4 (d), (h), as appearing in 471 Mass. 1483 (2015).[1]

The board voted to adopt the hearing committee's decision and to file an information with this court recommending that the respondent be disbarred. The board's recommendation that the respondent be disbarred is based on his violating Mass. R. Prof. C. 1.15 (b), as appearing in 471 Mass. 1380 (2015), by intentionally misusing client funds as alleged in count 1. As to each of the additional violations which made up the rest of count 1 and the violations that were proved as to count 2, the board noted that the recommended sanction was an admonition, public reprimand, or a short suspension but did not recommend any separate or increased sanction other than the disbarment.

[1] As to count 2, bar counsel also alleged that the respondent failed to provide competent representation, to seek his clients' lawful objectives, and to perform contracted services with reasonable diligence, see Mass. R. Prof. C. 1.1, as appearing in 471 Mass. 1311 (2015); Mass. R. Prof. C. 1.2 (a), as appearing in 471 Mass. 1313 (2015); Mass. R. Prof. C. 1.3, as appearing in 471 Mass. 1318 (2015); failed to keep his client reasonably informed and to comply with reasonable requests for information, see Mass. R. Prof. C. 1.4 (a)-(b), as appearing in 471 Mass. 1319 (2015); made knowingly false statements to a tribunal, see Mass. R. Prof. C. 3.3 (a) (1), as appearing in 471 Mass. 1416 (2015); engaged in the unauthorized practice of law in another jurisdiction, see Mass. R. Prof. C. 5.5 (a), as amended, 474 Mass. 1302 (2016); and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, see Mass. R. Prof. C. 8.4 (c), as appearing in 471 Mass. 1483 (2015). The hearing committee concluded that bar counsel had not carried its burden to prove the alleged violations included in count 2, except for the respondent's failure to provide his client with a written contingent fee agreement and his engaging in conduct prejudicial to administration of justice and adversely reflecting on his fitness to practice law.

The matter came before me for a hearing on January 13, 2022.[2] I have considered carefully the parties' arguments and reviewed the respondent's answer, the parties' proposed findings of fact and rulings of law, the voluminous exhibits and record of proceedings before the hearing committee and the board, and the hearing committee's report. I conclude that the record provides ample bases for the hearing committee's conclusions, which the board adopted, that the respondent intentionally misused client funds, with deprivation resulting, and committed a number of other violations. Nevertheless, I conclude that on the facts of this case, including the respondent's efforts at near-total voluntary restitution and the absence of evidence of fraudulent or deceitful conduct by the respondent, indefinite suspension is warranted. I therefore order that the respondent be indefinitely suspended from the practice of law.

Background. I summarize the board's findings of fact, which the respondent does not dispute, supplemented as necessary by the undisputed evidence.[3] The respondent is a solo practitioner. He maintained a general law practice that has included family law, real estate closings, estate planning, and accident cases. He has handled hundreds of real estate closings.

1. Count 1. The respondent knew and provided legal services to Paul and Lorraine Higginbottom (Higginbottoms) for more than forty years. Over the years, he represented them in various matters involving family law, collections, real estate transactions, and other real estate matters. The respondent represented the Higginbottoms in the purchase of a condominium in

[2] At the close of the hearing, the parties were given ten days to file any additional material that they deemed helpful to my consideration of the case. Neither party made any additional filing in the time provided.

[3] As the committee and the board's recommendation of disbarment is based on the conduct that forms the basis of count 1 only, see note 1, supra, I confine my recitation of the facts to those that form the basis for count 1.

December 2017. When he agreed to represent them in this new transaction, the respondent did not provide the Higginbottoms with a written communication setting out the scope of the representation and the basis or rate of the fees and expenses for which they would be responsible. The respondent and the Higginbottoms discussed the terms of the representation and came to an oral agreement.

The total purchase price of the condominium was $193,000. After the respondent paid a $10,000 deposit on the Higginbottoms' behalf, the Higginbottoms delivered the balance of the purchase price, $183,000, to the respondent on January 3, 2018, so that he could complete the payment. The respondent deposited the funds in an IOLTA account at TD Bank (IOLTA account). Around the same time, the Higginbottoms provided the respondent with $997 for legal fees, title examination, and recording fees, and the respondent deposited these funds into his personal account, instead of the IOLTA account.

On January 9, 2018, the respondent obtained a mortgage payoff statement for the sellers' mortgage from the mortgagee. The payoff statement showed a payoff figure of $96,748.48 (the initial payoff amount) valid through January 31, 2018. The payoff statement explicitly provided that the payoff figure was subject to adjustment at any time. The respondent recorded the executed deed transferring the condominium from the sellers to the Higginbottoms at the Registry of Deeds on January 10, 2018. The respondent did not pay the initial payoff amount to the mortgagee at this time.

On January 12, 2018, the respondent disbursed $85,371.44 of the sale proceeds to the sellers. He also withdrew $997 for his legal fees and the title examination and recording fees from the sale proceeds in the IOLTA account, instead of from the funds he had deposited into his personal account. As a result, there were insufficient funds in the IOLTA account as of January

12, 2018, to pay off the mortgage. On January 17, 2018, the respondent withdrew $997 from his personal account in cash and deposited it into the IOLTA account. The respondent testified that he did not remember making this transfer or why he made it but speculated that he did so because he needed to bring the IOLTA account up by that amount.

Even though the respondent then had sufficient funds in the IOLTA account on January 17, 2018, to pay the initial payoff amount to the mortgagee, he did not do so. On January 23, 2018, the mortgagee faxed the respondent an updated mortgage payoff statement dated January 22, 2018, indicating that the balance due had increased to $97,392.72 (the increased payoff amount), and that this amount was valid through January 31, 2018. Even though he was notified of the increase, the respondent transmitted the original (now deficient) payoff amount to the mortgagee on January 24, 2018. The mortgagee initially sent the respondent a notice that the mortgage was paid off, but later notified him that the payment was insufficient and returned the funds to the IOLTA account. At the respondent's request, the Higginbottoms delivered to the respondent a check for the increase in the payoff amount, $515.85. The respondent wired the combined total to the mortgagee on February 22, 2018. By this time however, there had been a further increase in the payoff amount, and the mortgagee again returned the payment to the IOLTA account. On March 29, 2018, the mortgagee faxed another updated payoff statement with the payoff amount listed as $98,056.60. The respondent took no action over the course of the next several months and did not respond to the Higginbottoms' inquiries as to whether the matter had been resolved.

The Higginbottoms' funds remained in the IOTLA account. The statements for the IOLTA account show that, between March 26 and November 28, 2018, the respondent made eight cash withdrawals from the IOLTA account totaling $6,390. Each of the transfers appears

on the statements as a debit transaction. The respondent does not deny that he used the withdrawn funds for personal and business expenses.[4] As of the date of the March 2018 statement for the IOLTA account, the account balance had fallen below $97,264.33, the amount the Higginbottoms had provided for the payoff of the mortgage. The balance consistently remained below that amount through November 30, 2018, when the balance was $92,738.16—$4,526.17 short of the amount provided for the payoff.

Meanwhile, the Higginbottoms retained successor counsel, paid off the mortgage with additional funds, and secured a discharge of the mortgage. Successor counsel made numerous demands for the respondent to return the Higginbottoms' money, with which the respondent did not comply. In December 2018, the respondent made a series of partial payments to the Higginbottoms, returning most of the funds, but leaving a balance of $464.33 unpaid. Eventually, the Higginbottoms successfully sued the respondent in small claims court to recover the unreturned amount.[5]

According to the respondent's proposed findings of fact, throughout this matter, he engaged with successor counsel and with counsel for the mortgagee and the sellers in an effort to resolve the problem and kept the Higginbottoms informed of its status, but the board did not credit these representations.

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[4] The respondent did not submit specific proposed findings on his use of the funds but contended that bar counsel failed to carry its burden to show that he misused funds. While he denied the allegation in his answer, his basis for doing so was that he lacked knowledge of how the withdrawn funds were spent.

[5] As the hearing committee noted, the record is unclear as to the amount sought be the lawsuit. There was a judgment against the respondent, and he paid $3,000 to the Higginbottoms in installments. It appears from the testimony at the hearing that the respondent, having paid this amount, accomplished full restitution to the Higginbottoms.

2. Count 2. Michael Sangiorgio is a resident of New Hampshire. On January 15, 2015, Sangiorgio was injured in a motor vehicle accident in New Hampshire, in which the other driver was at fault. The other driver also was a resident of New Hampshire and was insured by Amica Insurance Co. (Amica).

Sangiorgio, who worked in Massachusetts, went to the respondent's office, and the respondent agreed to represent him in negotiating a settlement. The respondent is not licensed to practice law in New Hampshire. The respondent agreed to represent Sangiorgio on a contingent fee basis but never provided Sangiorgio with a written contingent fee agreement.

Amica made an initial offer of settlement in the amount of $4,500 on September 3, 2015. The respondent testified that he rejected this offer after conferring with Sangiorgio. The evidence, however, indicates that Amica sent the respondent at least seven follow-up letters regarding this offer from October 2015 to May 2017. The respondent testified that he did not recall accepting this offer at any time and that he did not have the authority to accept it. Nevertheless, a letter from Amica to the respondent dated June 8, 2017, sought to confirm that the respondent had accepted the offer by voicemail on May 11, 2017. The letter included a release and settlement agreement for Sangiorgio to sign. The respondent claimed that he gave the agreement to Sangiorgio and that Sangiorgio did not sign it.

As the settlement process became prolonged, the statute of limitations on Sangiorgio's claims related to the motor vehicle accident approached. The respondent decided not to charge Sangiorgio for his services and informed Sangiorgio that he would need to hire New Hampshire counsel. The respondent drafted a pro se complaint against the other driver, signed Sangiorgio's name to the complaint, and filed it in New Hampshire Superior Court on January 12, 2018.[6] The

[6] The respondent did not charge Sangiorgio for drafting the complaint.

respondent admitted that it would have been better practice to include the notation "prepared with the assistance of counsel" on the complaint, but that he did not do so. On January 17, 2018, the respondent sent a copy of the complaint to Amica along with a letter suggesting that Amica increase its settlement offer.

On January 25, 2018, Amica offered to settle the matter for $7,500. The respondent communicated the offer to Sangiorgio. On or about February 6, 2018, Amica and the respondent, with Sangiorgio's consent, agreed to settle the matter for $8,000. That same day, Amica sent a release to the respondent. The respondent first testified that he gave the release to Sangiorgio and recommended that he sign it but later testified that he did not recall whether he actually gave the release to Sangiorgio or only told him about the $8,000 offer. Several times over the course of the next year, Amica requested a status update from the respondent by mail. The respondent never replied. Sangiorgio did not sign the release.

The respondent never served the New Hampshire complaint on the defendant, the other driver. The complaint therefore was dismissed on April 2, 2018.

Procedural history. On April 26, 2018, during the period when the respondent failed to respond to the Higginbottoms' repeated requests for information, the Higginbottoms filed a request for investigation with bar counsel.[7] Bar counsel commenced its investigation and filed a petition for discipline with the board on June 6, 2019, that included counts 1 and 2. The respondent initially was defaulted for failing to file an answer. The default subsequently was removed, and the respondent, represented by counsel, filed an answer on October 28, 2019.

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[7] The history of how the respondent's representation of Sangiorgio came to bar counsel's attention does not appear in the record.

After a two-day hearing at which the respondent was the sole witness, the hearing committee issued its hearing report on May 17, 2021,[8] finding that the respondent had committed numerous violations, including misusing client funds, and recommending disbarment.[9] The board voted to adopt the hearing committee's recommendation and to file an information with this court recommending that the respondent be disbarred. An information was filed on November 18, 2021.

Discussion. 1. Rule violations. The single justice upholds "[t]he subsidiary findings of the hearing committee, as adopted by the board, '. . . if [they are] supported by substantial evidence.'" Matter of Weiss, 474 Mass. 1001, 1001 n.1 (2016), quoting S.J.C. Rule 4:01, § 18 (5), as appearing in 453 Mass. 1315 (2009). "[T]he hearing committee's ultimate 'findings and recommendations, as adopted by the board, are entitled to deference, although they are not binding on this court.'" Id., quoting Matter of Ellis, 457 Mass. 413, 415 (2010). See Matter of Lupo, 447 Mass. 345, 356 (2006); Matter of Hiss, 368 Mass. 447, 461 (1975). The hearing committee is the sole judge of credibility; accordingly, the committee's credibility determinations "will not be rejected unless it can be 'said with certainty' that the finding was 'wholly inconsistent with another implicit finding'" (citation omitted). Matter of Haese, 468 Mass. 1002, 1007 (2014).

[8] The board subsequently issued a corrected hearing report on May 21, 2021.

[9] One member of the hearing committee dissented in part as to the conclusion that the respondent had violated Mass. R. Prof. C. 1.5 (c) as it pertained to count 2 by failing to provide Sangiorgio with a written contingent fee agreement. The dissenting member was of the opinion that the respondent's decision to not to charge Sangiorgio for his services was sufficient to excuse the respondent's failure to provide a written contingent fee agreement.

As to count 1, both before the hearing committee and at the hearing before me, the respondent did not materially dispute that he made improper cash withdrawals from the IOLTA account and used the Higginbottoms' funds for his own purposes. Instead, he stated only that he did not know how the withdrawn funds had been spent. He also admitted that he "inadvertently] lost track of the balance in the IOLTA account" and "allowed the balance of [the] IOLTA account to dip below the amount equal to the payoff balance of the mortgage." As to the $997 that the respondent withdrew from the IOLTA account to pay for legal fees and the title examination and recording fees, and which he later replaced with funds that he had received from the Higginbottoms and deposited into his operating account, the respondent stated that he did not recall making the transfer but admitted that he likely did so to bring the IOLTA account up to the amount required to pay off the mortgage.

The hearing committee concluded that misuse resulting in actual deprivation occurred because the Higginbottoms' funds were the only funds in the IOLTA account and the account balance consistently fell below the amount needed to pay off the mortgage as a result of the numerous cash withdrawals that the respondent made. In addition, the funds were due immediately to the mortgagee on the Higginbottoms' behalf, but the respondent failed to timely pay off the mortgage. Eventually, the Higginbottoms were forced to pay off the mortgage using additional personal funds. The record therefore adequately supports the hearing committee's conclusion, which the board adopted, that misuse resulting in deprivation occurred in violation of Mass. R. Prof. C. 1.15 (b) and 8.4 (c), (h).[10] Matter of Bailey, 439 Mass. 134, 150 (2003)

[10] Rule 8.4 (c) of the Massachusetts Rules of Professional Conduct states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." While the respondent's misuse of the funds for his own purposes suffices to show a violation of Mass. R. Prof. C. 8.4 (c), see Matter of Abrams, 436 Mass. 650, 652 (2002),

("Deprivation arises when an attorney's intentional use of a client's funds results in the unavailability of the client's funds after they have become due, and may expose the client to a risk of harm, even if no harm actually occurs" [citation omitted]). In addition, these facts support the hearing committee's findings and conclusions that the respondent violated Mass. R. Prof. C. 1.15 (e) (4) by making cash withdrawals from the IOLTA account and violated Mass. R. Prof. C. 1.15 (e) (6) by holding an amount in excess of $96,000 in a noninterest-bearing IOLTA account instead of in a separate interest-bearing account.

The record likewise supports the hearing committee's determination that the respondent failed to communicate the scope of the representation and the basis for his fees and expenses to the Higginbottoms. The respondent admitted that he did not provide the Higginbottoms with a written fee agreement and asserted that his longstanding relationship and oral fee agreement with them made a written agreement unnecessary. Rule 1.5 (b) (1) of the Massachusetts Rules of Professional Conduct, which requires an attorney to communicate in writing "the scope of the representation and the basis or rate for the fee and expenses for which the client will be responsible," also provides an exception "when the lawyer will charge a regularly represented client on the same basis or rate." The respondent's arrangement with the Higginbottoms does not come within this exception. The respondent never had a fee agreement with the Higginbottoms, and he did not claim that he always had charged the Higginbottoms the fee of from $500 to $700 purportedly agreed to in this case. In addition, he had not represented them for from five to seven years prior commencing the representation at issue, and he did not recall whether the last matter in which he represented them was a real estate closing or what he had charged them.

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we note that the committee made no other finding indicating that the defendant made false statements or engaged in other intentionally fraudulent conduct. See infra, part 2.

After reviewing the record, I conclude that the hearing committee's additional findings with respect to count 1, that the respondent failed to provide competent representation, to seek the lawful objectives of his client and to perform the contracted services with reasonable diligence, were supported by substantial evidence. See Mass. R. Prof. C. 1.1, 1.2 (a), 1.3.

With regard to count 2, the record supports the hearing committee's conclusions that the respondent failed to provide Sangiorgio with a written contingent fee agreement in violation of Mass. R. Prof. C. 1.5 (c), as he admitted at the hearing. In addition, the record supports the hearing committee's conclusion that the respondent's inconsistent and confusing testimony amounts to a violation of subsections (d) and (h) of Mass. R. Prof. C. 8.4, which do not require a showing of intent. These findings, as well, were supported by substantial evidence.[11]

2. Sanction. The presumptive sanction for intentional misappropriation of client funds, resulting in actual deprivation, is indefinite suspension or disbarment. Matter of Schoepfer, 426 Mass. 183, 186-187 (1997). The single justice must "afford substantial deference to the [board's] recommended disciplinary sanction." Lupo, 447 Mass. at 356, quoting Matter of Griffith, 440 Mass. 500, 507 (2003). However, the single justice "must ultimately decide every case 'on its own merits [such that] every offending attorney . . . receive[s] the disposition most appropriate in the circumstances.'" Lupo, supra, quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984). The "primary concern in bar discipline cases is the effect upon, and perception of, the public and the bar," and the single justice "must therefore consider, in reviewing the board's recommended sanction, what measure of discipline is necessary to protect the public and deter other attorneys from the same behavior" (internal quotation marks and citations omitted).

[11] I also agree with the hearing committee's conclusion that the record does not support the remaining violations alleged as part of count 2. See note 1, supra.

Lupo, supra. In addition, the sanction imposed should not be "markedly disparate from those ordinarily entered by the various single justices in similar cases." Matter of Pudlo, 460 Mass. 400, 404 (2011), quoting Matter of Alter, 389 Mass. 153, 156 (1983). Indefinite suspension is only "a somewhat lesser sanction than disbarment," Matter of Collins, 455 Mass. 1020, 1021 (2010), and in choosing between the two, the court "generally considers whether restitution has been made." Matter of LiBassi, 449 Mass. 1014, 1017 (2007).

In assessing the board's recommended sanction of disbarment, I find it significant that the respondent made voluntary restitution of most of the Higginbottoms' funds—all but $464.33, which he later returned as well in the small claims court action. See Matter of Grossman, 448 Mass. 151, 157 n.5 (2007) ("restitution . . . is a significant factor in determining between the two sanctions"). While restitution as a result of a court action does not weigh in favor of selecting indefinite suspension over disbarment as a sanction, see LiBassi, 449 Mass. at 1017; but see Matter of Brauer, 452 Mass. 56, 75-76 (2008) (indefinite suspension notwithstanding that respondent returned funds only after being sued), the respondent here remitted the great majority of the money at issue to the Higginbottoms without their having to bring an action to compel him to do so. That he did so after the Higginbottoms filed a complaint with bar counsel does not necessarily preclude the imposition of indefinite suspension over disbarment, see Matter of Johnson, 452 Mass. 1010, 1012 (2008) (indefinite suspension imposed where respondent made restitution to one client after complaint filed with bar counsel and to second client only after bar counsel became aware of misappropriations); Grossman, supra at 156-158 (indefinite suspension imposed where respondent made restitution after bar counsel commenced investigation), nor does the fact that that the voluntary restitution was partial, Collins, 455 Mass. at 1022 (considering partial restitution in mitigation even as court observed that "[p]artial restitution,

however, even if substantial, is not a substitute for full restitution" and modified order of indefinite suspension to include condition that respondent make full restitution).

Bearing in mind that the sanction in this case ought not to be "markedly disparate" from those imposed in similar cases, Pudlo, 460 Mass. at 404, quoting Alter, 389 Mass. at 156, I note that indefinite suspension has been imposed even in cases of more serious and extensive misconduct, including not infrequently the mishandling and commingling of multiple clients' funds and the making of false statements to bar counsel and others, circumstances not present here. See, e.g., Matter of Strauss, 479 Mass. 294, 301-302 (2018) (imposing indefinite suspension where respondent failed to timely pay settlement funds to client, failed to notify client of receipt of funds or of his paying fee out of them; converted client funds, and provided bar counsel with "reconstructed records" to conceal misuse of funds, about which he testified falsely); Matter of Osagiede, 453 Mass. 1001, 1002 (2009) (imposing indefinite suspension where respondent mishandled funds of six clients and, after warning from bar counsel, continued to commingle funds and pay personal and business expenses from IOLTA account); Johnson, 452 Mass. at 1010-1011 (imposing indefinite suspension where respondent intentionally misappropriated funds of three clients, used subsequent clients' funds to repay clients whose funds previously had been converted, commingled funds, signed client's name to settlement check without authorization, and made false statements to bar counsel); Brauer, 452 Mass. at 75 (imposing indefinite suspension where respondent intentionally converted escrowed funds in violation of fiduciary duty, failed to inform court that escrowed funds belonged to lender instead of client, and returned funds only after being sued); Grossman, 448 Mass. at 156 (imposing

indefinite suspension where respondent commingled, misused, and converted client funds and fabricated evidence provided to bar counsel).[12]

By the same token, cases involving intentional misuse of client funds which resulted in disbarment appear to include misconduct more egregious than that which occurred in this case, including affirmative fraudulent conduct. See, e.g., Matter of Dasent, 446 Mass. 1010, 1011 (2006) (disbarment imposed where respondent intentionally misused and commingled client funds, failed to make full restitution, and "obstructed bar counsel's investigation of the matter by failing to cooperate, making misrepresentations, furnishing fabricated evidence"); Matter of Dragon, 440 Mass. 1023, 1023-1025 (2003) (disbarment imposed where respondent commingled funds and "consistently and rapidly depleted client settlement funds deposited into [IOLTA] account [and] continually deposited personal or business funds to address persistent shortfalls in his IOLTA account, and used client funds for personal purposes" and then displayed lack of candor with bar counsel).[13]

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[12] See also, e.g., Matter of Abelson, 24 Mass. Att'y Discipline Rep. 1, 2-5, 9 (2008) (indefinite suspension imposed where respondent repeatedly used account that was not balanced for real estate transactions; deposited personal funds into account when overdrawn; failed to make necessary filings and to appear for trial, resulting in default judgment of which he failed to notify client immediately; and was found in contempt for failing to satisfy judgement that client obtained against him); Matter of Walsh Sullivan, 23 Mass. Att'y Discipline Rep 695, 698-699, 701-703 (2007) (indefinite suspension imposed where respondent commingled funds; failed to distribute estate proceeds for approximately three years; used funds from one estate to pay beneficiaries of another estate; made disbursement to charity not listed in will; failed to notify Attorney General of charitable bequests as required by statute; failed to respond to inquiries of investigating attorney; failed to comply with court order to render inventory and account to an estate; admitted that fees charged were not supported by records of time worked; and deceived clients to conceal misconduct).

[13] See also, e.g., Matter of Boyce, 25 Mass. Att'y Discipline Rep. 74, 75-76 (2009) (disbarment imposed where respondent misused over $66,000 and converted over $27,000 in client funds, was aware of insufficient funds in IOLTA account when he transmitted payment to mortgagee, intentionally misrepresented facts regarding payoff check to bar counsel, and failed to cooperate with bar counsel's investigation).

3. Aggravation and mitigation. a. Matters in mitigation. The respondent raised four mitigating factors in favor of imposing a lesser sanction than disbarment: his previously clean disciplinary record, his troubled financial condition, his and his wife's poor health, and his efforts at restitution. The hearing committee declined to weigh the first three factors in mitigation. I agree with this approach, and, like the hearing committee, I assign them no weight. The respondent's otherwise satisfactory record at the bar is only a typical mitigating factor not entitled to weight, see Matter of Alter, 389 Mass. 153, 157 (1983), and the respondent failed to establish a connection between his and his wife's poor health and his misconduct, see Matter of Luongo, 416 Mass. 308, 311 (1993). The respondent's troubled financial condition provides no basis to excuse his misconduct.[14]

As to the fourth factor, the hearing committee declined to assign weight to the respondent's efforts at restitution because they occurred after the Higginbottoms' complaint to bar counsel and, later, as a result of being sued by the Higginbottoms. As discussed supra, I consider it significant that the respondent made almost full restitution without having been ordered to do so, albeit after bar counsel became involved. The only disbarment case that the hearing committee cited in support of its decision not to weigh restitution as a mitigating factor in this case involved misconduct more egregious than in this case and restitution that was entirely involuntary because it was court ordered. See Matter of Concemi, 422 Mass. 326, 330 (1996) (disbarment where respondent had been convicted of thirty-five felonies and restitution was entirely court ordered). In contrast, in Matter of Martin, 5 Mass. Att'y Disc. R. 238, 239

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[14] I disagree with the dissenting member of the hearing committee's opinion that the respondent's decision not to charge Sangiorgio for his services excuses the respondent's failure to provide Sangiorgio with a written contingent fee agreement at the outset of the representation. See note 9, supra.

(1988), which the hearing committee also cited, restitution after discovery of the misconduct was given "some" mitigating weight in determining that term suspension was the appropriate sanction.

b. Matters in aggravation. The hearing committee weighed a number of matters in aggravation, namely the age and vulnerability of the Higginbottoms, the respondent's multiple violations of the rules of professional conduct, and the respondent's substantial experience in handling real estate transactions. While these matters are serious and weigh in aggravation, for the reasons that follow I conclude that they do not require disbarment as opposed to indefinite suspension in this case.

i. Elderly and vulnerable clients. While the Higginbottoms were elderly and vulnerable clients, this is not a case, like those cited by the hearing committee, where the client's vulnerability played a role in the attorney's taking advantage of them. See Lupo, 447 Mass. at 345-346, 358 (aggravating weight assigned where respondent failed to disclose conflicts of interest to elderly, unsophisticated clients, including his aunt, "reflect[ing] an insensitivity to his obligation of absolute fiduciary fidelity . . . combined with a pattern of self-dealing and self-enrichment at their expense"); Matter of Pemstein, 16 Mass. Att'y Disc. R. 339, 345 (2000) (respondent "took advantage of a vulnerable elderly woman"). I note that in both Lupo, supra at 362, and Pemstein, supra at 351, indefinite suspension was imposed as a sanction despite the weight given to the age and vulnerability of the clients.

ii. Multiple violations. While the defendant committed multiple acts of misconduct, the bulk of these violations occurred with respect to a single representation of one set of clients over the course of less than a year. The cases on which the hearing committee relied, like many others in which multiple violations were weighed in aggravation, involved violations over a

number of years and with respect to multiple clients. See Matter of Saab, 406 Mass. 315, 325-326 (1989) (multiple violations as to four clients over course of eight years weighed in aggravation); Matter of McBride, 21 Mass. Att'y Disc. R. 455, 456-465 (2005) (multiple violations as to three clients over a number of years). See also Matter of Grayer, 483 Mass. 1013, 1019 (2019) (multiple violations, multiple clients); Matter of Strauss, 479 Mass. at 302 (same); Matter of Sharif, 459 Mass. 558, 562 (2011) (same). Often in such cases, a sanction less than disbarment has been imposed. See Grayer, supra at 1019 (one-year suspension); Strauss, supra at (indefinite suspension); Sharif, supra at 571 (three-year suspension with third year stayed for two-year probationary period); Saab, supra at 329 (eighteen-month suspension). But see McBride, supra at 470 (disbarment where multiple violations occurred and where respondent had a record of discipline including similar violations). Thus, while the respondent's multiple violations weigh in aggravation, the significant sanction of indefinite suspension is nevertheless sufficient. See Collins, 455 Mass. at1021 (indefinite suspension is only "a somewhat lesser sanction than disbarment").

iii. Experience with real estate transactions. While I agree that the respondent's substantial experience with real estate transactions weighs in aggravation, it does not require disbarment. See, e.g., Matter of Diviacchi, 475 Mass. 1013, 1018, 1021 (2016) (experience weighed in aggravation, but twenty-seven month suspension imposed).

Conclusion. I conclude that, in the circumstances presented in this case, indefinite suspension is the appropriate sanction and is sufficient to protect the public and to deter other attorneys from similar misconduct. See Lupo, 447 Mass. at 356. A judgment shall enter suspending the respondent indefinitely from the practice of law in the Commonwealth.

By the Court,

/s/ Elspeth B. Cypher
Elspeth B. Cypher
Associate Justice

DATED: April 11, 2022