IN RE: MICHAEL M. McARDLE
BBO NO. 326580

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COMMONWEALTH OF MASSACHUSETTS
BOARD OF
BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL, **Petitioner** **vs.** **MICHAEL M. MCARDLE, ESQ.,** **Respondent**	**B.B.O. File No. C2-18-00252623**

HEARING REPORT

Statement of Proceedings

On June 30, 2020, Bar Counsel filed a petition for discipline against Michael M. McArdle. The petition charged that the respondent:

(Count One): did not keep a client adequately informed concerning his representation of her, charged her a clearly excessive fee and did not refund the excess upon termination of the representation, and did not obtain her informed consent to a contingent fee agreement that was materially different from the forms approved by the rules of professional conduct;

(Count Two): entered into agreements with numerous other clients, without obtaining their informed consent, by which he charged clearly excessive contingent fees, monthly fees that had no relation to the work performed, non-refundable retainers or advance fees that had not been earned when paid, and early termination fees; that some of those provisions violated state and federal regulations governing mortgage foreclosure relief services; and that the agreements included collection provisions to which the clients had also not given informed consent;

(Count Three): commingled unearned legal fees with personal funds, failed to deposit into a trust account fees that had been paid in advance, intentionally misused clients' funds for personal purposes, caused negative balances in trust accounts, and failed to maintain required trust account records and reconciliations.

Represented by counsel, the respondent filed an answer to the petition on October 1, 2020. We were appointed as the hearing committee on October 7, 2020.

On December 8, 2020, we conducted a remote prehearing conference. That day, we allowed a motion to withdraw the appearance of counsel for the respondent that was accompanied by the appearance of successor counsel.

On December 21, 2020, the respondent moved to amend his answer. On the same date, he submitted to the Board of Bar Overseers a proposed affidavit of resignation. The Board declined the tendered resignation and remanded the case to us for further proceedings. The proffered resignation does not affect our decision in this case. The committee chair allowed the amendment to the respondent's answer on January 21, 2021.

We held a remote final prehearing conference on February 3, 2021.

On February 5, 2021, the respondent moved to withdraw his affidavit of resignation and to further amend his answer to the petition for discipline. We allowed the motion on February 9, 2021. The second amended answer is the operative one in this proceeding.

We held remote evidentiary hearings on February 16, 17 and 18, March 16, and April 8 and 16, 2021. Fifty-one exhibits were admitted. Ten witnesses testified: the respondent; Morgan Russell, Esq., who kept the McArdle firm's trust account records at certain times; Stephanie McArdle, the respondent's daughter, who kept the firm's records at an earlier time and who is an officer of a non-profit corporation to which the respondent made payments from clients' trust funds; Al Nolan, Bar Counsel's financial investigator (since deceased); Neurys Balbi, a computer network consultant who worked for the McArdle firm; and five present or former clients of the respondent: Eddie Telemaco, Ray Cloutier, Paul Wennik, Bruce Boguslav and Ronald Morse.

On July 26, 2021, the parties filed their proposed findings of fact and conclusions of law.

Findings of Fact and Conclusions of Law[1]

Common Facts (¶¶ 1-3)

1. The respondent, Michael M. McArdle, was admitted to the Massachusetts bar on December 18, 1980. Ans. ¶ 2. He practices as a principal of McArdle Law & Associates, PLLC, at 280 Merrimack Street, Lawrence (formerly Law Offices of Michael M. McArdle). Ans. ¶ 2.

2. During the time the alleged disciplinary violations occurred (which was from 2011 to 2020), the respondent's practice consisted, in significant part, of the representation of homeowners facing foreclosure of their mortgages and resulting eviction from their homes. Ans. ¶ 28. The respondent and those clients entered into "foreclosure defense client fee agreements" that typically required payment of an up-front fee or retainer plus monthly installments in fixed amounts, and that sometimes also involved reverse contingent fees (or success fees) and collection provisions. Ans. ¶¶ 30, 31. Many of the disciplinary violations charged by Bar Counsel arose from provisions of those agreements. We have concluded that some, but not all, of those violations have been established.

3. On April 4, 2018, Bar Counsel notified the respondent of a grievance filed against him by a former client, Mary Kathryn O'Brien. Ex. 1. Not all the claims of misconduct made in O'Brien's grievance were charged in the petition for discipline.

Count One: Findings of Fact (¶¶ 4-42)

4. In this section of our report, we set forth our findings of fact concerning the respondent's relationship with former client O'Brien (¶¶ 5-42) and our conclusions (¶¶ 43-55) that the respondent (a) did not keep his client adequately informed concerning his representation of her, (b) charged and collected from her a clearly excessive fee, (c) did not refund the excess

[1] In this report, the hearing transcript is cited as "Tr. [#]:[page]." The hearing exhibits are cited as "Ex._." The petition for discipline and O'Brien's grievance are in evidence by agreement. Ex. 37; Ex. 1. The respondent's second amended answer to the petition is also in evidence by agreement. Ex. 36. Therefore, the statements of fact and the admissions made in it are part of the evidentiary record of this case. It is cited as "Ans. ¶ _."

We have considered all the evidence, but we have not necessarily identified all evidence supporting our findings where the evidence is cumulative. We credit the testimony cited in support of our findings to the extent of those findings; we do not credit contradictory testimony. In some findings, we have expressly identified testimony we do or do not credit.

when the representation ended, and (d), as a result, deprived O'Brien of those excess funds. We find that Bar Counsel did not establish that the respondent's agreement with O'Brien included a provision for a contingent fee; therefore, we conclude that there was no violation of the rules of professional conduct governing contingent fee agreements.

The Client (¶¶ 5-7)

5. O'Brien owns 103 High Street, Newbury (the "Property"), and resides there. Ans. ¶ 3, Ex. 36, at Bates Page ("BP") 1550.

6. O'Brien bought the Property in 2002. In 2006, she obtained a $150,000 line of credit, secured by the Property, from Washington Mutual Bank ("WAMU"). By 2008, she had also encumbered it with a refinanced mortgage to WAMU in the principal amount of $825,000 (the "Mortgage"). Tr. II:106-107 (respondent); Ans. ¶ 4, Ex. 36, at BP 1550.

7. Around June 11, 2009, O'Brien was turned down by WAMU for a loan modification because the outstanding balance was too high. Tr. II:108-109 (respondent); Ex. 22, at BP 1271 (O'Brien's letter of 8/9/2009 WAMU, questioning denial). See also Ex. 22, at BP 1276-1277 (Chase letter declining modification in 2010 because of loan balance). Around August 2009, O'Brien received from WAMU a notice of foreclosure of the Mortgage. Ans. ¶ 5, Ex. 36, at BP 1551; Ex. 22, at BP 1271. Thereafter, O'Brien engaged Andrew Evans, Esq. to file a chapter 13 bankruptcy petition on her behalf. Ans. ¶ 5, Ex. 36, at BP 1551; Ex. 23, at BP 1294-1297 (voluntary petition, signed by Evans), BP 1298ff (bankruptcy docket). On August 28, 2010, Evans filed the petition, In Re: Mary Kathryn O'Brien, U.S. Bank. Ct. No.10-19316. Ans. ¶ 5, Ex. 36, at BP 1551; Ex. 23, at BP 1294-1297 (petition), 1298ff (docket).

O'Brien Retains Respondent to File Adversary Proceeding; Hourly Fee Agreement (¶¶ 8-9)

8. Beginning in 2009, the respondent provided legal services to O'Brien by looking into options for loan modification and foreclosure avoidance. Tr. II:110-111; Ex. 22, at BP 1286-1291; Ex. 25, at BP 1314-1315; Ex. 49, at 112. At some time between October 12, 2010 and August 2011, O'Brien retained the respondent to commence an adversary proceeding in her chapter 13 bankruptcy to challenge the validity of the Mortgage. Ans. ¶ 6, Ex. 36, at BP 1551;

Ex. 1, at BP 0007-0010; Ex. 25, at BP 1315-1318. Around August 2011, they entered into a written "general representation agreement" requiring O'Brien to pay the respondent a $2,500 retainer against which he would bill at an hourly rate of $275. Tr. I:227-228, 230-231 (respondent); Ans. ¶ 6, Ex. 36, at BP 1551; Ex. 1 at 007-010. The respondent's understanding was that he could not take payment while the bankruptcy was pending. Tr. I:228-229 (respondent). He later billed O'Brien for his services in preparing and filing the adversary complaint, but at the rate of $225 per hour. Tr. I:237-238 (respondent); Ans. ¶ 9, Ex. 36 at BP 1553; Ex. 25, at BP 1315-1318, 1319-1322, 1323-1326; Ex. 49, at 115.

9. On September 7, 2011, the respondent filed the adversary proceeding, Mary Kathryn O'Brien v. J.P. Morgan Chase Bank, Adversary Proceeding No.11-01270. Ans. ¶ 7, Ex. 36, at BP 1552; Ex. 1 at 015-016; Ex. 32 (original and amended adversary complaint).

Dismissal of Bankruptcy and Adversary Proceeding (¶ 10)

10. On February 29, 2012, the bankruptcy court dismissed the chapter 13 petition. By stipulation, the court dismissed the adversary proceeding around March 16, 2012. Ans. ¶ 8, Ex. 36, at BP 1553; Ex. 1, at BP 0115 (bankruptcy court docket for petition, entry 142); Ex. 3, at BP 0156 (notice of dismissal of bankruptcy); Ex. 23, at BP 1299 (voluntary dismissal of bankruptcy); Ex. 1 at BP 0097 (bankruptcy court docket for adv. proceeding, entry 16), 1300 (order dismissing adversary proceeding).

O'Brien's Payments Until Change in Payment Arrangements (¶¶ 11-12)

11. The respondent rendered the following invoices to O'Brien, and received the following payments from her, for legal work done through dismissal of the bankruptcy (Ex. 25):

a. An invoice dated June 12, 2011 for work done from August 10, 2009 to June 11, 2011. The legal services covered by the bill involved potential foreclosure of the Mortgage and modification of the loan. They included consultation with Evans on the bankruptcy case and preparation of the adversary complaint. The invoice charged for 66.45 hours of legal work at the rate of $225 per hour, for a total fee of $14,793.75. It credited the client for payments of $500 made on August 23, 2009;

$225 on July 16, 2010; and $1,000 on August 16, 2010, for total payments of $1,725. After applying those credits, the balance due was stated as $13,068.75.

b. An invoice dated February 2, 2012 for legal work done from June 13, 2011 to January 27, 2012. The legal services covered by the bill consisted of ongoing work on the bankruptcy case, and on the adversary complaint, in consultation with Evans. The invoice charged for 41.20 hours of legal work at the rate of $225 per hour, for a total fee of $9,270. The previous balance of $13,068.75 was stated on the invoice. The bill credited the client for a payment of $2,000 made on October 21, 2011. After applying that credit, the new balance due was stated as $20,338.75.

c. An invoice dated October 16, 2012 for legal work done from June 13, 2011 to August 21, 2012, largely overlapping the previous invoice (¶ 11(b), above). The legal services covered by the bill extended through the conclusion of the bankruptcy in March 2012 and included some estate planning and real estate work at the end of the period. The invoice charged for 44.40 hours at $225 per hour, for a total fee of $9,945. A previous balance of $13,068.75 was stated on the invoice. (That was the balance stated as due on the June 12, 2011 bill (¶ 11(a), above) rather than on the February 2, 2012 bill (¶ 11(b), above).) The bill credited the client for payments of $2,000 on October 21, 2011 and $5,000 on May 29, 2012 for total payments of $7,000. After applying those credits, the balance due was stated as $16,013.75.

d. The October 16 invoice (¶ 11(c), above) includes all the time charged on the February 2 invoice (¶ 11(b), above). The balance due on the October 16 invoice appears to ignore the February 2 invoice. The $2,000 payment appears as a credit on both invoices, so we count it only once, resulting in total payments of $8,725. The balance of $16,013.75 stated on the October 16 invoice therefore appears to be correct.

12. Bar Counsel's claim that the respondent charged O'Brien excessive fees includes the following contentions with which we do not concur.

a. Bar Counsel asks us to find that O'Brien made two additional payments to the respondent, $225 on July 16, 2010 and $1,000 on August 13, 2012. We do not so find. (i) The July 16, 2010 payment of $225 is stated as a credit on the respondent's bill to O'Brien of June 12, 2011 and is included in ¶ 11(a), above. (ii) The parties' agreed-upon schedule of payments made by O'Brien for foreclosure-related services does not include the August 13, 2012 payment of $1,000. Ex. 50. Ex. 5, at BP 0227, includes an October 23, 2012 statement to O'Brien for estate planning services during

July and August 2012, which reflects a payment of $1,000. Bar Counsel has not proved that the $1,000 payment was for mortgage foreclosure services.

b. Bar Counsel asks us to find that O'Brien paid the respondent an additional $7,500, as indicated in O'Brien's grievance, Ex. 1, at BP 0004, 0011. We do not so find. O'Brien paid $7,500 after she had agreed to retain a forensics expert. Ans. ¶ 15, Ex. 36, at BP 1556-1557. However, we find that the $7,500 was used to pay a settlement with Rockland Trust of the balance claimed by the bank on a loan secured by O'Brien's car, not for foreclosure-related services. Id.; Tr. II:116-117 (respondent) (O'Brien covered the settlement with her $7,500 payment); Ex. 24.

13. Therefore, by the date of the invoice of October 16, 2012, O'Brien had paid the respondent $8,725 (¶ 11, above). After applying those payments, the respondent claimed O'Brien owed him $16,013.75 (¶¶ 11(c) and (d), above). We find no evidence questioning the validity of that balance or of the legal work on which it was based. We address charges and payments made after October 2012 in ¶¶ 14, 18, 19, below.

New Payment Arrangements (¶¶ 14-17)

14. At some time between August and November 2012, after dismissal of the bankruptcy, the respondent made an oral agreement with O'Brien covering ongoing defense against foreclosure of her Mortgage and payment of accrued fees. Tr. II:242-243 (respondent); Ans. ¶ 9, Ex. 36, at BP 1553; Ex. 49, at 132. They agreed that O'Brien would pay $500 per month and that the respondent would continue to represent her until the conclusion of the foreclosure, similar to his other foreclosure clients. Tr. I:236-237 (respondent); Tr. II:239-243 (respondent); see also Ex. 49, at 116, 132; Ans. ¶ 9, Ex. 36, at BP 1553; Ex. 50. The respondent billed O'Brien for the $500 charges. See Ex. 3, at BP 203 (example of billing for monthly fees).

15. The respondent did not document the basis of his fee or the scope of his services under this oral agreement in a writing to O'Brien. Ex. 49, at 132, line 1, to 134, line 5, and at 140, lines 4-12.

16. Bar Counsel contends that the respondent and O'Brien also orally agreed that she would pay a reverse contingent fee that would be based on any amount the respondent saved or

recovered for her. Petition, ¶ 9;). Bar Counsel's Post-Hearing Proposed Findings of Fact, Conclusions of Law, and Recommendation for Discipline (Bar Counsel's PFCs), at ¶ 9, at 3. We find no evidence of such an agreement. O'Brien did not testify before us; her grievance does not claim the respondent asked her to agree to a contingent fee. Ex. 1, at BP 0003, 0004. The respondent presented credible evidence that a contingent fee was not discussed then, and that the topic was left to future discussions. Tr. II:239-240, 242, 244 (respondent); Ans. ¶¶ 9, 11, Ex. 36, at BP 1553, 1555; Ex. 49, at 133-134. We do not find that when the respondent told O'Brien she could pay him like his other clients, she understood that this included a contingent fee. We find that the parties never established a reverse contingent fee percentage in the oral agreement they made in the fall of 2012, or that they agreed to a contingent fee at all. Ans. ¶ 11, Ex. 36, at BP 1555.

17. Earlier, while working on the bankruptcy case, the respondent sent O'Brien an e-mail message on August 22, 2011, transmitting to her the general representation agreement identified to in ¶ 8, above. Neither the agreement nor the e-mail refers to a contingent fee. Ex. 1, at BP 14, 7-10. In 2012, after dismissal of the bankruptcy, the respondent and O'Brien discussed the $500 per month payment plan. ¶¶ 14-15, above. We find no evidence that in those discussions, the respondent mentioned a contingent fee or drew O'Brien's attention to the contingent fee provision of his standard fee agreement. Ex. 1, at BP 0078, 0080-0082; Ex. 15, at BP 0468, 0475-0477 (response to Bar Counsel's request for information).

Monthly Payments Treated as Earned on Receipt (¶¶ 18-19)

18. The respondent admitted that he treated the $500 monthly payments made by O'Brien as earned upon receipt. Ans. ¶ 10, Ex. 36, at BP 1554; Ex. 1, at BP 0077; Ex. 3, at BP 0149, 0150, 0080, 0083. He deposited all those payments into his operating account. Ex. 49, at 130. That was consistent with his treatment of the monthly payments he received from other clients under the fee agreements he used in his mortgage foreclosure defense practice. Tr. I:83-84 (respondent); Ex. 49, at 84.

19. As stated in ¶¶ 11-12, above, the respondent claimed O'Brien owed him $16,013.75 at the time she agreed to the $500 per month arrangement (which was in the latter part of 2012, after dismissal of the bankruptcy; ¶ 14, above). Because we have found that balance to be valid, most of the $500 monthly payments were properly treated as earned upon receipt – but not all of them, as we find at ¶ 36, below.

Payments from November 2012 Onward (¶ 20)

20. In November 2012, O'Brien paid the respondent $1,000, which his records attribute to foreclosure defense. Ex. 5, at BP 0223. From December 2012 to March 2016, she paid $500 each month, except in October and November 2014 and July and August 2015. Ans. ¶ 12; Ex. 50. O'Brien made thirty-six payments of $500, for a total of $18,000. Ex. 50.

The Foreclosure Goes Dark; Monthly Payments Suspended; Inactivity (¶¶ 21-27)

21. From November 2012 to May 2017, neither WAMU nor any successor in interest pursued a foreclosure of O'Brien's Mortgage. Ans. ¶ 13, Ex. 36, at BP 1555. At some time in or after March 2016, at O'Brien's request, the respondent agreed she could suspend monthly payments in light of inactivity on the foreclosure and her reported financial difficulties. Tr. I:252-253 (respondent); Ans. ¶¶ 14, 15, Ex. 36, at BP 1556 to 1557; Ex. 49, at 119. O'Brien stopped making monthly payments to the respondent. Ans. ¶ 15, Ex. 36, at BP 1556; Ex. 3, at BP 0215; Ex. 49, at 119.

22. The respondent admitted that, after dismissal of the bankruptcy, during the period of inactivity on the threatened foreclosure, and until 2017 when O'Brien began to claim she was entitled to a refund, he and O'Brien had only limited communication about her foreclosure. Ans. ¶ 14, Ex. 36, at BP 1556. During that period, as he saw it, the case had become static, and there was nothing to be done; he was not thinking of O'Brien but instead was focusing on other clients whose cases were more pressing, resulting in a gap in communication with O'Brien. Tr. I:239-41, 247-248, 251-252; Tr. II:151; Tr. VI:106 (respondent); Ex. 49, at 123-125.

23. During a statement under oath before Bar Counsel, the respondent acknowledged that he lost track of O'Brien's case. Ex. 48, at 80. He further acknowledged that the firm does

not reach out to clients making monthly payments on inactive cases; usually it is the client who brings to his attention that a case has become inactive while the client continues to pay the monthly fees, and the client asks for a respite from those fees, as eventually happened with O'Brien. Tr. I:304 (respondent); Ex. 48, at 79-80. He told us it is "on the client" to ask for a break from monthly payments. Tr. I:304-305 (respondent).

24. The respondent recalled that he spent legal time on some incidental phone conversations, including interaction with a mortgage forensics expert (Marie McDonnell) and discussions with O'Brien about what was "going on with Washington Mutual." Ex. 49, at 134. The evidence shows the following activity not encompassed by the respondent's billings to O'Brien (i.e., to August 21, 2012, ¶ 11(c), above):

a. Time slips (Ex. 5, at BP 0297-0309):
   i. January 21, 2014: review case, settlement, e-mail from client regarding opting out of class settlement ..…………………………………………….... .1
   ii. January 24, 2014: e-mail exchange with client and Marie MacDonald .. .1
   iii. January 26, 2014: review McDonnell audit regarding J.P. Morgan …… .7
   iv. February 8, 2014: forward Nardi deposition regarding J.P. Morgan Chase take over of Washington Mutual, review first hundred pages of deposition .. 1.2

b. Lawyers Diary and Manual for 2016 (Ex. 44):
   i. January 2, 2016: entry, apparently for a telephone call ("PC"), otherwise illegible, no time assigned.
   ii. January 4, 2016: entry, apparently for a telephone call with client ("O'Brien PC Cl R. Set"), no time assigned.

Those entries correspond with the respondent's testimony that during the dark period he reviewed materials sent to him by a third party and discussed using Marie McDonnell, the forensic examiner, when the foreclosure became active and for a possible class action. Tr. II:150-151 (respondent).

25. The respondent did some work for O'Brien post-bankruptcy unrelated to mortgage foreclosure defense. Tr. I:234-235; Tr. II:114 (respondent) (auto loan settlement with Rockland Trust); Ex. 24 (same); Ex. 25, at BP 1327-1329 (same); Tr. I:246-247 (respondent) (estate plan); Tr. II:113 (respondent) (settling various claims); Tr. II:150 (respondent) (real estate

matters). Some of this work is reflected in the time slips referenced in ¶ 24, above; we have excluded it from our consideration of work done on foreclosure defense during the dark period.

26. We do not credit the respondent's assertion that he continued to perform significant legal work for O'Brien after the bankruptcy was dismissed. Ans. ¶ 14, Ex. 36, at BP 1555. We find that the respondent spent at most three hours over about four years on matters incidentally related to foreclosure defense, and that he spent only .2 documented hours in telephone calls with the client, as shown in the time slips, and some unspecified amount of time recorded in his Lawyers Diary. Ex. 44.

27. We find, therefore, that from the end of the bankruptcy until the spring of 2017, the respondent did not have any regular communications with O'Brien about her foreclosure, only the incidental conversations recorded in his time slips and diary, described in ¶ 24, above.

O'Brien's E-mails About Accounting, Refund (¶¶ 28-34)

28. Between September 2016 and May 4, 2017, O'Brien made four attempts to contact the respondent by e-mail concerning her foreclosure defense. Those efforts consisted of the following:

a. A September 6, 2016 e-mail to the respondent requesting an accounting, Ex. 1 at 0067; Ex. 27, at BP 1334;

b. A December 2, 2016 e-mail requesting a copy of her bill and a statement of the amount of credit built up after payments allegedly totaling "over $34,000," Ex. 1, at BP 0068; Ex. 27, at BP 1335; see also Ex. 1, at BP 0070; Ex. 27, at BP 1336;

c. A January 9, 2017 e-mail requesting a detailed bill and asserting that the respondent had done nothing for years after stopping the foreclosure, Ex. 1 at BP 0069; Ex. 27, at BP 1337; and

d. A May 4, 2017 e-mail to the respondent demanding an accounting and stating she would contact the B.B.O. if he did not respond. Ex. 1, at BP 0072.

Bar Counsel asks us to find that O'Brien also attempted to reach the respondent during this time by telephone. Bar Counsel's PFCs, at ¶ 16, at 4. Bar Counsel cited no evidence supporting this request; O'Brien did not testify to provide details of her allegation of unanswered calls. Ex. 1, at

BP 0004. Credible testimony indicated that O'Brien did not call the office. Tr. I:148 (Russell); Tr. II:135, 156-157 (respondent). We find that Bar Counsel has not proved that O'Brien's efforts to reach the respondent from September 2016 to May 4, 2017 included telephone calls.

29. The respondent did not respond to O'Brien's first three attempts to contact him by e-mail. Tr. I:252-254; Tr. II:104, 134-135 (respondent) (did not receive e-mail); Ex. 49, at 142 (no record of response); Ans. ¶ 18, Ex. 36, at BP 1559-1561.

30. The respondent contends that O'Brien's first three e-mail messages to him were sent to an address that was no longer used after a new e-mail address had been adopted by the newly formed PLLC in 2016, and that technical problems prevented e-mail forwarding from the old address to the new one. Respondent's Proposed Findings of Fact & Conclusions of Law (Respondent's PFCs), paragraph numbered 2, and sub-paragraphs, at pp. 9-10; see also Tr. II:104, 134 (respondent) (e-mail address, but not telephone number, changed in January 2016).

31. The evidence marshalled to support this contention is of two types: (i) Testimony about inability to retrieve old e-mail, which is not relevant to whether the respondent received the messages in the first place. Tr. I:252, II:93 (respondent); Tr. III:121-122 (S. McArdle); Ex. 48, at 59. (ii) Testimony that when the firm changed its e-mail address it did not enable e-mail forwarding from the old address. Tr. V:52-52, 56 (Balbi); Tr. I:116 (Russell); see also Tr. II:155-156, 277 (respondent).

32. Evidence of problems with the respondent's e-mail does not address the charge that he failed to communicate with O'Brien in response to her first three messages. The respondent is responsible for maintaining communication with his clients. Mass. R. Prof. C. 1.4. He offered no credible explanation why O'Brien was not told of the new e-mail address or how she obtained the correct address after sending three messages to the old one. See Tr. II:154-158, 276-279 (respondent). He acknowledged that he did not inform his clients of his new e-mail address. Tr. II:207 (respondent); see also Tr. I:115-116 (Russell) (did not follow any formal procedure for notifying clients of new e-mail address). Either the respondent did not maintain

communication with O'Brien by not responding to her first three e-mails upon receipt, or he did not maintain communication by failing to put systems in place to ensure she could reach him.

33. On May 4, 2017, the respondent contacted O'Brien after her fourth e-mail, sent to his then-current e-mail address, in which she demanded an accounting and said she would contact the Board of Bar Overseers if he did not reply. Ans. ¶ 19, Ex. 36, at BP 1561; Ex. 1, at BP 0073. However, the respondent's reply concerned providing O'Brien with a copy of their fee agreement, in response to an e-mail making only that request. Ex. 1, at BP 0074.

34. The respondent and O'Brien then exchanged e-mails in which he reported that her monthly payments were not being held in escrow, and she demanded that he pay her the amount she claimed she was owed, i.e., about $34,000, or face a lawsuit and an accompanying lien. Ex. 1, at BP 0072, 0075-0092. The respondent's offer to return funds and to handle the foreclosure matter on a straight contingent fee basis did not resolve the dispute. Ex. 1, at BP 0087-0088.

O'Brien's Payments in Excess of Hourly Time Charges (¶¶ 35-39)

35. As set forth in ¶ 11, above, O'Brien had paid the respondent $8,725 by August 21, 2012. In his invoice of October 16, 2012, he claimed a balance of $16,013.75; see ¶ 13, above. As set forth in ¶ 20, above, O'Brien paid the respondent an additional $19,000 from December 2012 to March 2016, consisting of one payment of $1,000 and thirty-six monthly payments of $500 each. All those payments were treated by the respondent as earned upon receipt and were deposited into his operating account.

36. We subtract that balance of $16,013.75 from the total of $19,000 in payments made as set forth in ¶¶ 20 and 35, above. We find that by the time O'Brien made her last monthly payment of $500 in March 2016, she had paid $2,986.25 more than the respondent could have charged her on an hourly basis using the rate of $225 he had established with her.

37. Bar Counsel contends we should use the respondent's settlement of O'Brien's civil claim against him, see below, ¶ 47, as an admission that he charged and collected excessive fees. See Ex. 45 (settlement package, March 2021). We decline to do so. Settlements, and the negotiations leading to them, are generally not admissible in evidence "to prove or disprove the

validity or amount of a disputed claim." MASSACHUSETTS GUIDE TO EVIDENCE (2021 Edition) § 408(a)(1).

38. We do not accept the respondent's other billing contentions. (a) The respondent contends that in determining whether O'Brien's payments exceeded earned fees, we should consider interest on her late payments. However, interest was never charged on the respondent's bills, nor was it provided for in any of his fee agreements with O'Brien. (b) He contends we should use the $275 per hour rate set forth in the hourly fee agreement that was superseded by the billed $225 rate. We find that the respondent should be held to the concession he made while the client's bankruptcy was pending. (c) The respondent suggests that his total billings at the $225 rate were $24,918.75 versus $27,500 in payments. That calculation produces a result close to our own, but it does not include all payments made. Also, it overcharges for post-bankruptcy services because it does not take into account the charges for non-foreclosure work that appeared on the foreclosure defense bills. See Respondent's PFCs, paragraph numbered 3 (and subparagraphs) at 13-15.

39. We find that the respondent charged O'Brien, and collected from her, clearly excessive fees.

End of Representation (¶¶ 40-42)

40. In May or June 2017, O'Brien terminated the respondent's representation of her. Ex. 1, at BP 0083, 0084; Ans. ¶20, Ex. 36 at 1561.

41. In May 2017, O'Brien received a notice of foreclosure of the Mortgage. By June 2017, she had retained new counsel. Ex. 1, at 0005, 0083; Tr. I:252; Tr. II:244; Tr. III:41-42; Tr. VI:104, 105 (respondent).

42. The respondent did not refund any money to O'Brien when she terminated the representation. Tr. I:254 (respondent); Ex. 1, at BP 0086, 0087; Ex. 45; Ex. 49, at 136.

Count One: Conclusions of Law (¶¶ 43-55)

43. Bar Counsel charged that the respondent violated rule 1.4 by his inadequate communication with O'Brien, by his failure to keep her informed of the status of her potential

foreclosure, or otherwise to explain the matter so as to permit her to make informed decisions about the representation, and by his failure to comply with reasonable requests for information. Mass. R. Prof. C. 1.4(a)(3) (keep client reasonably informed of status); 1.4(a)(4) (promptly comply with reasonable requests for information); and 1.4(b) (explain matters to client for informed decisions).

44. We conclude that the respondent violated those rules as charged. For years, he had no more than incidental communications with O'Brien. ¶¶ 22, 26, 27, above. He was passive with respect to the possibility that foreclosure proceedings would be restarted; he did not confer with O'Brien about whether such a passive stance served her interests. ¶¶ 21, 22, above. The respondent's discussion with O'Brien about the new payment arrangement after the bankruptcy did not address what would happen when her accrued bills had been paid and the monthly payments had become payments in advance. ¶ 14, above. At that point, O'Brien was entitled to a clarification of the fee arrangement and the opportunity to confirm that she was willing to continue to pay $500 per month during the period of inactivity on the foreclosure. The respondent contended that O'Brien could have reached out to him. ¶ 32, above. We decline to conclude that she had the burden to do so; it was the respondent's ethical obligation to maintain communication with his client.

45. Bar Counsel charged that the respondent violated Mass. R. Prof. C. 1.5(a) (illegal or clearly excessive fees). We conclude that the respondent collected a clearly excessive fee by receiving total monthly payments from O'Brien that were in excess of the agreed-upon value of the services provided, calculated on an hourly basis, during an extended period of inactivity in the case. ¶¶ 21, 22, above. The overcharge was less than O'Brien and Bar Counsel asserted, but it was still clearly excessive at the hourly rates established between O'Brien and the respondent.

46. Bar Counsel alleged that by failing to refund unearned advance fee payments made by O'Brien, the respondent violated Mass. R. Prof. C. 1.16(d) (duties on discharge, including refunding unearned fees). We conclude that Bar Counsel has proved that charge. ¶¶ 18, 28-29, 33-39, 42, above.

47. Bar Counsel contends that the respondent's conduct resulted in O'Brien's being deprived of funds to which she was entitled until she and the respondent made a civil settlement in April 2021. Bar Counsel's PFCs, at ¶ 23, pp. 6-7. We conclude that the respondent deprived O'Brien of funds by failing to refund advance fees when the attorney-client relationship ended four years earlier. See ¶ 46, above; see Matter of Bailey, 439 Mass. 134, 150, 19 Mass. Att'y Disc. R. 12, 31 (2003); Matter of Watt, 430 Mass. 232, 236 (1999) (deprivation occurs when funds belonging to a client have been used and are unavailable when due, creating a risk of harm, even if no loss ultimately occurs). The respondent deprived O'Brien of funds belonging to her in the amount of $2,986.25 for some four years after the attorney-client relationship had ended.

48. Bar Counsel seeks a finding that by depositing directly into his operating account O'Brien's advance fees that had not yet been earned, the respondent misused client funds in violation of Mass. R. Prof. C. 8.4(c) (dishonesty, deceit, misrepresentation or fraud) and 8.4(h) (conduct reflecting adversely on fitness to practice). Bar Counsel's PFCs, at ¶ 91, p. 22. However, in count one Bar Counsel did not charge the respondent with violating rules 8.4(c) and 8.4(h). See petition for discipline, Ex. 37, ¶¶ 22-26. If we find misconduct that would have violated a rule not charged, we can, at most, consider it in aggravation. Matter of the Discipline of an Attorney, 448 Mass. 819, 825 n.6, 24 Mass. Att'y Disc. R. 791, 798 (2007); Matter of Orfanello, 411 Mass. 551, 556, 7 Mass. Att'y Disc. R. 220, 226 (1992); Matter of Provenzano, 5 Mass. Att'y Disc. R. 300, 302, n.4 (1988); Matter of Brower, 1 Mass. Att'y Disc. R. 45, 47 (1979). We conclude that the respondent's conduct violated rule 8.4(h), but would not have violated rule 8.4(c), had that been charged, as there was no dishonesty or fraud.

49. Had it been charged, we would also have found a violation of Mass. R. Prof. C. 1.15(b)(3), which provides: "A lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or as expenses incurred." Comment 2A to rule 1.15 states: "Legal fees and expenses paid in advance that are to be applied as compensation for services subsequently rendered . . . are trust property and are required by paragraphs (b)(1) and (b)(3) to be deposited to a trust account." The

respondent failed to comply with those clear requirements, and this was a misuse of a client's funds.

50. We conclude that, although the respondent deprived O'Brien of funds, he did not engage in the kind of intentional misuse of client trust funds that presumptively requires indefinite suspension or disbarment. Matter of Schoepfer, 426 Mass. 183, 187 (1997). The respondent did not abscond with money that had been entrusted to him, such as settlement funds delivered to him as counsel and owed to his client, or money paid by a client to fund a settlement with others. E.g., Matter of Ablitt, 486 Mass. 1011 (2021); Matter of Brauer, 452 Mass. 56, 75 (2008); Matter of Hilson, 448 Mass. 603, 23 Mass. Att'y Disc. R. 269 (2007).

51. This case is also distinguishable from those in which an attorney charges and collects fees for work not performed. E.g., Matter of Zankowski, 487 Mass. 140, 37 Mass. Att'y Disc. R. ___ (2021). In Zankowski, the Court imposed a term suspension for deliberate overbilling, treating it as misappropriation of client funds, but did not apply the presumptive Schoepfer sanctions. The Zankowski decision contrasts with Matter of Goldstone, 445 Mass. 551, 21 Mass. Att'y Disc. R. 288 (2005). The Court treated Goldstone as a case of fraudulent billing and indicated it was deciding it by applying Schoepfer. The Court stated: "In this case, disbarment is the appropriate sanction. See Matter of Schoepfer, 426 Mass. 183, 187, 687 N.E.2d 391 (1997)." Goldstone, 445 Mass. at 566.

52. Here, unlike both Zankowski and Goldstone, the respondent did not make false statements about the work for which he charged O'Brien. We conclude that this case is similar to cases involving misuse of retainers paid in advance, which treat such misuse as not within the presumptive Schoepfer sanctions and which impose term suspensions rather than indefinite ones. See, e.g., Matter of Sharif, 459 Mass. 558, 27 Mass. Att'y Disc. R. 809 (2011) (three-year suspension, with last year stayed, for intentional misuse of unearned retainer); Matter of Quigley, 36 Mass. Att'y Disc. R. 388 (2020) (three-year suspension for intentional misuse of unearned retainer plus other misconduct).

53. The types of fraud and dishonesty present in cases of classic misuse of client funds or fraudulent billing are absent here. There was no written or oral contract by which the respondent promised to hold advance payments in trust. ¶ 14, above. Nevertheless, he was required to segregate and hold O'Brien's advance payments in a trust account and, as stated, we conclude that his failure to do so would have violated rule 1.15(b). We also conclude that his conduct would have violated rule 8.4(h), based on the violation of rule 1.15(b) violation we would have found, and the impropriety of requiring O'Brien to ask for a payment holiday when monthly fees were not being earned. ¶ 21, above. We have not found dishonesty, misrepresentation, deceit or fraud, as would have been required for a violation of rule 8.4(c).

54. Bar Counsel charged that by failing to obtain O'Brien's informed consent to the use of a contingent fee agreement materially different from those set forth in Mass. R. Prof. C. 1.5(f) (standard and approved contingent fee agreements), the respondent violated rule 1.5(f)(3) (informed consent in writing to use of variant contingent fee agreements). We conclude that Bar Counsel has not proved that alleged violation. ¶¶ 16, 17, above.

55. Bar Counsel charged that the respondent's failure to communicate to his client in writing the scope of the representation and the basis or rate of the contingent fee and expenses for which she would be responsible violated Mass. R. Prof. C. 1.5(c) (contingent fee agreement to be in writing). We have rejected Bar Counsel's charge that the oral payment plan included a contingent fee and, therefore, conclude there was no violation in that regard. The respondent did fail to comply with rule 1.5(b)'s requirement that the scope of services and basis for the fee be communicated to the client in writing in connection with the oral agreement for payments of $500 per month. ¶ 15, above. However, rule 1.5(b) was not charged in the petition for discipline, so while we could consider this misconduct as an aggravating factor, see case citations cited above in ¶ 48, we decline to do so because we have addressed this failure under rule 1.4 in ¶¶ 43-44, above.

Count Two: Findings of Fact (¶¶ 56-118)

56. In this section of our report, we set forth our findings of fact concerning the respondent's alleged disciplinary violations arising from his use with many clients of similar foreclosure defense client fee agreements (¶¶ 57-118) and our conclusions (¶¶ 119-126) that the respondent (a) violated applicable disciplinary rules, and federal and state regulations, by charging and collecting advance fees for foreclosure-related services and mortgage assistance relief services without depositing those fees into a clients' trust account, (b) contracted for advance fees in the form of retainers and monthly payments that were clearly excessive, and collected excessive fees from some clients, (c) as a result, misused clients' funds, but without resulting deprivation, (d) contracted for clearly excessive reverse contingent fees, and (e) failed to obtain clients' informed consent to reverse contingent fee provisions and related collection provisions that differed materially from the forms of fee agreements approved by the rules of professional conduct. We find and conclude that Bar Counsel did not prove (a) that the respondent's conduct concerning advance fees involved misrepresentation, fraud, deceit, dishonesty or criminal conduct, (b) that the respondent collected any clearly excessive reverse contingent fee, or (c) that there was any ethical impropriety in the early termination provisions of the fee agreements.

Foreclosure Defense Clients (¶ 57)

57. Over one hundred foreclosure defense clients engaged the respondent between 2011 and the present. Ans. ¶ 28, Ex. 36, at BP 1566; Ex. 4 at BP 0217 (as of 1/14/2019, 105 foreclosure clients, 59 still open). The clients were typically in desperate circumstances that involved both financial and emotional distress. Tr. I:205, 274, 275; Tr. II:91; Ex 49, at 38.

Contingent and Reverse Contingent Fees (¶¶ 58-68)

58. Most of the respondent's foreclosure defense client fee agreements ("FDCFA's") provided for some form of contingent fee. Ans. ¶ 30, Ex. 36, at BP 1566; Ans. ¶ 33, Ex. 36, at BP 1568.

59. The following are examples of the contingent fee provisions in the FDCFA's:

a. [¶ 2] The calculation of the contingency upon which additional compensation is to be paid is: (a) The actual principal reduction in the obligation of any note/mortgage obligation(s) secured against the Client's real estate, whether by negotiated settlement or Court judgment. (b) The actual full principal discharge of any of Client's note and mortgage obligation(s) by negotiated settlement or Court judgment. (c) The recovery of money damages paid by way of negotiated settlement or as part of a court judgment. . . . [¶4] Except for any money recovered under a standard contingent formula at paragraph 2(c) above, reasonable compensation on the foregoing reverse contingency at paragraphs 2(a) and 2(b) above is to be paid . . . by way of a promissory note . . . . Such compensation (including that of any associated counsel or paralegal) is not to exceed the following maximum percentages of the gross principal reduction amount of savings against the Client's loan obligations: –33-1/3% of the gross principal loan reduction obtained adjusted by and offset by any attorney's fees awarded by the Court. – 40% of the gross principal loan reduction obtained, adjusted by and offset by any attorney's fees awarded, if an appeal is taken by the Defendant (lender).[2]

b. [¶ 2] The calculation of the contingency upon which additional compensation is to be paid is: (a) The reconveyance of the premises free of the mortgage lien or the actual principal reduction in the obligation of any note/mortgage obligation(s) secured against the Client's . . . Premises, whether by negotiated settlement or Court judgment. (b) The recovery of money damages paid by way of negotiated settlement or as part of a court judgment. . . . [¶4] Except for any money recovered under a standard contingent formula at paragraph 2(b) above, reasonable compensation on the foregoing reverse contingency at 2(a) above is to be paid . . . by way of a promissory note . . . . Such compensation (including that of any associated counsel or paralegal) is not to exceed the following maximum percentages of the gross principal reduction amount savings against the Client's loan obligations: – 33-1/3% of the gross principal loan reduction obtained adjusted by and offset by any attorney's fees awarded by the Court. – 40% of the gross principal loan reduction obtained, adjusted by and offset by any attorney's fees awarded, if an appeal is taken by the Defendant (lender).[3]

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[2] See, e.g., Ex. 5, at BP 0239-0240 (Locke "Partial Hourly and Partial Reverse Contingency Fee Agreement"); Ex. 5, at BP 0258-0259 (Stanley "Partial Hourly and Partial Reverse Contingency Fee Agreement").

[3] See, e.g., Ex. 6, at BP 0310-0311 (Lekos "Partial Hourly and Partial Reverse Contingency Fee Agreement"); Ex. 47 (Telemaco "Partial Hourly and Partial Reverse Contingency Fee Agreement"). Cf. Ex. 6, at BP 0325-0326

c. [I]f the matter is concluded favorably to the Client and the Client's mortgage is expunged or reduced, a subsequent sale of the property is negotiated, or by way of cash settlement, McArdle Law will be due compensation equal to one third (1/3) of any such mortgage expungement, principal reduction, excess proceeds of any sale, whether pre or post-foreclosure, or cash settlement, with a credit against any such contingency for any retainer and monthly fees already paid by the client at ¶ 2 above.[4]

60. Version (c) sets compensation based on a one-third contingent fee calculation, while versions (a) and (b) call for compensation not to exceed the one-third contingent fee.

61. The respondent adopted the contingent fee provision to give himself the opportunity to recover for time for which he was not adequately compensated by the retainers and monthly fees; he credibly testified that was usually the case. Tr. I:182-184, 295-297; Tr. VI:18, 84, 299 (respondent); and see Ans. ¶ 30, Ex. 36, at BP 1566-1567; Ans. ¶ 33, Ex. 36, at BP 1568. His testimony is supported by the firm's reconstructed bills that were admitted in evidence. They show the firm consistently putting in more time/value, at a reasonable rate, than the clients paid, except at the outset in some cases. Ex. 28.

62. The practice of foreclosure defense was new in the mid-2000's, and it remains a niche field. Tr. II:60 (respondent); Ans. ¶ 34, Ex. 36, at BP 1568 to 1569. Reverse contingent fees are not a well-established part of the practice. Tr. I:261-262; Tr. II:84 (respondent) (respondent aware of only one other attorney who used this payment structure; respondent did not pattern his fee agreement on the retainer model most attorneys use); Tr. II:171 (respondent) (other attorneys who have sought to collect fees from his clients used hourly billings at rates of

(Fillion "Partial Hourly and Partial Reverse Contingency Fee Agreement," 6/23/15); Ex. 6, at BP 0328-0329 (Minnehan "Partial Hourly and Partial Reverse Contingency Fee Agreement," January 2016).

[4] See, e.g., Ex. 6, at BP 0313 (Germinara "Representation and Fee Agreement," 10/2/2017); Ex. 6, at BP 0331 (Gormley "Representation and Fee Agreement," April 2018); Ex. 35, at BP 1529 (Ciampa "Representation and Fee Agreement," March 2017); Ex. 35, at BP 1535 (Garland "Representation and Fee Agreement," April 2017); Ex. 35, at BP 1538 (Mondi "Representation and Fee Agreement," January 2018); Ex. 35, at BP 1544 (Taveras "Representation and Fee Agreement"); Ex. 46, at 1 (Boguslav "Representation and Fee Agreement"). Cf. Ex. 6, at BP 0316 (Dibella-Ginetti "Representation and Fee Agreement," August 2016); Ex. 6 at BP 0319 (Richards "Representation and Fee Agreement," November 2018); Ex. 6, at BP 0322 (Haikal "Representation and Fee Agreement," July 2018); Ex. 35, at BP 1532 (DeMustchine "Representation and Fee Agreement," December 2018); Ex. 35, at BP 1541 (Ryan "Representation and Fee Agreement").

$400 to $450 per hour); Tr. V:130 (Boguslav) (based on his experience with financially distressed clients who have contacted other attorneys, reverse contingent fees are not common). The respondent came to learn that the reverse contingent fee provisions, and the accompanying note and mortgage provisions, were of limited value in his practice. Tr. I:208-209 (respondent); Tr. VI:38-39 (respondent).

63. The respondent's associate told one of the clients that, if applied as written, a one-third reverse contingent fee would be unreasonable and that the firm would never seek such an amount even though provided for in the fee agreement. Ex. 38 (e-mail from Lucas McArdle to Spector; FDCFA not in evidence). The respondent was asked what he did to determine whether a one-third contingent fee was excessive. He said they "were never enforcing that arrangement" and that the formula "wasn't utilized." Tr. II:253 (respondent). Rather, he said, the question was whether you are treating the client fairly; the fee calculation was not based on the value of the client's house; it was measured against "all kinds of successful options." Tr. II:253-254 (respondent). He never enforced that "in any serious way" and never took a lien on anyone's house. Tr. II:254 (respondent). We found that testimony credible. It was corroborated by the respondent's testimony about one case (Spector) in which he collected what he referred to as a "success fee." Tr. I:209-210 (respondent); Ex. 38. Bar Counsel did not show that the respondent ever collected a reverse contingent fee that was excessive.

64. However, the contingent fee provisions of the respondent's FDCFA's differed materially from the standard contingent fee agreements approved by Mass. R. Prof. C. 1.5(f). Those standard agreements are set forth in that rule as Forms A and B. The rule requires a lawyer to obtain the client's informed consent in writing to the use of any contingent fee provisions that materially differ from or add to those of Forms A and B. In this case, the respondent's FDCFA's varied materially from Forms A and B by including provisions basing a fee on the occurrence of a reverse contingency (that is, a reduction in the amount claimed by the lender, rather than affirmative collection of funds out of which a fee could be paid) as well as provisions for other forms of compensation such as retainers and monthly fees.

65. The respondent did not obtain informed consent in writing where the contingent fee provisions in his FDCFA's differed materially from Forms A and B. Ans. ¶ 36, Ex. 36, at BP 1569 (respondent's second amended answer explained that "each client was expressly provided an opportunity to review the contingency provisions with outside legal counsel"); Ex. 49, at 108-109 (did not obtain signed consent to variance of terms other than signature on FDCFA itself); Ex. 5, at BP 0239, 0258, 0276; Ex. 6; Ex. 35; Ex. 46; Ex. 47 (FDCFA's in evidence do not contain written acknowledgment of variance from approved forms).

66. The reverse contingent fee provisions of the FDCFA's created the risk of imposing on financially unstable clients a large liability without a corresponding monetary recovery to fund the fee. Earlier versions of the FDCFA's did allow clients to pay the fees over time under a note. However, that would involve a new lien on their property, which was not adequately disclosed in the FDCFA.

67. The absence of any written limitation on the amount of the reverse contingent fee, such as "a reasonable fee not to exceed 33 1/3%," meant that clients were left at the discretion of the respondent rather than protected by an enforceable contract term. We do credit the respondent's testimony that he attempted to treat his clients fairly in those cases where the reverse contingent fee came into play. Still, in light of the risks, as well as the acknowledgment in the Spector case that application of the reverse contingent fee as written would produce an unreasonable result, we find that the reverse contingent fee provisions of the FDCFA's resulted in the respondent's contracting for clearly excessive fees.

68. However, Bar Counsel has not shown that any client was actually charged, or that the respondent ever collected, a reverse contingent fee that was clearly excessive.

Retainers (¶¶ 69-76)

69. The respondent's FDCFA's provided for an up-front flat fee identified as a retainer. Ans. ¶ 31, Ex. 36, at BP 1567; Ans. ¶ 37, Ex. 36, at BP 1569.

70. The following are examples of the retainer provisions in the FDCFA's:

a. [¶2] The client has paid a Fifteen Hundred ($1,500) Dollar retainer herewith and will apply $750/month against the hourly fees set forth in paragraph 3 below and the reasonable expenses set forth in paragraph 6. . . . [¶3] . . . said [monthly $750] payment amount applied towards the Attorney's hourly legal work which are tracked at $275/hour, including the $1,500 retainer, heretofore paid to bind the agreement and to be applied against hourly billings and expenses. . . . [¶7] If the Client wishes to discharge Attorney Michael M. McArdle, the Client shall, in this event, be liable . . . for a legal fee at the hourly rate of $275.00 per hour . . . whether the claim against the Defendant (lender) is pursued to a successful conclusion with or without successor counsel.[5]

b. [¶2] The Client has paid a Twenty Five Hundred ($2,500) Dollar retainer herewith and will apply $500/monthly against the time charges set forth in paragraph 3 below and the reasonable expenses . . . [¶3] . . . said [monthly $500] payment amount applied towards the Attorney's hourly legal work . . . [¶7] If the Client wishes to discharge Attorney Michael M. McArdle, the Client shall . . . be liable . . . for a legal fee at the hourly rate of $275.00 per hour . . . if and only if, the claim is pursued to a successful conclusion as contemplated by the parties contingency formula . . . with or without successor counsel.[6]

c. [¶2] The Client has paid a One Thousand ($1,000) Dollar non-refundable retainer herewith and will apply $500/monthly against the hourly fees set forth in paragraph 3 below and the reasonable expenses. . . . [¶3] [The $500 monthly payment amount] applied towards the Attorney's hourly legal work billed at $275/hour, including the $1,000 retainer, heretofore paid to bind the agreement and to be applied against hourly billings and expenses. . . .[7]

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[5] Ex. 5, at BP 0239-0240 (Locke "Partial Hourly and Partial Reverse Contingency Fee Agreement" #1). Cf. Ex. 5, at BP 0276 (Harrison "Partial Hourly and Partial Reverse Contingency Fee Agreement"); Ex. 6, at BP 0310 (Lekos "Partial Hourly and Partial Reverse Contingency Fee Agreement"); Ex. 47 (Telemaco "Partial Hourly and Partial Reverse Contingency Fee Agreement").

[6] Ex. 6, at BP 0326 (Fillion "Partial Hourly and Partial Reverse Contingency Fee Agreement," June 2015). Cf. Ex. 6, at BP 0328-0329 (Minnehan "Partial Hourly and Partial Reverse Contingency Fee Agreement," January 2016).

[7] Ex. 5, at BP 0243 (Locke "Partial Hourly and Partial Reverse Contingency Fee Agreement" #2); Ex. 5, at BP 0246 (Locke "Partial Hourly and Partial Reverse Contingency Fee Agreement" #3). Cf. Ex. 35, at BP 1475 (DeMustchine "Representation and Fee Agreement," December 2018); Ex. 5, at BP 0258 (Stanley "Partial Hourly and Partial Reverse Contingency Fee Agreement").

d. [¶2] The Client has paid a two thousand five hundred ($2,500) dollar retainer herewith and will make consecutive monthly payments of five hundred ($500) dollars . . . [¶5] If the Client wishes to discharge McArdle Law, the Client shall . . . be liable . . . for a legal fee at the hourly rate of $275.00 per hour . . . for any months (pro-rated for partial months) for which the above-stated monthly $500 fee was not paid.[8]

e. [¶2] The Client has paid a two thousand five hundred ($2,500) dollar case opening fee herewith and will make consecutive monthly payments of five hundred ($500) dollars . . . [¶5] If the Client wishes to discharge McArdle Law, the Client shall . . . be liable . . . for a legal fee at the hourly rate of $300.00 per hour . . . for any months (pro-rated for partial months) for which the above-stated monthly $500 fee was not paid.[9]

71. The FDCFA's, with one or two exceptions, did not describe the retainer as non-refundable; none said it was earned on receipt; and none identified it as a flat fee. None of the agreements committed the respondent to depositing the retainer funds into a trust account and withdrawing them only when earned. But clients were told that the initial retainer was a flat fee, which they acknowledged. Tr. II:164 (respondent). No client, except O'Brien, asked for an accounting or made a formal complaint. Tr. II:164-165 (respondent).

72. Until around 2020, the respondent did not deposit the retainers into a clients' fund trust account. He treated them as earned upon receipt, regardless of when services were rendered, and as non-refundable (unless the client promptly asked for the money back); he deposited them into his operating account. Tr. I:82-84, 86, 171 (Russell); Tr. I:291-292 (respondent); Ex. 49, at 83-84; Ans. ¶ 38, Ex. 36, at BP 1569. In most cases, time spent on the matter had exhausted the retainer by the time it was received, or it would do so before the first monthly bill was issued. Tr. I:292-293, Tr. II:83 (respondent). In cases where litigation was

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[8] Ex. 6, at BP 0313-0314 (Germinara "Representation and Fee Agreement," October 2017); Ex. 35, at BP 1535-1536 (Garland "Representation and Fee Agreement," April 2017). Cf. Ex. 6, at BP 0316-0317 (Dibella-Ginetti "Representation and Fee Agreement," August 2016); Ex. 6, at BP 0322 (Haikal "Representation and Fee Agreement," July 2018); Ex. 6, at BP 0331 (Gormley "Representation and Fee Agreement," April 2018); Ex. 35, at BP 1529-1530 (Ciampa "Representation and Fee Agreement," March 2017); Ex. 35, at BP 1538 (Mondi "Representation and Fee Agreement," January 2018); Ex. 35, at BP 1541 (Ryan "Representation and Fee Agreement"); Ex. 35, at BP 1544 (Taveras "Representation and Fee Agreement"); Ex. 46 (Boguslav "Representation and Fee Agreement").

[9] Ex. 6, at BP 0319 (Richards "Representation and Fee Agreement," November 2018).

pending or imminent, some fifteen hours of work would be done at the start of the representation, including intake work. Tr. I:293; Tr. II:160-162 (respondent); Tr. I:136-137, 172-173 (Russell).

73. We find that the retainer provisions of the FDCFA's were neither flat fees nor classic retainers. (a) They were not flat fees because the agreements did not specify the scope of work covered by the retainer. Therefore, they could not be construed as providing a set fee for a defined scope of work. Monthly payments, discussed below, were also required for clients to receive ongoing representation, and they included some of the work the respondent said was covered by the retainer. See ¶ 70, above. See also Mass. R. Prof. C. 1.15, comment 2(A): "A flat fee is a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services, whether relatively simple and of short duration, or complex and protracted." (b) They were not classic retainers, either. See Matter of Sharif, 459 Mass. 558, 568–69 (2011) ("a classic retainer is 'a fee given to counsel on being consulted, in order to insure [the lawyer's] future services,' whereby the attorney is "paid a reasonable compensation for being so bound"). The respondent's retainer provisions were not classic retainers for at least two reasons. First, the retainer itself was not sufficient to bind the agreement. The respondent did testify that he always understood the purpose of the retainer was to bind the agreement. However, clients were also required to make the monthly payments. Tr. I:290 (respondent). Second, when called on to justify his treatment of the retainers as earned on receipt, the respondent did not invoke the concept of a classic retainer. Instead, he claimed that the retainers had been exhausted by initial work on the case by the time of receipt, or would be exhausted soon after. Tr. II:254-255 (respondent).

74. We find, therefore, that the respondent's FDCFA's provided for advance fee payment retainers, to be earned based on time spent on the client's case at the hourly rate set forth in that client's FDCFA. As stated in the preceding paragraph, they were not classic retainers or flat fees. The fee agreements expressly provided that the monthly payments would be tracked at an hourly rate (see ¶ 78, below). They did not clearly provide that the respondent would earn the retainer against the same hourly rate, but that seems to be implicit in them. See ¶

70, above; cf. Ans. ¶ 39, Ex. 36, at BP 1569. All the agreements provided for an early termination fee, also based on a stated hourly rate. (That provision would address the situation in which early termination would prevent the respondent from collecting a contingent fee to make up the shortfall between time spent on the case and payments which, by the time of termination, had been made as retainers or monthly fees.) Those provisions indicate that the retainers were intended to be earned based on time spent on the client's case.

75. The respondent offered in evidence reconstructed bills on several clients' matters to demonstrate that he had earned the retainers and monthly payments by the time he had received them. Tr. III:78 (respondent); Ex. 28. The respondent characterized those clients as typical. Tr. I:172 (respondent). He asserted that the reconstructed bills undervalue his legal work because they omit substantial time spent on the case; for instance, for work done out of court. Tr. I:205-206, 293-294; Tr. II:190-193 (respondent); contrast Tr. II:264-265 (respondent); Ex. 49, at 85. We do not credit that assertion; the reconstructed bills include charges for time spent by the respondent out of court. See, e.g., Ex. 28, at BP 1341-1342, 1345-1346.

76. Based on those reconstructed bills and, where available, the corresponding FDCFA's, we find that sometimes the retainer was earned upon receipt, or shortly thereafter, but that in other cases it was not, as the respondent acknowledged. Tr. II:254-255 (respondent).

a. In the Ciampa case (see ¶ 70 and note 8, above), the firm received $1,500 out of a total retainer of $2,500 on or about March 28, 2017, with the balance to be covered by additions to the monthly payments in April, May, June and July 2017. Ex. 35, at BP 1519. By July 2017, the firm had earned only $440 (at the rate of $275/hour, as set forth in the contract's early termination provision). Ex. 28, at BP 1344. The entire $2,500 retainer was not earned until almost eleven months later, on February 13, 2018. Id.

b. In the Garland case (see ¶ 70 and note 8, above), the firm received a $2,500 retainer upon signing the fee agreement in April 2017 (Ex. 35, at BP 1535, 1537). That amount had not yet been earned (using the contractual early termination rate of $275 per hour) by December 12, 2017, eight months later. Ex. 28, BP 1348-1352.

c. In the Mondi case (see ¶ 70 and note 8, above), the firm received a $2,500 retainer at the signing of the fee agreement in January 2018. Ex. 35, at BP 1538, 1540. Using the contractual early termination rate of $300, the firm did not earn the retainer until about eight months later, on August 22, 2018. Ex. 28, BP 1353-1356.

d. In the Taveras case (see ¶ 70 and note 8, above), the client paid a $1,500 retainer at the execution of the fee agreement. Ex. 35, at BP 1544 (undated copy). With entries on the reconstructed bill for services starting on November 17, 2016, and using the contractual early termination rate of $275 per hour, the firm had not earned the retainer until about three months later, i.e., February 4, 2017. Ex. 28, at BP 1363.

e. However, in the John Ryan case (see ¶ 70 and note 8, above), the client paid a $2,500 retainer upon execution of the fee agreement. Ex. 35, at BP 1541 (undated copy). With entries on the reconstructed bill for services starting on October 15, 2018, and using the contractual early termination rate of $300 per hour, the firm had earned the retainer less than a month after the start of services, on November 7, 2018. Ex. 28, at BP 1357.

f. In the Scott Hall case (fee agreement not in evidence), at the rate of $300 per hour, the firm had earned $2,500 by the third day of its services (March 4, 2019). Ex. 28, BP 1360-1361.

g. In the Greige case (fee agreement not in evidence), the first services were rendered on July 1, 2019. At the indicated rate of $350 per hour, the firm had not earned $1,500 until August 12, 2019, or $2,500 until February 10, 2020. Ex. 28, at BP 1366.

h. In the King case (fee agreement not in evidence), the first services were rendered on July 24, 2019. At the indicated rate of $375 per hour, the firm had not earned $2,500 (6.66 hours) until December 4, 2019, but had earned $1,500 by July 30, 2019. Ex. 28, BP 1370-1373.

i. In the McSharry case (fee agreement not in evidence), the first services were rendered on October 22, 2019. At the indicated rate of $375 per hour, the firm had earned $2,500 (6.66 hours) by October 23, 2019, and $1,500 by the end of the first day of services. Ex. 28, BP 1374-1376.

j. In the Castoires case (fee agreement not in evidence), the first time entry is for January 9, 2018; by February 8, 2018, the respondent had expended 12.9 hours on the matter, which translates to $3,547.50 in earned fees. That would have quickly exhausted the retainer whether it was $2,500 (as in many of the agreements reviewed

in ¶ 55, above), or the $1,000 the respondent testified he accepted to take the case. Tr. II:196 (respondent). Ex. 28, BP 1341-1343.

In some cases, the retainers were earned when received, in other cases they were not. Therefore, we find that the respondent's treatment of all the retainers as earned on receipt sometimes resulted in his collecting clearly excessive fees. When he deposited such fees into his operating account before they were earned, he misused clients' funds. Nevertheless, we do not find that this practice caused deprivation of any client's funds. Except as to O'Brien, Bar Counsel has not demonstrated that, at the termination of the attorney-client relationship, the respondent continued to hold unearned fees and failed to refund them.

Monthly Fees (¶¶ 77-90)

77. The respondent's FDCFA's provided for a flat monthly fee, usually $500. Ans. ¶ 31, Ex. 36, at BP 1567; Ans. ¶ 43, Ex. 36, at BP 1571.

78. The following are examples of the monthly payment provisions in the FDCFA's:

a. [¶2] The Client . . . will apply $750/month against the hourly fees set forth in Paragraph 3 below and the reasonable expenses . . . . Said monthly payments shall continue as long as the Client continues to maintain her rights to the premises. [¶3] In addition to the contingent compensation . . . the client shall pay the following installments against the attorney's time charges: Seven Hundred fifty ($750) Dollars monthly . . . with said payment amount applied towards the Attorney's hourly legal work which are tracked at $275/hour, including the $1,500 retainer, heretofore paid to bind the agreement and to be applied against hourly billings and expenses incurred to date and to be incurred in the future, for all such times as the Client continues to maintain control of the real estate while litigation is being pursued up to the time of a successful conclusion of the claim and/or if the Client is forced to give up operating and control of the real estate by the successful title and possession claims of the opposing party lenders, servicers or foreclosing attorneys. Time charges are tracked for the purposes of statutory claims that may award attorneys fees to a successful claim by the client and/or in the case of a discharge of the attorney under paragraph 7 below. [¶7] If the Client wishes to discharge Attorney Michael M. McArdle, the Client shall, in this event, be liable . . . for a legal fee at the hourly rate of $275.00 per

hour . . . whether the claim against the Defendant (lender) is pursued to a successful conclusion with or without successor counsel.[10]

b. [¶2] The Client . . . will apply $500/monthly against the hourly fees set forth in Paragraph 3 below and the reasonable expenses . . . . [¶3] [T]he Client shall pay the following installments against the attorney's time charges: Five Hundred ($500.00) Dollars monthly . . . with said payment amount applied towards the Attorney's hourly legal work billed at $275/hour, including the $1,000 retainer, heretofore paid to bind the agreement and to be applied against hourly billings and expenses incurred to date and to be incurred in the future, for all such times as the Client continues to pursue litigation to obtain the reconveyance of her property . . . free of any mortgage or other contract claim . . . . [¶ 7] If the Client wishes to discharge Attorney Michael M. McArdle, the Client shall, in this event, be liable . . . for a legal fee at the hourly rate of $275.00 per hour . . . if and only if the claim is pursued to a successful conclusion as contemplated by the parties contingency formula . . . whether the claim against the Defendant (lender) is pursued to a successful conclusion with or without successor counsel.[11]

c. [¶2] The Client . . . will apply $500/monthly against the time charges set forth in Paragraph 3 below and the reasonable expenses . . . . [¶3] the Client shall pay the following installments against the attorney's time charges: Five Hundred ($500.00) Dollars monthly . . . with said payment amount applied towards the Attorney's legal work for all such times as the Clients continue to pursue litigation to obtain the reconveyance of title to their residential property . . . free of any mortgage or other contract claim of any third party foreclosure purchaser, lender or assignee of said original promissory note. . . . [¶7] If the Client wishes to discharge Attorney Michael M. McArdle, the Client shall, in this event, be liable . . . for a legal fee at the hourly rate of $275.00 per hour . . . if and only if, the claim is pursued to a successful conclusion as contemplated by the parties contingency formula . . . whether the claim

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[10] Ex. 5, at BP 0239-0240 (Locke "Partial Hourly and Partial Reverse Contingency Fee Agreement" #1). Cf. Ex. 5, at BP 0258 (Stanley "Partial Hourly and Partial Reverse Contingency Fee Agreement"); Ex. 5, at BP 0276 (Harrison "Partial Hourly and Partial Reverse Contingency Fee Agreement").

[11] Ex. 5, at BP 0243-0244 (Locke "Partial Hourly and Partial Reverse Contingency Fee Agreement" #2); Ex. 5, at BP 0246-0247 (Locke "Partial Hourly and Partial Reverse Contingency Fee Agreement" #3). Cf. Ex. 47 (Telemaco "Partial Hourly and Partial Reverse Contingency Fee Agreement"); Ex. 6, at BP 0310 (Lekos "Partial Hourly and Partial Reverse Contingency Fee Agreement").

against the Defendant (lender) is pursued to a successful conclusion with or without successor counsel.[12]

d. [¶2] The Client . . . will make consecutive monthly payments of five hundred ($500) dollars . . . until the resolution of this matter. [¶5] If the Client wishes to discharge McArdle Law, the Client shall . . . be liable . . . for a legal fee at the hourly rate of $275.00 per hour . . . for any months (pro-rated for partial months) for which the above-stated monthly $500 fee was not paid.[13]

79. The respondent testified that a fair exchange was given in return for the monthly fee because his legal representation kept clients in their homes without having to pay their mortgage, taxes or insurance while receiving valuable legal services. Tr. I:270-271 (respondent). The respondent did not affirmatively advise his clients to stop paying those expenses while paying his fees and remaining in their homes. However, the clients' mortgages were typically in default because of non-payment when they came to him; his representation had the effect of maintaining that state of affairs in exchange for the monthly fee while forestalling foreclosure. Tr. I:271-274; Tr. II:53-54, 262 (respondent).

80. The rules of professional conduct acknowledge that results obtained by a lawyer can affect the reasonableness of his fee. Mass. R. Prof. C. 1.5(a) (4). In this case, however, the respondent's FDCFA's established the hourly value of his legal work. Beyond that, the reverse contingent fee provisions were intended to place a value on the results achieved; the respondent referred to them as success fees. Tr. I:209-210 (respondent). The result of keeping a client in his home despite a pending foreclosure was achieved by legal services for which the respondent had

[12] Ex. 6, at BP 0325-0326 (Fillion "Partial Hourly and Partial Reverse Contingency Fee Agreement," June 2015). Cf. Ex. 6, at BP 0328-0329 (Minnehan "Partial Hourly and Partial Reverse Contingency Fee Agreement," January 2016).

[13] Ex. 6, at BP 0313-0314 (Germinara "Representation and Fee Agreement," October 2017); Ex. 35, at BP 1535-1536 (Garland "Representation and Fee Agreement," April 2017). Cf. Ex. 35, at BP 1544 (Taveras "Representation and Fee Agreement"); Ex. 6, at BP 0316-0317 (Dibella-Ginetti "Representation and Fee Agreement," August 2016); Ex. 6, at BP 0319 (Richards "Representation and Fee Agreement," November 2018); Ex. 6, at BP 0322 (Haikal "Representation and Fee Agreement," July 2018); Ex. 6, at BP 0331 (Gormley "Representation and Fee Agreement," April 2018); Ex. 6, at BP 0331 (Gormley "Representation and Fee Agreement," April 2018); Ex. 35, at BP 1538 (Mondi "Representation and Fee Agreement," January 2018); Ex. 35, at BP 1541 (Ryan "Representation and Fee Agreement"); Ex. 46 (Boguslav "Representation and Fee Agreement").

set an hourly rate. He agreed to be compensated at that rate by the retainer and the monthly payments until conclusion. At that time, a success fee could be agreed to, if appropriate. Therefore, we reject the suggestion that the benefit to the client of remaining in his home, without paying the mortgage, can be treated as additional value that justified the monthly fees.

81. Most of the respondent's foreclosure defense clients faced imminent foreclosure of their mortgages and eviction from their homes. Tr. II:62 (respondent). His strategy was to resist eviction by defending the summary process action brought by the lender after foreclosure. He did so by attacking the lender's claim for possession both procedurally, by contesting such matters as the adequacy of notice of foreclosure, and substantively, by contesting the lender's right to possession after foreclosure. Tr. II:41-43, 46-48 (respondent); Ex. 48, at 74-76. We credit that in cases that progressed to litigation, the time value the respondent invested often exceeded the retainers and monthly fees the clients paid. The respondent claimed that was overwhelmingly the case. Tr. II:182-182); Tr. I:298; Tr. II:66-67, 182-183 (respondent); Ex. 48, at 74-76 (respondent) (without a success fee, the practice is not lucrative because time spent in litigation exceeds retainer and monthly fees). See also Ex. 28. Bar Counsel has not proved otherwise. (The respondent did charge and collect excessive fees from O'Brien for his work post-bankruptcy but, in that case, the foreclosure did not progress to litigation.)

82. The respondent acknowledged what is shown by the FDCFA provisions cited in ¶ 78, above: the monthly fee had no direct relationship to the extent of services provided or the expenses incurred by the respondent. Ex. 49, at 84, lines 19-86, line 2 (no relationship "apparent on . . . [the agreement's] face" between time spent and the monthly fee, which was based on "a couple of hours worth of work"). See also Tr. I:83, lines 18-84, line 3, 97-98 (Russell) (Russell did not compare work done to fees received; cannot say that work always equaled or exceeded clients' monthly payments). The respondent admitted that, at times, which he characterized as rare, the payment of monthly fees outpaced the time spent. Tr. I:305 (respondent). In effect, the monthly payments were a financing arrangement toward future legal representation where the hours put into the case would eventually exceed those payments. Ex. 48, at 74-76.

83. In the Ciampa case, for instance, the respondent's reconstructed bill indicated that by July 17, 2017, he had earned only $440. Ex. 28, at BP 1344. Nevertheless, according to the payment schedule in the Ciampa FDCFA and the respondent's billing records, Ciampa had paid between $3,000 and $4,500 by around July 2017, including the retainer and the monthly fees, well in advance of the firm's earning them. Ex. 35, at BP 1529-1530 (FDCFA); Ex. 16, at BP 0916-0917 (Ciampa billing report, which starts in June 2017).

84. The FDCFA's did not specify how long a client was expected to pay the monthly fees in the event no foreclosure was instituted. Ans. ¶ 46, Ex. 36, at BP 1571; ¶ 78, above. Some of them did provide for termination or suspension of the monthly fee if the client lost possession of the premises or was no longer pursuing litigation against the lender. ¶ 78, above.

85. The respondent treated the monthly fees as earned upon receipt, and he deposited them into his operating account. Tr. I:82-84, 171 (Russell); Tr. IV:126-127 (Nolan); Ex. 49 at 84, lines 6-12 (respondent). The respondent or someone else in the firm explained this to the clients when they were presented with their FDCFA's. Tr. I:269-270; Tr. II:164 (respondent); see ¶ 79, above (respondent's view of the exchange of value for the monthly payment). See also Tr. V:114 (Boguslav) (FDCFA was explained to Boguslav; he understood the retainer and monthly fees were earned on receipt).

86. We find that the provisions for monthly fees, taken as earned upon payment, resulted in the respondent's contracting for clearly excessive fees because of the absence of any connection between the work done and the amounts the clients were required to pay. In some cases, where the payments exceeded the value of the work performed, the respondent collected clearly excessive fees because of these provisions. However, Bar Counsel has not shown that this resulted in deprivation of any client's funds. That is, we find that Bar Counsel did not establish that upon termination of any client's representation, the respondent kept any unearned fees and failed to return them.

87. The respondent offered some clients a respite from paying monthly fees during a period of inactivity in foreclosure proceedings. Tr. I:241, 271, 302-303; Tr. II:165; Tr. VI:26,

58-59 (respondent); Tr. I:94 (Russell); Tr. V:211-221, 235 (Telemaco); Ans. ¶ 46, Ex. 36, at BP 1571. Such payment holidays were not provided for in the written agreements, were not automatic, and depended on unarticulated factors such as activity expected to occur in the future. Tr. I:304-305 (respondent). Therefore, they were undefined and potentially arbitrary.

88. Bar Counsel contended that the respondent's preferred strategy placed clients in harm's way. We disagree. A client's default under the mortgage debt was typically a given at the start of the representation. See ¶ 81, above. The respondent testified that most foreclosure defense cases are not successful, Ex. 49, at 54-55, but that was an acknowledgment of the difficulty of these cases. The evidence before us indicates that the respondent engaged in intake and preparatory work that provided an opportunity to assess potential defenses to possession. Tr. I:293 (respondent) (fifteen-hour average of intake work if litigation is looming); Tr. II:160-162 (respondent) (usual intake work); Tr. I:136-137, 172-173 (Russell) (advance work required when case first undertaken); Ex. 49, 11-18. As we have noted (¶ 81, above), the respondent's preferred strategy was to engage with the lender to give the client time to negotiate by contesting the lender's right to possession. Tr. II:172-174, 179-182 (respondent) (foreclosure does not involve judicial oversight, but firm can use knowledge of summary process eviction procedure to slow things down; firm contacts lender's counsel to seek settlement).

89. The respondent offered his financially distressed clients the option of a predictable monthly payment in lieu of an hourly fee to make his services more affordable to such clients and to offset the advantage enjoyed by deep-pocketed lenders. Tr. I:205, 276; Tr. II:37, 60-61, 65-67, 248-249; Tr. VI:39-41 (respondent). Bar Counsel has not challenged the propriety of the monthly payment arrangement, only whether the respondent was entitled to treat the monthly fees as earned on receipt irrespective of the time spent by the date of payment.

90. As a result of Bar Counsel's involvement, the firm now deposits monthly fees into a trust account and withdraws them when earned against a set hourly rate. Tr. VI:83-84 (respondent). The respondent testified that this has not affected the firm's profitability because under the prior practice, the firm had usually earned the fees when taken. Tr. II:266-267

(respondent). The respondent said it remains to be seen whether the firm can make a reasonable profit under the new practice of withdrawing the monthly payments from a trust account and depositing them into the operating account only after they have been earned on an hourly fee basis. Tr. VI:84 (respondent). He had already testified that the firm operated on a shoestring and did not make much money on foreclosure defense cases. Tr. II:104-105 (respondent).

Early Termination Provisions (¶¶ 91-92)

91. The FDCFA's set an hourly rate to be applied in the event of early termination of the representation. Ans. ¶ 31, Ex. 36, at BP 1567. Bar Counsel contends that the early termination provisions constituted part of the excessive fees charged under the fee agreements, but we do not so find. This case is not like Matter of Murray, 24 Mass. Att'y Disc. R. 483 (2008). There, the early termination clause set a clearly excessive rate, well in excess of what the attorney usually charged. The provision functioned as a penalty that unfairly restricted client mobility, rather than fair compensation.

92. In this case, the rates established in the respondent's FDCFA's were not excessive, given the complexity and novelty of this field of law. Early termination would deprive the respondent of an opportunity, however unusual, to recoup what he postponed and often gave up by the retainer and monthly payment provisions, i.e., being paid the fair value of his work. Only some of the agreements provided for credit against the termination fee for monthly payments and retainers paid to the date of termination, but we think such a credit is implicit in all the FDCFA's. Therefore, we find that the early termination provisions did not call for an excessive fee, and we do not address them further.

Collection Provisions (¶¶ 93-103)

93. The following are examples of provisions in FDCFA's entitled "Partial Hourly and Partial Reverse Contingency Fee Agreement" for collection of the reverse contingent fee:

a. [¶4] Except for any money recovered under a standard contingent formula at paragraph 2(c) above, reasonable compensation on the foregoing reverse contingency at paragraphs 2(a) and 2(b) above is to be paid by the Client to the Attorney by way

of a promissory note with interest at 6% per annum on a fifteen (15) year amortization basis, with said promise secured by a mortgage security interest against the Client's premises.[14]

b. [¶ 4] Except for any money recovered under a standard contingent formula at paragraph 2(b) above, reasonable compensation on the foregoing reverse contingency at 2(a) above is to be paid by the Client to the Attorney by way of a promissory note with interest at 6% per annum on a fifteen (15) year amortization basis, with said promise secured by a mortgage security interest against the Client's real property, if and when the same is successfully re-conveyed to client free of any mortgage security interest.[15]

94. Those provisions did not set forth the full terms of the mortgage security interest against a client's property. As a result, a client could not give informed consent to the provision.

95. Each of the FDCFA's with this provision included an agreement to submit to the Massachusetts Bar Association's fee arbitration board disputes over the amount owed. None of them, however, recommended that the client seek independent advice concerning the agreement generally or the mortgage security provision in particular.[16] Clients who had questions about the fee agreement were simply told to take the agreement home and discuss it with anyone they chose. Tr. VI:75-76 (respondent) (focusing on reverse contingent fee clause).

96. The mortgage security clause has never been enforced, and the respondent has never taken a lien on a client's home. Tr. II:67-68, 254 (respondent) (clause adopted from another lawyer's fee agreement when respondent not sure how important it would be; proved not to be useful and confusing to clients; never took a lien); see also Ans. ¶ 32, Ex. 36, at BP 1567;

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[14] Ex. 5, at BP 0240 (Locke "Partial Hourly and Partial Reverse Contingency Fee Agreement" #1); Ex. 5, at BP 0259 (Stanley "Partial Hourly and Partial Reverse Contingency Fee Agreement"); Ex. 5, at BP 0277 (Harrison "Partial Hourly and Partial Reverse Contingency Fee Agreement").

[15] Ex. 5, at BP 243 (Locke "Partial Hourly and Partial Reverse Contingency Fee Agreement" #2); Ex. 5, at BP 0246 (Locke "Partial Hourly and Partial Reverse Contingency Fee Agreement" #3). Cf. Ex. 6, at BP 0310 (Lekos "Partial Hourly and Partial Reverse Contingency Fee Agreement"); Ex. 47 (Telemaco "Partial Hourly and Partial Reverse Contingency Fee Agreement"); Ex. 6, at BP 0325 (Fillion "Partial Hourly and Partial Reverse Contingency Fee Agreement"); Ex. 6, at BP 0328 (Minnehan "Partial Hourly and Partial Reverse Contingency Fee Agreement").

[16] See FDCFA's cited in notes 14 and 15, above, and Ans. ¶ 49, Ex. 36, at BP 1572.

Ans. ¶ 47, Ex. 36, at BP 1572; Tr. I:144 (Russell) (firm never enforced the mortgage clause). The respondent explains to his clients that the clause has never been enforced and that it is intended for the rare case in which the mortgage is expunged and the property is returned to the client free and clear. Ans. ¶ 47, Ex. 36, at BP 1572. This, however, is not what the FDCFA's say. The security clause applies to any reverse contingent fee recovery, whether based on full mortgage expungement or on a reduction in loan principal. See ¶¶ 59(a), (b), and (c), above; compare ¶¶ 84(a) and (b), above.

97. Above, ¶ 66, we found that the reverse contingent fee clause resulted in a contract for a clearly excessive fee. Because the note and mortgage provisions are part of the reverse contingent fee provisions, they also resulted in a contract for a clearly excessive fee, in addition to their failure to adequately disclose the terms of the note and mortgage to the client.

98. Some of the FDCFA's entitled "Representation and Fee Agreement" contained the following provisions concerning default under the monthly payment terms:

> If the Client becomes delinquent for a period of two months or greater under the monthly installment payments assumed under this contract, McArdle Law, at its sole discretion, may 1) withdraw representation (assuming the Court allows such withdrawal in the case of then-current litigation), 2) continue representation in good faith if Client demonstrates an ability and willingness to pay owed installments, 3) demand, in the case of immediately pending or then-current litigation, payment in full of all moneys owed and if satisfied continue with litigation and if not satisfied, provide Client an outside opportunity involving a third-party Investor, who would assist Client in buying out the mortgage holder's interest and together with Client sell the Property for a mutually agreed on beneficial interest in any proceeds of such sale, over and beyond the investment made by Investor (an additional contract would be executed in this situation).[17]

[17] Ex. 6, at BP 0314-0315 (Germinara "Representation and Fee Agreement"); Ex. 6, at BP 0320 (Richards "Representation and Fee Agreement"); Ex. 6, at BP 0323 (Haikal "Representation and Fee Agreement"); Ex. 6, at BP 0332-0333 (Gormley "Representation and Fee Agreement"); Ex. 35, at BP 1530-1531 (Ciampa "Representation and Fee Agreement"); Ex. 35, at BP 1533-1534 (DeMustchine "Representation and Fee Agreement"); Ex. 35, at BP 1536-1537 (Garland "Representation and Fee Agreement"); Ex. 35, at BP 1539-1540 (Mondi "Representation and Fee Agreement"); Ex. 35, at BP 1542-1543 (John Ryan "Representation and Fee Agreement"); Ex. 35, at BP 1545-1546 (Taveras "Representation and Fee Agreement"); Ex. 46, at 2-3 (Boguslav "Representation and Fee Agreement").

99. The third-party investor clause was offered to clients as an option in lieu of terminating the relationship when the client was unable to maintain the monthly payments. Tr. II:22-23, 25, 183-185, 186-187 (respondent); Tr. I:145-146 (Russell).

100. With but one or two exceptions, the respondent has not withdrawn from representing clients who fell behind under the FDCFA, although many of them have fallen "far, far behind." Tr. VI:58-59 (respondent); Tr. I:93-94 (Russell).

101. The FDCFA's containing the third-party investor clause expressly contemplated a new contract. They did not disclose the terms of the investor's involvement, the outcome to be achieved, or the client's ultimate interest in the premises or the proceeds of sale; those were to be negotiated when the investor was brought in. Tr. II:25-28 (respondent). ¶ 98, above.

102. The FDCFA's containing this provision include an acknowledgment that the client has been advised of the right to seek independent legal review of the terms of the contract and has exercised the right or waived it.[18]

103. We find that the third-party-investor clause did not result in a contract for excessive fees because, as written and as applied, it was an option offered to the client, was not mandatory, and contemplated a new contract. There was no evidence that the respondent took unfair advantage of any client by using this clause.

The MBA Opinion Letter (¶¶ 104-105)

104. The respondent modeled his FDCFA's on an agreement used by another attorney practicing mortgage foreclosure defense, Jamie Ranney. Tr. I:202-207 (respondent). The respondent used Attorney Ranney's form to draft his own agreement after having reviewed an advisory letter from the ethics committee of the Massachusetts Bar Association, addressed to Ranney. The letter identified ethical difficulties with non-refundable fees and reverse contingent fee provisions, among others. Tr. I:207-208 (respondent); Ex. 15 at BP 0468, 0478-0481. The respondent testified that he understood the MBA opinion as permission to use Ranney's form so

[18] See ¶10 of the FDCFA's cited in note 17.

long as it was administered fairly. Tr. I:210-212 (respondent). Morgan Russell credibly testified that the respondent told her that the MBA had approved the terms of his fee agreement, including that fees were earned on receipt; but she also testified that he showed her only the first page of the opinion letter, which did not address payments treated as earned on receipt. Tr. I:84, 109-110 (Russell).

105. In fact, the MBA opinion did not approve Ranney's form; for instance, it warned against the use of non-refundable fees. When confronted with that section of the opinion, the respondent said he was not concerned about it because he was doing work equal to or greater than the fees he charged. That statement is undercut by his acknowledgment that in some cases the work performed did not equal the retainer. Tr. I:84, lines 11-17 (thought MBA allowed it); Tr. II:254, line 10, to 255, line 13 (respondent). We find that the respondent's reliance on the MBA opinion is misplaced. It falls far short of justifying his fee arrangements.

Illegal Fees: State and Federal Regulations (¶¶ 106-118)

106. Between 2011 and the present, the respondent had foreclosure defense clients sign fee agreements that called for advance retainers and monthly payments with no necessary connection to fees earned that month or to date. Therefore, some of those were payments in advance for legal services to be rendered in the future. Those services included litigation, preparation of forensic loan analyses, and negotiation of loan modifications with the client's lender or mortgage servicer. Ans. ¶ 58, Ex. 36 at BP 1574; and see ¶¶ 70, 76, 78, 81, 82, above.

107. Between 2011 and the present, the respondent solicited, arranged, and accepted fees for loan modification services, including litigation, from clients in advance of providing such services to the clients. Ans. ¶ 59, Ex. 36, at BP 1574 (admitted, but denied soliciting for purely loan modification services); and see ¶ 59 (contingencies include the outcome of such services), and ¶¶ 70, 76, 78, 81, 82, above.

108. Between 2011 and 2020, the respondent did not deposit the retainers and advance monthly fees into client trust accounts and therefore failed to comply with the Massachusetts Rules of Professional Conduct concerning the maintenance of clients' trust funds. Ans. ¶ 60, Ex.

36, at BP 1574-1575 (admits advance fees were not deposited; if they were advance fees, non-deposit would violate state laws and regulations); and see ¶¶ 72, 74, 81, 82, 85, above.

109. The evidence before us includes certain provisions of the Code of Massachusetts Regulations ("CMR") and the Code of Federal Regulations ("CFR"). Ex. 18; Ex. 19; Ex. 20; Ex. 21. Bar Counsel contends that the respondent's fee agreements violated those provisions.

110. "Foreclosure-related Services" are defined in 940 CMR § 25.01 as: "[A]ny goods or services related to, or promising assistance in connection with: (a) avoiding or delaying actual or anticipated foreclosure proceedings concerning residential property; or (b) curing or otherwise addressing a default or failure to timely pay, with respect to a residential mortgage loan obligation." Ex. 18 (940 CMR 25.00, including §§ 25.01 to .03.) We find that the respondent provided foreclosure-related services within the meaning of this regulation. Tr. I:294-295, Tr. II:178, 182 (respondent) (respondent contacted foreclosing attorney in an effort to stop the foreclosure or to settle cases); and see ¶ 59, above (case outcomes warranting reverse contingent fees included reduction or expungement of mortgage loan principal).

111. Section 25.02 of 940 CMR declares it "an unfair or deceptive act in violation of M.G.L. c. 93A, § 2(a) to solicit, arrange, or accept an advance fee in connection with offering, arranging or providing Foreclosure-related Services . . . ," subject to certain exceptions. For purposes of 940 CMR § 25.02, an advance fee is "any money or consideration paid in advance of actually receiving services." Ex. 18, at BP 1251.

112. An exception in 940 CMR § 25.02(2) is as follows:

> [P]rovided, however, that 940 CMR 25.02(2) shall not prohibit a licensed attorney from soliciting, arranging or accepting an advance fee or retainer for legal services in connection with the preparation and filing of a bankruptcy petition, or court proceedings, to avoid a foreclosure. Provided further, however, that a licensed attorney accepting an advance fee or legal retainer must comply with all applicable laws and regulations pertaining to such fees, including the Massachusetts Rules of Professional Conduct, specifically Rules 1.5 and 1.6.

We read this exception as requiring compliance with Mass. R. Prof. C. 1.15, which requires deposit of clients' trust funds, including prepaid fees, into a trust account. The respondent did not qualify for the exception because he did not deposit unearned retainers and advance monthly fees into a trust account. ¶¶ 72, 74, 81, 85, above.

113. Turning to the federal regulations, "Mortgage Assistance Relief Service" is defined at 12 CFR § 1015.2 as follows:

> *Mortgage Assistance Relief Service* means any service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or by implication, to assist or attempt to assist the consumer with any of the following: (1) Stopping, preventing, or postponing any mortgage or deed of trust foreclosure sale for the consumer's dwelling, any repossession of the consumer's dwelling, or otherwise saving the consumer's dwelling from foreclosure or repossession; (2) Negotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees; (3) Obtaining any forbearance or modification in the timing of payments from any dwelling loan holder or servicer on any dwelling loan; (4) Negotiating, obtaining, or arranging any extension of time within which the consumer may (i) Cure his or her default on a dwelling loan, (ii) Reinstate his or her dwelling loan, (iii) Redeem a dwelling, or (iv) Exercise any right to reinstate a dwelling loan or to redeem a dwelling; (5) Obtaining any waiver of an acceleration clause or balloon payment contained in any promissory note or contract secured by any dwelling; or (6) Negotiating, obtaining, or arranging: (i) a short sale of the dwelling, (ii) a deed-in-lieu of foreclosure, or (iii) any other disposition of a dwelling other than a sale to a third party who is not the dwelling loan holder.

Ex. 19, at BP 1255-1256.

114. "*Mortgage Assistance Relief Service Provider*" is defined at 12 CFR § 1015.2 as follows: "any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service." Ex. 19, at BP 1256.

115. A prohibition on advance fees for mortgage assistance relief services appears at 12 CFR § 1015.5 (Ex. 19, at BP 1260) in the following terms:

> It is a violation of this rule for any mortgage assistance relief provider to: (a) Request or receive payment of any fee or other consideration until the consumer has executed a written agreement between the consumer and the consumer's dwelling loan holder or servicer incorporating the offer of mortgage assistance relief the provider obtained from the consumer's dwelling loan holder or servicer.

116. An exception for attorneys appears at 12 CFR § 1015.7(b), as follows:

> (b) An attorney who is exempt pursuant to paragraph (a) of this section is also exempt from § 1015.5 if the attorney: (1) Deposits any funds received from the consumer prior to performing legal services in a client trust account; and (2) complies with all state laws and regulations, including licensing regulations, applicable to client trust accounts. Ex. 19, at BP 1261-1262. "Client trust account" is defined at 12 CFR § 1015.2 as follows: "a separate account created by a licensed attorney for the purpose of holding client funds, which is: (1) Maintained in compliance with all applicable state laws and regulations, including licensing regulations; and (2) Located in the state where the attorney's office is located, or elsewhere in the United States with the consent of the consumer on whose behalf the funds are held.

Ex. 19, at BP 1254-1255.

117. We find that the respondent provided mortgage assistance relief service within the meaning of this regulation. He did not satisfy the exemption from the prohibition in 12 CFR § 1015.5 on collecting advance fees because he received advance fees that he did not deposit into a trust account. ¶¶ 72, 74, 81, 85, above.

118. We find that the respondent violated the state and federal regulations cited above.

Count Two: Conclusions of Law (¶¶ 119-126)

119. Bar Counsel charged that the respondent violated Mass. R. Prof. C. 1.5(f)(3) (contingent fee agreement materially different from prescribed forms) by failing to obtain his foreclosure defense clients' informed consent, confirmed in writing, to the reverse contingent fee provisions and the other provisions of the FDCFA's that differ materially from those forms. Based on our findings set forth in ¶ 65, above, we conclude that the respondent violated that rule as charged. The rule requires more than the client's signature on the fee agreement itself. Mass.

R. Prof. C. 1.5(f)(3) ("A fee agreement containing a statement in which the client specifically confirms with his or her signature that the lawyer has explained that there are provisions of the fee agreement, clearly identified by the lawyer, that materially differ from, or add to, those contained in Forms A or B meets the 'confirmed in writing' requirement"). The respondent obtained no such written confirmations from his clients. That omission violated rule 1.5(f)(3).

120. Bar Counsel contends that the respondent violated Mass. R. Prof. C. 1.5(a) (illegal or clearly excessive fees) by entering into fee agreements charging ill-defined and excessive contingent fees prohibited by state and federal law and regulations, monthly fees that bore no relation to the work performed, retainers that the respondent did not have to earn, non-refundable up-front fees, early termination fees, and other clearly excessive fees. Based on the findings set forth above, ¶¶ 66, 74, 76, 81, 82, 85, 86, we conclude that the FDCFAs' provisions for reverse contingent fees, retainers, and monthly fees were contracts for the payment of clearly excessive fees in violation of rule 1.5(a).

121. We conclude that the provisions for retainers and monthly fees sometimes resulted in the respondent's collecting illegal fees under the regulations cited in ¶¶ 106-118, above. We also conclude that in some instances, the respondent's receipt of retainers and monthly fees constituted the collection of clearly excessive fees. ¶¶ 76, 82, 85, above. Nevertheless, we conclude that Bar Counsel has not shown that any client was deprived of funds as a result of the respondent's collecting excessive fees. ¶¶ 68, 76, 86, above. Bar Counsel did not prove that any client's funds were unavailable when the client required them or upon termination of the representation.

122. Bar Counsel contends that the retainer payments constituted client funds to which the respondent was not entitled, and that when he deposited them into his operating account, he misused clients' funds in violation of Mass. R. Prof. C. 8.4(c) and (h). Bar Counsel's PFCs, at ¶ 44, p. 10. Bar Counsel also contends that by depositing clients' monthly fees and other advance fees into his personal and/or business accounts, and using the funds for his own purposes, the respondent misused clients' funds. Violations of rules 8.4(c) and 1.15(b) were not charged in

count two of the petition for discipline. Count three of the petition cites rule 8.4(c) and rule 1.15(b), as stated above. Had the respondent been charged in count two with improperly depositing unearned fees into his operating account in violation of rules 1.15(b) and 8.4(c), we would have analyzed his conduct as follows.

123. Under count one, in ¶¶ 48-53, above, we concluded that the respondent's misuse of O'Brien's advance fee payments would have violated rules 1.15(b) and 8.4(h), had they been charged. We found that deprivation resulted from the misuse because the respondent did not refund the excess payments when O'Brien fired him. However, we concluded that the respondent did not violate rule 8.4(c); his conduct did not involve dishonesty even though deprivation resulted from the misuse. Under count two, we conclude that the respondent violated rule 8.4(h). We again conclude that his treatment of retainers and advance monthly payments as earned upon receipt constituted commingling and misuse of clients' funds that would have violated rule 1.15(b), had it been charged. And we again conclude that Bar Counsel has not proved dishonesty, deceit, fraud, or misrepresentation on the respondent's part. He applied his fee agreements as written and as explained to his clients. Unlike count one, we conclude that the respondent's misuse of clients' funds under count two did not result in deprivation. Therefore, the principle of Schoepfer and related precedents, discussed in our conclusions under count one, does not come into play under count two.

124. Bar Counsel charged the respondent with violating the state and federal regulations cited above. He alleged that the respondent's charging and collection of fees in advance for loan modification-related legal services, without depositing the advance fees into a trust account, violated 940 CMR § 25.02(b) and was therefore an unfair or deceptive act or practice in violation of G.L. c. 93A. Bar Counsel also charged that the respondent's soliciting, arranging, and accepting fee payments for loan modification services in advance of providing such services to clients, without depositing the advance fees into trust accounts, and otherwise without complying with state laws and regulations governing legal fees and the maintenance of

client trust funds, violated 16 CFR §§ 322.5 and 322.7 and Regulation O, 12 CFR §§ 1015.5 and 1015.7. We conclude that Bar Counsel has proved that the respondent violated those regulations.

125. Bar Counsel charged that the respondent's conduct violated 12 U.S.C. §§ 5531 and 5536 (Ex. 20). Section 5531 empowers the Bureau of Consumer Financial Protection to prohibit unfair, deceptive, or abusive acts or practices. Section 5536 declares it unlawful to violate consumer financial law or to engage in any unfair, deceptive, or abusive act or practice. Bar Counsel has not provided any analysis of those statutes; they do not appear to establish any standard of conduct the respondent could be held to have violated.

126. Bar Counsel contends in his PFCs that, by entering into fee agreements that violated state and federal regulations, the respondent violated Mass. R. Prof. C. 8.4(c) (dishonesty, deceit, fraud or misrepresentation) and (h) (other conduct reflecting adversely on fitness to practice law). Bar Counsel's PFCs, at ¶ 98, p. 24. The 8.4(c) contention is a change from the petition for discipline, which charged the respondent with violating Mass. R. Prof. C. 8.4(b) (engaging in conduct constituting a crime). The original charge has not been proved; we have found no criminal conduct. As to the revised charge articulated in Bar Counsel's PFCs, nothing before us establishes that the respondent's fee agreements and collection practices involved misrepresentation, fraud, deceit or dishonesty in violation of rule 8.4(c). We conclude that some of the provisions for contingent fees and advance payments were illegal, in that they violated the regulations cited by Bar Counsel, and therefore violated rules 1.5 and 8.4(h) and would have violated rule 1.15, as stated in ¶¶ 119-123, above. They did not involve dishonesty, so no violation of rule 8.4(c) has been established.

Count Three: Findings of Fact (¶¶ 127-156)

127. In this section of our report, we set forth our findings of fact concerning the respondent's alleged disciplinary violations arising from the maintenance of his firm's clients' funds account records and reconciliations (¶¶ 128-137) or from commingling clients' funds with earned fees and misusing clients' funds (¶¶ 138-156) and our conclusions (¶¶ 157-167) that the respondent (a) failed to maintain records of clients' funds and to reconcile his clients' funds

accounts as required by the rules of professional conduct, (b) misused clients' funds by making payments to Beyond Soccer, Inc. with money in his IOLTA account, (c) did so negligently in three instances and intentionally in one, (d) commingled clients' funds with earned fees, and (e) negligently created negative balances in his IOLTA account. We find and conclude that Bar Counsel did not prove (a) that the respondent intended to deprive any client of clients' funds, (b) that any such deprivation occurred, or (c) that the respondent's misuse or commingling of clients' funds involved misrepresentation, fraud, deceit or dishonesty.

Account Records and Reconciliations (¶¶ 128-137)

128. Three accounts in the name of the Law Offices of Michael M. McArdle were opened on November 9, 2006: Beverly Co-operative Bank operating #7479, clients' fund IOLTA #7487, and real estate IOLTA #7495. Ex. 17, at BP 01233. The successor firm's accounts, in the name of McArdle Law & Associates PLLC, were opened on the following dates and remained open until at least to January 9, 2019: clients' fund IOLTA #4103 (1/16/2015); real estate IOLTA #1395 (5/10/2016); operating account #0177 (9/29/2015). Ex. 17, at BP 1234.

129. The respondent admitted that between 2011 and 2016, his firm did not maintain the records required by Mass. R. Prof. C. 1.15 for his clients' funds IOLTA account. Tr. I:197 (respondent). We found, above, that retainers and monthly fees received under the FDCFA's were clients' funds until earned and that they were, therefore, required to be deposited into a trust account until earned. See ¶ 124; Mass. R. Prof. C. 1.15(b). Nevertheless, the respondent deposited, and treated as earned on receipt, some of those payments before they had been earned.

130. Therefore, between 2011 and at least 2018, the respondent did not maintain accurate trust account documentation as required by Mass. R. Prof. C. 1.15 for funds received from his approximately sixty active foreclosure defense clients. Ans. ¶ 67 (admits facts, but not violation); Ex. 7, at BP 0334 (letter from respondent's counsel). He acknowledged that he did not maintain a chronological check register with client identifiers, individual client ledgers or a bank fee ledger and that he did not perform three-way reconciliations at intervals of not more than sixty days. Ans. ¶ 67.

131. Starting no later than 2011, the firm's bookkeeping and accounting were handled by the respondent's daughter, Stephanie McArdle. Tr. I:122-123 (Russell); Tr. III:78-80,184-185 (S. McArdle). The respondent did not instruct Stephanie how to perform three-way reconciliations of trust accounts. Tr. III:90-91 (S. McArdle). She could not recall reviewing Mass. R. Prof. C. 1.15. Tr. III:95 (S. McArdle). For the following reasons, we find that Stephanie did not keep properly reconciled trust account records.

132. Stephanie testified that she performed three-way reconciliations, but her testimony about what she did, and her description of a three-way reconciliation, did not conform to rule 1.15. Tr. III:79-83, 87-88, 139-140 (S. McArdle). When the firm received an audit request in 2016, the respondent told Morgan Russell to ask Stephanie what needed to be done, and how to do reconciliations. Tr. I:123, 160, 168 (Russell). Russell did not recall that what Stephanie showed her constituted a three-way reconciliation. Tr. I:160-161 (Russell).

133. Stephanie testified that she believed Russell was reconciling the same way she did. Tr. III:185 (S. McArdle) (Russell took over after her, reconciled in same way). Stephanie testified that she saved some reconciliation reports, but none were presented to us. Tr. III:86-87, 203-204 (S. McArdle); Ex. 16 (response to Bar Counsel's requests for information and documents). Based on the foregoing, and on Russell's testimony, cited in ¶ 134, below, that her own reconciliations did not comply with rule 1.15 until 2018, we find that the respondent did not start to maintain properly reconciled trust accounts until 2018.

134. For the firm's trust accounts set up in 2015 and 2016, identified in ¶ 128, above, the accounting was performed by Russell starting around 2016, when she assumed administrative responsibilities at the firm. Tr. I:42-43, 46 (Russell). During a title insurance audit in 2016, the insurer advised her that accounts were not being reconciled. Tr. I:43-44 (Russell). Russell took over the task voluntarily at that time; she was not instructed to do so. Tr. I:45, 46, 158-159, 162 (Russell).

135. However, the reconciliations Russell performed from 2016 to 2018 were not three-way reconciliations among clients' and bank fee ledgers, bank statements, and a master

check register. Tr. I:46-47, 52 (Russell); see Mass. R. Prof. C. 1.15(f)(1)(E). Russell came to learn the correct way to perform three-way reconciliations around 2018, when another title insurance audit disclosed that the reconciliations were still not being performed correctly; the title insurer sent a representative to train Russell how to perform them for the real estate IOLTA account. Tr. I:44, 46, 52-53, 58, 120, 151, 153, 167-169, 170 (Russell). She obtained a reconciliation worksheet in 2018 and began to use it to perform three-way reconciliations. Tr. I:56-58 (Russell). She then undertook to perform reconciliations going forward, and, around 2019, retrospective reconciliations for 2016-2017; the retrospective reconciliations were not completed. Tr. I:54, 71-73 (Russell). Her reconciliations of the clients' fund IOLTA account were not performed as often as required by Mass. R. Prof. C. 1.15. Tr. I:59 (Russell). Not all the reconciliations resulted in a balanced reconciliation report. Tr. I:62, 64, 68, 70 (Russell); Ex. 16, at BP 0658, 0696.

136. The respondent was not involved in Russell's reconciliations except as a source of information when she asked questions, and he did not review them. Tr. I:63, 65, 69, 111, 121 (Russell). The firm had no policies to ensure that attorneys stayed current on the rules of professional conduct and complied with those rules. Tr. I:87-88 (Russell).

137. In our findings of fact under count one (¶¶ 30-32), we rejected the respondent's claim that computer problems excused his failure of communication with client O'Brien. We likewise reject his excuse that corruption or loss of his firm's computer records have prevented him from demonstrating compliance with the recordkeeping requirements of rule 1.15. See Tr. III:202 (S. McArdle). The respondent's own admissions, and the testimony of Stephanie McArdle and Morgan Russell, leave no doubt that their recordkeeping fell far short of meeting the requirements of that rule.

Payments to Beyond Soccer, Inc. (¶¶ 138-148)

138. Between 2011 and at least 2016, the respondent and Stephanie were officers and directors of Beyond Soccer, Inc. ("BSI"). Ans. ¶ 68; Ex. 7, at BP 0335; Ex. 9; Ex. 10. BSI is a non-profit organization incorporated by the respondent in 2011. Tr. III:101-104 (S. McArdle);

Ex. 9. Its laudable purpose is to operate and promote "long term, quality soccer experiences for underprivileged youth . . . in the City of Lawrence, MA, and to create a positive environment that builds self confidence, develops leadership and life skills, promotes healthy living and the general welfare of the players, their families and the Lawrence community." Ex. 9, at BP 0404; see also Tr. III:101-104 (S. McArdle). BSI was not a client of the respondent. Ex. 48, at 88.

139. The respondent made, or caused to be made, four payments totaling $16,500 to BSI from his clients' fund IOLTA account, #7487 at Beverly Co-operative Bank ("clients' fund IOLTA account"). Ans. ¶ 69, Ex. 36. Those payments were as follows:

a. Clients' fund IOLTA account check no. 2813, dated 10/23/2014, for $3,000; Ex. 12, at BP 0440;

b. Clients' fund IOLTA account check no. 2984, dated 10/31/2014, for $2,000; Ex. 12, at BP 0441;

c. Clients' fund IOLTA account check no. 2815, dated 11/5/2014, for $4,000; Ex. 12, at BP 0442;

d. Clients' fund IOLTA account check no. 2864, dated 11/25/2015, for $7,500; Ex. 12, at BP 0444.

140. The respondent testified that he believed those checks were funded by earned fees he had left in the clients' fund IOLTA account. Tr. II:230 (respondent); Ex. 48, at 88-89. For the reasons set forth in the next four paragraphs, we find that they were drawn on clients' funds.

141. With respect to clients' fund IOLTA account check no. 2813 to BSI, in the amount of $3,000 and dated 10/23/2014, we find as follows:

a. On October 17, 2014, the balance in the clients' fund IOLTA account was $11,342.08. On that date, a deposit of $300,000, unrelated to BSI, was made into the account. Ex. 39 (Bar Counsel's spreadsheet summarizing activity in the clients' fund IOLTA account), at BP 1615, lines 164, 165; Ex. 16, at BP 0748 (respondent's spreadsheet summarizing activity in that account). Just after that, check no. 2813 to BSI, for $3,000, was issued on October 23; check no. 2984, for $2,000, on October 31; and check no. 2815, for $4,000, on November 5, 2014. Ex. 39, at BP 1615, lines

168, 171. Those three payments to BSI totaled $9,000, which was all but $2,342.08 of the balance of $11,342.08 that was in the account before the $300,000 deposit.

b. By November 19, 2014, the $300,000 had been transferred out of the account by wire. After that transfer and the three payments to BSI that totaled $9,000, and other unrelated disbursements, the balance in the account was down to $67.08. Ex. 39, at BP 1615, lines 164, 165, 173; Ex. 16, at BP 0748. The respondent would have us find that the entire $9,000 consisted of his money even though it was on deposit in a clients' funds account and made up nearly the entire balance in that account when the checks were written. The evidence does not support such a finding; the logical inference is to the contrary.

c. As to the $300,000 deposit, we received no evidence that it represented, in whole or in part, funds belonging to the respondent. Even if it did, the entire amount was soon wired out of the account and was not used to cover any of the checks to BSI. The $300,000 deposit does not establish that the $3,000 check to BSI was drawn on funds belonging to the respondent.

d. The respondent contends that the $3,000 check was drawn on fees he had earned from a foreclosure defense client (Trudy Thompson) and that it was funded by three transfers into the clients' fund IOLTA account totaling $3,100. Tr. II:234 (respondent); Ex. 49, at 66. Those deposits were made on 5/29/2014 ($1,100), 6/3/2014 ($1,000), and 6/3/2014 ($1,000). Ex. 39, at BP 1614, lines 144, 147, 148; Ex. 16, at BP 0748.

e. The fact that those were deposits into the clients' fund IOLTA account from or on behalf of Thompson indicates they were client funds, not legal fees. The respondent testified that there were "adjustments that were due me" from Thompson and that the deposits represented earned fees even though "they weren't written out of the clients' fund IOLTA right away." Tr. II:234 (respondent); Ex. 49, at 66, 68.

f. On his spreadsheet (Ex. 16, at BP 0748), the respondent attributed $2,000 of those deposits to a foreclosure defense fee. According to the respondent, Thompson owed him a fee and did not send him trust funds in round $1,000 amounts. Ex. 49, at 69, 71. We do not credit that statement. We received no other evidence, such as fee invoices rendered to Thompson, that any of the three deposits were legal fees. The entire $3,100 was deposited within four days, from May 29 to June 3, 2014. Those deposits do not fit the pattern of monthly payment of legal fees in equal round amounts.

g. The $3,100 was deposited into an IOLTA account and not transferred to the operating account, raising the inference that they were trust funds, not legal fees. Morgan Russell testified that money that came in for something other than fees was deposited into the clients' funds account. Tr. I:86.

h. The respondent told Bar Counsel in a statement under oath that Thompson was a foreclosure defense client, but also had litigation in the superior court, which she settled, then "failed on settlement agreement," requiring his further assistance. Ex. 49, at 69-70; see also reference to mis-deposited funds relating to both fees and settlement at Tr. II:99 (respondent). He testified that Thompson's legal affairs were disorganized and that her fee payments to him might well have ended up in the wrong account. That testimony was by way of explanation that the $3,100 consisted, in whole or in part, of earned fees.

i. The contrary inference – that these three deposits were client funds – is supported by the testimony of Stephanie McArdle that (a) the firm reviewed the clients' fund IOLTA account to determine whether there was money in it that was owed to the respondent, Tr. III:189 (S. McArdle), and (b) the firm often needed cash, so it was not common to leave non-client money in an IOLTA account. Tr. III:190-191 (S. McArdle). The respondent would have us find that three deposits totaling $3,100, made in May and June 2014, were earned fees that sat untouched in the IOLTA account (where they did not belong) until October, at which time, he now says, they were still available to fund the October 23 check to BSI for $3,000. Ex. 49, at 71.

j. We decline to find that the $3,000 check was funded by earned fees. We find that it was drawn on trust funds in the clients' fund IOLTA account.

142. With respect to clients' fund IOLTA account check no. 2984 to BSI, in the amount of $2,000 and dated 10/31/2014, we find as follows:

a. This check was written fourteen days after the $300,000 deposit on October 17, 2014. It was one of the three payments to BSI, totaling $9,000, that depleted all but $2,342.08 of the $11,342.08 balance that was in the account before the $300,000 deposit. Ex. 39, at BP 1615, lines 163, 165, 168, 171. Again, the respondent would have us find that the entire $9,000 consisted of his money even though it was on deposit in a clients' funds account and made up nearly the entire balance in that account. (As stated in ¶ 141(a), above, the $300,000 was transferred out within a month of its deposit and was not used to fund any of the checks to BSI.)

b. The respondent attributed the $2,000 check to earned fees from a McKenna closing that remained in the account after distribution of about $500,000 of $502,000 of seller's proceeds. Tr. II:233-234 (respondent); Ex. 49, at 66, 70, 72. The spreadsheets prepared by the respondent and by Bar Counsel indicate that a differential of $2,000 was left in the clients' fund IOLTA account after distribution of those closing proceeds. Tr. IV:229-230 (Nolan); Ex. 39, at BP 1613, lines 119, 121 ($502,800.91 "Herrick Road . . . Seller Proceeds" deposited on 3/25/2014; $500,800.91 "wire to Estate of Barbara," on 3/28/2014); Ex. 16, at BP 0747 ($502,800.91 in on 3/25/2014; $500,800.91 "Herrick Road sale proceeds" out to Estate of Barbara McKenna, on 3/28/2014). However, the spreadsheets do not establish that the $2,000 was a fee or that it otherwise belonged to the respondent.

c. The respondent testified that when representing a seller with no financing arrangement, he takes a flat fee of $500, or $1,000 if the matter is complicated. Tr. III:40-41. We have not seen documentation of the McKenna closing, which should be available in the respondent's files. Such documentation would likely have shown whether the $2,000 that remained undisbursed from the sale proceeds consisted of legal fees, money withheld to pay client expenses, or a combination of the two.

d. Numerous deposits and withdrawals occurred in the account during the seven months between the disbursement of all but $2,000 of the McKenna sale proceeds in March and the $2,000 BSI check in October, so we cannot determine from the bank records whether the $2,000 of McKenna sale proceeds remained intact in the account. Ex. 39, BP 1613 to 1615, at lines 119 to 168; Ex. 16 at BP 0747 to 0748.

e. That the $2,000 of McKenna sale proceeds did not represent earned fees is indicated by the evidence that the firm reviewed its accounts to identify fees available to satisfy the firm's need for cash. The same is indicated by the passage of some seven months between the McKenna closing and the $2,000 check to BSI. As stated in ¶ 141(i), above, the respondent asserts that $2,000 left over from a closing in March 2014 were earned fees that remained intact in the IOLTA account until October, at which time, he now contends, they were available to fund the $2,000 check to BSI. If they were earned fees, they did not belong in an IOLTA account, especially not for seven months. (The respondent's contention that they were fees seems to represent an admission of improper commingling.)

f. We decline to find that they were earned fees. Instead, we find that the $2,000 check to BSI dated 10/31/2014 was drawn on trust funds.

143. With respect to clients' fund IOLTA account check no. 2815 to BSI, in the amount of $4,000 and dated 11/5/2014, we find as follows:

a. This check was written about twenty days after the $300,000 deposit that was made on October 17, 2014. It was one of the three payments to BSI, totaling $9,000, that depleted all but $2,342.08 of the $11,342.08 balance that was in the account before the $300,000 deposit was made. Ex. 39, at BP 1615, lines 163, 165, 168, 171. As we have stated in ¶¶ 141(i), 142(e), above, the respondent would have us find that the entire $9,000 consisted of his money even though it was on deposit in a clients' funds account and made up almost the entire balance in that account.

b. When the $4,000 check was written on November 5, and because of other disbursements, only $1,092.08 remained of the $11,342.08 balance that was in the clients' fund IOLTA account before the $300,000 deposit was made on October 17, 2014. Ex. 39, at BP 1615, lines 163, 171. By November 19, the $300,000 had been transferred out, and an unrelated disbursement of $1,025 had been made, leaving the account balance at $67.08. Ex. 39, at BP 1615, line 173.

c. The respondent attributed the funding of the $4,000 check to credits available to him for non-client money in the clients' fund IOLTA account, yet he admitted he knew he needed to cover the check with two deposits, consisting of his own money, of $700 and $800. Ex. 49, at 73 (respondent's statement under oath to Bar Counsel: ". . . [R]ight after that check was made I also deposited 700 and 800 of my own money because it was clear I didn't have all the $4,000 at the time I wrote the check to Stephanie. So I had to . . . cover that amount with money . . . that I deposited . . . at or about that time."). He acknowledged that either he drew the BSI check[s] on his own money "or I would . . . cover it with my money." Ex. 49, at 76.

d. However, if there were two such personal deposits, they were not enough to cover the $4,000 check to BSI. The respondent has said there was another deposit of $1,500. Ex. 49, at 74 to 75. Beyond that $1,500 amount, he attributed the rest of the $4,000, i.e., $1,000, to funds left in the account for some six months "for a rainy day." Ex. 49, at 74-75. One such amount was $680 remaining after paying a client's tax debt. Ex. 49, at 73-74. (The respondent's casual suggestion that his IOLTA account was used as a rainy day fund containing personal money does not help his case.)

e. However, Bar Counsel's spreadsheet, Ex. 39, does not substantiate the respondent's recollection: it does not show covering deposits of $700, $800 or $1,500 into the

clients' fund IOLTA account. Rather, it shows the following deposits starting more than two months after the $4,000 check was written: $780 deposited on January 28, 2015 (Ex. 39, at BP 1615, line 181, source unidentified); $800 in cash deposited on February 17, 2015 (Ex. 39, at BP 1615, line 184); $500 transferred from a private checking account on March 5, 2015 (Ex. 39, at BP 1615, line 187); $1,300 deposited on March 10, 2015 (Ex. 39, at BP 1615, line 189); and a $100 transfer from the respondent's operating account (Ex. 39, at BP 1615, line 191).

f. Less than two weeks after the last of those deposits, the account balance was only $97.08. Ex. 39, at BP 1615, line 192. Therefore, before those deposits were made, the respondent did not have sufficient funds in the clients' fund IOLTA account to cover the payments to BSI. In any event, the covering was not done until weeks or months after those payments had been made, which means that until they were covered, the payments were made with funds belonging to clients. If personal funds were available to cover the $4,000 check to BSI, they could and should have been deposited into an operating account, or a personal account, and the check(s) to BSI drawn on that account. There would have been no need to cover a check drawn on an IOLTA account.

g. The respondent has suggested there were funds available to cover the payments to BSI, funds that had been mis-deposited either by client Thompson or because of a problem with the firm's deposit slips that caused funds intended for the clients' fund IOLTA account to be deposited by mistake into the real estate IOLTA account. Tr. IV:156-167, 183-188, 193, line 20 to 194, 202-206 (Nolan). Some of Thompson's funds did come into the clients' fund IOLTA account in February 2016, but that was months after the last check to BSI had been written. It does appear that funds were mis-deposited into the real estate IOLTA account, and that, for whatever reason, the clients' fund IOLTA account did not have those funds in it when the $4,000 check was written to BSI. Tr. IV:186-188 (Nolan); Ex. 39, at BP 1617, lines 261, 262. In any event, money deposited into the real estate IOLTA account presumptively represented client funds; saying they should instead have gone into the clients' fund IOLTA account does not make them any less client funds.

h. The respondent was necessarily using money in his clients' fund IOLTA account, not the mis-deposited funds, when the $4,000 check was written. That is so whether or not he later made restitution and thereby avoided depriving any client of those trust funds by using his own money or by making adjustments or reconciling transfers from the real estate IOLTA account. See, e.g., Tr. IV:159-160, 166, 202-206 (Nolan).

i. The evidence includes the respondent's admission that he knew he needed to make the so-called covering deposits identified in subparagraph (c), as corrected by subparagraph (d), and the analysis in subparagraph (e) confirming that admission. The evidence also shows that those deposits were made long after the $4,000 check was written. Therefore, we find that the respondent knowingly used trust funds in his clients' fund IOLTA account, at least temporarily, to fund the $4,000 check to BSI.

144. With respect to clients' fund IOLTA account check no. 2864 to BSI, in the amount of $7,500 and dated 11/25/2015, we find as follows:

a. The respondent wrote this check on the same date, November 25, 2015, as a $60,000 deposit into the clients' fund IOLTA account relating to a matter for a client named Raymond Cloutier. Ex. 39, at BP 1617, lines 236, 237; Ex. 12, at BP 0444.

b. On cross-examination of Nolan, the respondent's counsel asked hypothetical questions about funds that might have been available in another account to cover the $7,500 check. Those questions referred to deposits that were not in the clients' fund IOLTA account when that check was written. Tr. IV:221-225 (Nolan); see also Ex. 39, at BP 1617, lines 261, 262; Tr. III:134-135 (S. McArdle) (two transfers totaling $5,347.74 from real estate IOLTA account to clients' fund IOLTA account in February 2016); Ex. 34, at BP 1518 (real estate IOLTA records). Whether or not there was money in other accounts available to fund the $7,500 check, it was not in the account on which that check was drawn when it was drawn, resulting in the misuse of whatever funds were in that account at that time. See Tr. IV:228 (Nolan) ("My statement is based upon what was in the account and what funds were drawn off of to make the $7,500 payment").

c. Nolan's spreadsheet tracked re-deposits from the real estate IOLTA account into the clients' fund IOLTA account; many examples cited by the respondent in his PFCs occurred before the $7,500 check was written. Ex. 39, at BP 1610, lines 21, 23, BP 1613, lines 104, 105, 108, 112, 113, BP 1614, line 162, BP 1616, line 212, and BP 1617, line 230. Those re-deposits were not in the clients' fund IOLTA account long enough or in sufficient amounts to fund the $7,500 check. Other evidence the respondent marshalled of mis-deposits into the real estate IOLTA account occurred well before that check was written. See Respondent's PFCs at 48-49, referring to Ex. 41, starting at BP 1727-1728 (12/31/12) to end. Regardless of the mis-deposits and re-deposits, there was not enough non-client money in the clients' fund IOLTA account to fund the $7,500 check when it was written.

d. The respondent necessarily used at least some of the $60,000 deposit attributed to client Cloutier (see ¶ 144(a), above) to cover the $7,500 check; that is shown on both the respondent's recreation of the clients' fund IOLTA account ledger and Bar Counsel's spreadsheet summarizing activity in that account. Ex. 16, at BP 0750 (respondent's recreated ledger); Ex. 39, at BP 1617, lines 236, 237 (Bar Counsel's spreadsheet: after $60,000 Cloutier deposit, balance was $62,429.59; after $7,500 check, balance was $54,992.59). It is likely that the entire $60,000 deposit in November 2015 consisted of Cloutier's funds; the subsequent distribution to Cloutier in April 2016 was in the amount of $75,612. Ex. 39, at BP 1618, line 272; see Tr. IV:177-178 (Nolan) (April 2016 distribution, which resulted in overdraft, was for the same real estate transaction as the $60,000 deposit).

e. We do not credit the respondent's assertion that the $7,500 check (and, impliedly, all the other BSI checks) was funded by earned fees retained in the clients' fund IOLTA account and attributed to work done for another client, Ronald Morse. Tr. II:230-238 (respondent); Ans. ¶70, Ex. 36, at BP 1577-1579. The respondent's accounting for Morse's funds indicates that he was holding $21,295.82 of Morse's funds as of April 23, 2012. Ex. 31, at BP 1422. There was a balance of $40,972.12 in the clients' fund IOLTA account as of December 1, 2012; we assume it included some or all of Morse's $21,295.82, and that that amount was at some point earned as fees. Ex. 39, at BP 1610. Nevertheless, the account balance dropped to $521.72 on January 30, 2013, so that virtually all the (assumed) Morse fees had been exhausted before any of the checks to BSI were written. In addition, this effort to justify the checks to BSI is inconsistent with the respondent's other explanations, addressed in subparagraph (c), above, that the money to cover the BSI checks was available, but in other accounts. It also appears to represent another admission that earned fees remained in the clients' funds IOLTA account for many months where they were commingled with client funds.

f. Funds from client Morse were, in fact, deposited into the clients' fund IOLTA account during 2012. A $1,500 deposit on April 23, 2012 was disbursed on the same date. Ex. 31, at BP 1422. Another $1,800, deposited in 2013, was insufficient to cover any of the BSI checks; that $1,800 had been depleted by November 2014, when the account balance fell to $67.08. Ex. 39, at BP 1611, line 44 and BP 1615, line 173. There is no evidence that this money, presumptively clients' funds because deposited into an IOLTA account, constituted earned fees. See Tr. IV:82 (Nolan) (unaware of documentation from respondent concerning Morse funds). In any event, the $1,800

was no longer in the account when the $7,500 check was drawn in November 2015; the account had been drawn down to $67.08 a year earlier.

g. We accept Nolan's conclusion that Morse's funds were not available to cover the BSI checks, especially the $7,500 check, notwithstanding the respondent's evidence that other deposits were misdirected. Tr. IV:76-80, 81-82, 83-88 (Nolan). If funds were indeed mis-deposited into another account, and therefore were not in the clients' fund IOLTA account to cover disbursements from that account, then the respondent necessarily misused other funds in the clients' fund IOLTA account, including (on the assumed facts) Morse's, to cover those disbursements that brought the account down to $521.72 by January 30, 2013, which was before any of the checks to BSI were written. Compare Tr. IV:208, lines 13-22.

h. Morse gave general testimony about his relationship with the respondent and that it was his custom to leave funds at the respondent's disposal. That testimony sheds no light on what funds were available to the respondent to cover the four checks to BSI. Tr. V:144-167 (Morse). Any such funds belonged to Morse and could not properly have been used to make payments to BSI.

145. The respondent misused trust funds when he made payments to BSI from the clients' fund IOLTA account by the four checks identified in ¶¶ 141-144, above. We find that such misuse was negligent, not intentional, as to three of the checks. We base that finding on:

a. the evidence of mis-deposits, which was likely a source of confusion concerning amounts available in the clients' fund IOLTA account;

b. the evidence that Stephanie McArdle did not perform proper three-way reconciliations of the trust accounts, and the respondent's admissions that he did not review her work and that proper account records were not kept;

c. Stephanie's testimony that the accountings she performed would have looked very different from Ex. 39, the accounting Bar Counsel prepared for this proceeding, and that she was confident the first check to BSI, for $3,000, was drawn on earned fees. Tr. III:129-131, 162-172, 175, 178, 188 (S. McArdle);

d. our determination to credit the respondent's testimony that he believed at the time he was drawing on earned fees, at least with respect to the three checks;

e. In January 2019, based on his own records, the respondent told Bar Counsel under oath that he drew the $7,500 check when he did not have sufficient earned funds to

cover it, and that it was funded primarily by the $60,000 deposited in connection with client Cloutier, later covered by other deposits. Ex. 49, at 77. In his testimony before us, he retracted that statement, claiming instead that he thought the check was covered by earned fees that turned out to have been deposited in the real estate IOLTA account by error. Tr. I:220-222 (respondent). The respondent did not retract his similar admission that he lacked sufficient earned funds to cover the $4,000 check to BSI. ¶ 143(c), above. We credit that testimony and accept the retraction as to the $7,500 check.

146. We find that issuing the $4,000 check to BSI (¶ 143, above) was a knowing, and therefore intentional, misuse of trust funds. The respondent knew there were insufficient non-client funds in the account to cover the check. He told us he realized immediately that he needed to deposit funds to cover it; he did not say that was something he discovered later. ¶ 143(c), above. When he drew the $4,000 check in 2014, he was not requiring his staff to conduct proper three-way accountings. ¶¶ 129-137, above. If he reviewed the account, he had further reason to know he did not have the funds; but if he did not investigate before drawing a check on a trust account for a personal expenditure, he was at the least acting with willful blindness. Willful blindness satisfies the element of knowledge in a bar discipline case. Matter of Zimmerman, 17 Mass. Att'y Disc. R. 633 (2001). We find that issuing the $4,000 BSI check was an intentional misuse of trust funds, based on the respondent's admission that he knew he had to cover it with additional deposits and the evidence that he did not do so until after the check had been delivered to BSI. ¶¶ 143(c)-(f), above.

147. We find that Bar Counsel has not proved that any client was deprived of funds by any of these four instances of misuse, or that the respondent intended to deprive any client in the sense of leaving the client without funds when that client's funds were due and payable.

148. We find that the respondent's misuse, even the intentional and knowing one, did not target any particular client's funds. Rather, the respondent was dismissive of his overall obligations concerning the handling of trust funds. Ignoring the requirements of Mass. R. Prof. C. 1.15, the respondent adopted the attitude that all was well as long as things worked out in the

end. Tr. II:236-237 (respondent). He was dismissive of his obligations by suggesting that he was entitled to leave earned fees in his IOLTA account as a reserve fund (¶ 140, above) and by writing checks for personal expenses directly from that account (¶ 139, above). By doing so, the respondent created major risks of harm to his clients. It was mere fortuity that no loss resulted, but we find that Bar Counsel has not proved that deprivation occurred.

Retainers Deposited into Operating Account (¶¶ 149-150)

149. Bar Counsel charged that on nine occasions in 2013 and 2014, the respondent deposited clients' funds, identified as retainers, directly into his operating account, resulting in commingling in violation of Mass. R. Prof. C. 1.15(b). Petition, Ex. 37, ¶¶ 72, 78. Bar Counsel cites three exhibits: Ex. 13, consisting of nine checks payable to the firm during 2013 and 2014; Ex. 14, consisting of checks to the firm later than 2014; and Ex. 40, Nolan's schedule of activity in the respondent's Beverly Bank operating account. Bar Counsel's PFCs, ¶ 79, at 19. Given the 2013-14 time frame pleaded in the petition, we consider only exhibits 13 and 40.

150. We have compared the nine purportedly improper deposits of retainer checks with those fee agreements that are in evidence, and have sought evidence of when legal work was done for the clients who paid the retainers. We find that Bar Counsel has not proved that any of those checks were deposited into an operating account before the retainers had been earned.

a. The Boyd check dated 6/17/13, posted 6/24/13, in the amount of $1,500, has a memo line stating "retainer." Ex. 13, at BP 0447. It was endorsed for deposit into the respondent's operating account, no. 7479. Boyd was not a foreclosure defense client. He retained the respondent to handle employment and post-employment matters. Ex. 5, at BP 0271-0272; Ex. 16, at BP 0904 ff. Boyd's fee agreement with the respondent provided for a paid-in-advance retainer, to be earned as fees accrued. Ex. 5, at BP 0271-0274. However, we have no evidence that the check was deposited into the operating account before the retainer was earned.

b. The Lekos check, dated 7/13/2013 and in the amount of $2,500, is endorsed for deposit into the operating account. It appears to have been posted on July 17, 2013 to an account ending in 1912. Ex. 13, at BP 0448. That was not one of the respondent's trust accounts. Ex. 17 at BP 1233-1237; ¶ 128, above. The memo line appears to say

"legal – sub." Lekos was a foreclosure defense client. Her FDCFA calls for an advance retainer, to be earned as fees accrued. The copy of the agreement in evidence is undated. There is no evidence indicating when services began or that the check was deposited into an operating or personal account before it was earned.

c. The Locke check, in the amount of $1,000, dated January 9, 2014, and with a memo line stating "35 Buffum retainer," was endorsed for deposit into the operating account. Ex. 13, at BP 0449. It appears to have been posted to an account ending in 1607 on 1/15/14. That was not one of the respondent's trust accounts. Ex. 17, at BP 1233-1237; ¶ 128, above. Locke was a foreclosure defense client. The two FDCFA's in evidence for Locke and concerning "35 Buffum" are undated. The respondent's records concerning Locke show payments starting as early as 2011. Ex. 5, at BP 0249-0253. There is no evidence indicating when services began, or that the check was deposited into an operating or personal account before the retainer was earned.

d. The Vasiliou check, in the amount of $1,000, dated 11/1/13, and with a memo line stating "retainer," was endorsed for deposit into the operating account. It appears to have been posted to an account ending in 9755 on 11/8/13. Ex. 13, at BP 0450. That was not one of the respondent's trust accounts. Ex. 17, at BP 1233-1237; ¶ 128, above. The evidence does not identify Vasiliou as a foreclosure defense client. Ex. 5, at BP 0285-0287; Ex. 16, at BP 0904 ff. His fee agreement was executed in 2007; it acknowledges receipt of $1,500 paid on account. There is no evidence that the retainer – if it was correctly characterized – had not been earned by the time the check was deposited into an operating or personal account.

e. The Rodriguez check, in the amount of $500, dated April 10, 2014, and with a memo line stating "retainer [illegible] appeal DCF," was posted to an account ending in 9518 on 4/14/14. That was not one of the respondent's trust accounts. Ex. 17, at BP 1233-1237; ¶ 128, above. Apparently, Rodriguez was not a foreclosure defense client. Ex. 4, at BP 0293-0294, Ex. 16, at BP 904 ff. No fee agreement between the respondent and Rodriguez is in evidence. There is no evidence that the retainer – if it was correctly characterized – had not been earned by the time the check was deposited into an operating or personal account.

f. The Harrison check in the amount of $500, dated August 7, 2013, and with a memo line stating "2nd Pmt Retainer," was posted to an account ending in 8779 on 8/19/13. That was not one of the respondent's trust accounts. Ex. 17, at BP 1233-1237; ¶ 128, above. Harrison was a foreclosure defense client. Ex. 4, at BP 0276-0279, Ex. 16, at

BP 904 ff. His undated FDCFA provided for a retainer to be earned by future services. The FDCFA acknowledges receipt of a $2,500 retainer and calls for $500 monthly payments. Ex. 5, at BP 0276. If this was a retainer, there is no evidence from which we can determine whether or not it had been earned by the time the check was deposited into an operating or personal account.

g. Another Harrison check in the amount of $450, dated October 29, 2013, and with a memo line stating "Retainer Payment #3," was posted to the account ending in 8779 on 11/4/13. Ex. 13, at BP 0453. That was not a trust account. Ex. 17, at BP 1233-1237; ¶ 128, above. If this was a retainer, there is no evidence from which we can determine whether or not it had been earned on an hourly basis by the time the check was deposited into an operating or personal account.

h. A third Harrison check in the amount of $500, undated, with a memo line stating "Pmt 4 Retainer," was posted to the account ending in 8779 on 12/12/13. Ex. 13, at BP 0454. That was not a trust account. Ex. 17, at BP 1233-1237; ¶ 128, above. If this was a retainer, there is no evidence from which to determine whether or not it had been earned on an hourly basis when deposited into an operating or personal account.

i. A fourth Harrison check in the amount of $500, dated February 21, 2014, with a memo line stating "5 Pmt Retainer," was posted to the account ending in 8779 on 3/12/14. Ex. 13, at BP 0455. That was not a trust account. Ex. 17 at BP 1233-1237; ¶ 128, above. If this was a retainer, there is no evidence from which we can determine whether or not it had been earned by the time it was deposited into an operating or personal account.

We found and concluded under count two that the respondent regularly deposited retainers from his foreclosure defense clients into his operating account, sometimes in advance of earning them on an hourly basis. ¶ 122. That was commingling and, in some instances, misuse of trust funds, but without deprivation. ¶ 123. The evidence concerning these nine checks does not show either commingling or misuse and therefore does not add anything to Bar Counsel's case.

Negative Balances in IOLTA Account (¶ 151)

151. On two occasions, in 2014 and 2016, the respondent authorized transfers from his clients' fund IOLTA account that created negative balances in that account, and in two clients' matters, of $7,238.70 and $23,766.67. Petition, Ex. 37, ¶¶ 73, 82, 83 (alleging commingling in

violation of rule 1.15 and misuse in violation of rules 8.4 (c) and (h)); Ans. ¶ 73, Ex. 36, at BP 1579-1580. With respect to those two transactions and negative balances, we find as follows:

a. On January 30, 2014, the clients' fund IOLTA account was overdrawn by $7,238.70. Tr. IV:115 (Nolan); Ex. 39, at BP 1613, line 107. The overdraft occurred, and was cured, as follows: (i) On 1/28/14, there was a balance of $217,761.30 in the account. Tr. IV:115-116 (Nolan); Ex. 39, at BP 1613, line 106. (ii) On 1/30/2014, a check for $225,000 payable to Wells Fargo Advisors on behalf of a client named Worrall cleared the account, creating the overdraft of $7,238.70. Tr. IV:116 (Nolan); Ex. 39, at BP 1613, line 107. (iii) The next day, $15,000 was transferred from the real estate IOLTA account into the clients' fund IOLTA account, curing the overdraft and creating a positive balance of $7,761.30. Tr. IV:116-117 (Nolan); Ex. 39, at BP 1613, line 108; Tr. IV:173-174 (Nolan). (iv) A bank statement for the real estate IOLTA account shows a deposit of $20,000 on 10/8/13. Tr. IV:174 (Nolan). That appears to have been a mis-deposit of $20,000 into the real estate IOLTA account attributable to a misprinted deposit ticket. Ex. 41, at BP 1854. (v) The mis-deposit appears to have been rectified by the transfer on 1/31/14 of $15,000 from the real estate IOLTA account to the clients' funds IOLTA account that cured the 1/30/14 overdraft, and by the transfer of another $5,000 from the real estate IOLTA account into the clients' fund IOLTA account around 2/7/14. Ex. 39, at BP 1613, lines 108, 113. (vi) According to Ex. 39, the overdraft on January 30, 2014 did not result in the check for $225,000 being returned. There is no evidence that the $20,000 that was mis-deposited on October 8, 2013 was money that belonged to client Worrall. The item or items accompanying the misprinted deposit slip are not in evidence, so we cannot determine whether or not that deposit consisted of Worrall's money. If it was not, the respondent is attempting to explain a Worrall shortfall by the mis-deposit of someone else's money. Bar Counsel had the burden of proof and equal access to the relevant bank records. He did not show anything more than a temporary mis-deposit. The mis-deposit did create a negative balance in the clients' fund IOLTA account, but not necessarily in Worrall's funds. Bar Counsel has not shown that Worrall was deprived of funds belonging to him.

b. On April 14, 2016, the clients' fund IOLTA account was overdrawn by $23,766.67. The overdraft occurred when a check for $75,612, payable to client Raymond Cloutier, was posted against a balance of $51,845.33. Ex. 39, at BP 1618, lines 271, 272. The check did not bounce. Ex. 39, at BP 1618, line 273. The respondent

presented evidence that the overdraft was cured the next day by a wire transfer from the Law Offices of Michael M. McArdle (no account number referenced). The respondent's records of this transfer are incomplete and inconsistent. It appears that the overdraft occurred because $24,012 was deposited by mistake into a new clients' fund account at Enterprise Bank and then transferred to the Beverly Bank clients' fund IOLTA account to cover the $75,612 check. Ex. 16, at BP 0511. However, the transfer out of the Enterprise account is dated 4/20/16 on Ex. 16, BP 0511, about five days after the transfer into the clients' fund IOLTA account. The deposit into and transfer out of the Enterprise account ($24,012) corresponds only roughly to the deposit into the clients' fund IOLTA account shown on Ex. 39, at BP 1618, line 273 ($24,021). The evidence of the deposit into the new IOLTA account does not attribute those funds to Cloutier. Ex. 16, at BP 0511. Bar Counsel has not presented evidence from which we can find that the negative balance in the clients' fund IOLTA account was intentional, rather than the result of a negligent mis-deposit, or that it created a negative balance in Cloutier's account. Nor does it appear that either the negligent overdraft itself, or the mis-deposit, resulted in deprivation to Cloutier of funds belonging to him.

Deposit of Personal Funds into IOLTA Account (¶¶ 152-156)

152. Bar Counsel charged that on thirteen occasions between February 2017 and January 2019, the respondent or other firm employees transferred personal funds from the operating account into an IOLTA account. Petition, Ex. 37, ¶¶ 75, 76, 79 (presumably alleging commingling in violation of rule 1.15(b)(2)). Of those thirteen transfers, the petition identified four that exceeded $200: (A) $1,842.28 on September 27, 2017; (B) $1,000 on April 16, 2018; (C) $2,000 on October 30, 2018; and (D) $5,000 on January 31, 2019. Bar Counsel has not identified the other nine alleged deposits of personal funds, and we make no findings about them.

153. None of the four transactions appear on Ex. 39, Nolan's analysis of the Beverly Bank clients' fund IOLTA account. Ex. 39, at BP 1619. Bar Counsel must be referring to transfers into the newer McArdle Law clients' fund IOLTA account at Enterprise Bank, account number ending 4103, opened on January 16, 2015 ("Enterprise IOLTA"). Records of that account show deposits (A), (B) and (D), but not (C); none indicate they were personal funds of

the respondent or that they were transferred from an operating account. Ex. 7, at BP 0353, 0355, 0358; Ex. 16, at BP 0516, 0518, 0521, 0670-0678.

154. The respondent's answer, the only support Bar Counsel offers for this charge, provides an adequate explanation for three of the four deposits: that they were not deposits of personal funds to cure shortfalls in the Enterprise IOLTA but instead were proper deposits of trust funds that belonged in that account. (A) was a transfer into the account concerning a business transaction with the respondent's law partner (his son, Attorney Lucas McArdle) involving the purchase of land in Maine; (B) related to the mistaken deposit of a retainer into the operating account, which was corrected; and (C) was the correction of a double transfer of earned fees from a client named Khursheed. Ans. ¶ 75, Ex. 36. We find that these three transfers did not constitute efforts on the respondent's part to cure shortfalls in the Enterprise IOLTA resulting from intentional misuse of trust funds.

155. As to item (D), the deposit of $5,000 on January 31, 2019, we find as follows:

a. The respondent's answer explains the deposit of $5,000 into the Enterprise IOLTA on 1/31/2019 as making up for an expenditure of $5,000 made, by mistake, without covering funds. The respondent says he thought he had received money in 2015 from a client named Gary De Los Santos to be held on account and then to be used as a down payment toward the purchase of the assets of a restaurant. The respondent later used what he thought was that money, plus an additional $5,000 advanced to De Los Santos from the respondent's own fees, to make a $10,000 payment toward the settlement of an unrelated injury claim by a patron of the restaurant. The respondent was later unable to confirm receipt of the $5,000 down payment, realized he had used IOLTA funds not belonging to De Los Santos toward the settlement, and requested reimbursement from him. Ans. ¶ 75(D), Ex. 36, at BP 1581-1584.

b. Much of this narrative is confirmed by documents in evidence, and we credit it in substance. Ex. 29, at BP 1381-1385, 1401, 1402.

c. It is likely that the $5,000 deposit into the Enterprise IOLTA in January 2019 came from the respondent's own money because: (i) De Los Santos did not deliver the $5,000 reimbursement until March 2019 at the earliest, Ex. 29, at BP 1386; (ii) the respondent told Morgan Russell before 1/31/2019 that the firm would have to cover

the unaccounted-for $5,000 until they could figure it out, Ex. 29, at BP 1394; and (iii) on the day of the deposit, 1/31/2019, Russell asked the respondent about the missing $5,000 that put the De Los Santos client account into a negative $5,000 position. Ex. 29, at BP 1389, 1391.

d. As to the presumed or missing $5,000 deposit in 2015: The respondent's spreadsheet of his Beverly Bank clients' fund IOLTA account does not show a deposit of $5,000 from De Los Santos during 2015. Ex. 16, at BP 0748-0750. However, four deposits, totaling $27,000, occurred during August 2015, attributed by the respondent to a different client named Cimon. The first of these was in the amount of $5,000, on August 20. Virtually all of those deposits were exhausted by a payment in the amount of $26,363.15 for back taxes to the Town of Georgetown on behalf of Cimon on September 17, 2015. Ex. 16, at BP 0749.

e. Bar Counsel's spreadsheet for the Beverly Bank clients' fund IOLTA account also shows deposits totaling $27,000 during August 2015, corresponding to the amounts on the respondent's spreadsheet. Ex. 39, at BP 1616. However, the first deposit, for $5,000, is attributed to De Los Santos, in connection with the asset purchase referenced above in subparagraph (a). Tr. IV:111-114 (Nolan). According to Nolan, the attribution of the $5,000 to De Los Santos "came right off of the bank record." Tr. IV:113 (Nolan). We have not been told what records Nolan relied on to say that, nor do we know what records were available to the respondent in 2015 or when he prepared his own reconstruction of the account for this proceeding. The balance in the account after the payment of Cimon's back taxes was $692.59. If the $5,000 deposit was correctly attributed to De Los Santos, then at least part of it must have been used to pay Cimon's taxes.

f. If the $5,000 deposited in August 2015 belonged to De Los Santos, it was misused to pay Cimon's taxes. But if it belonged to Cimon, then there was apparently no deposit in 2015 from De Los Santos. If not, the evidence does not explain the source of half of the $10,000 paid or advanced by the respondent in 2019 toward the injury settlement. The respondent says that half of that $10,000 payment was made out of his client funds IOLTA account because he thought there was $5,000 there that belonged to De Los Santos. If there was not, then the $5,000 must have belonged to some other client, while the other half was from the respondent's fee. If in 2019 the $5,000 reimbursement from De Los Santos went back into the clients' fund IOLTA account, that account was made whole, while the respondent is apparently short $5,000 on his fee. If that is the case, the evidence shows notably poor bookkeeping

> but no ultimate deprivation of trust funds belonging to Cimon, De Los Santos, or any other client. It also suggests that De Los Santos still owes the respondent $5,000 on account of the fee he advanced toward the injury settlement.

156. The respondent has offered computer problems as an excuse for incomplete records of his law practice bank accounts. Tr. II:275 (respondent); Ex. 7, at BP 0334; Ex. 15, at BP 0468. But he has not explained why, in 2019, he was able to print records of payments made by a client in 2014, which was before the reported computer crash and loss of data. See Ex. 5, BP 0296. Stephanie McArdle testified that she kept paper copies of records and efforts at reconciliation. Tr. III:86-87, 208, 209-210 (S. McArdle). To the extent those documents concerned individual clients, the client's file should contain them or some useful sample of them. Stephanie's testimony suggests that they did, as does the respondent's ability to produce clients' billings dating back to 2011. See Ex. 5, BP 0288-0291. It is unclear why records such as those did not provide adequate information for the respondent to explain what occurred in his firm's bank accounts. There is sufficient evidence to support our findings of commingling and misuse of clients' funds, and we find no basis to conclude that the respondent could have rebutted that evidence but for crashed computers and lost records.

Count Three: Conclusions of Law (¶¶ 157-167)

157. The respondent contends that documents wrongfully withheld from him by Bar Counsel would have helped him establish that one or more of the payments to BSI were covered by earned funds, including funds deposited by mistake in the real estate IOLTA account. The documents allegedly withheld were periodic statements, check images, and deposit slips, obtained by Bar Counsel from Beverly Bank, that were the source materials for Nolan's spreadsheet analyzing the respondent's clients' funds IOLTA account (Ex. 39). The respondent asserts that Bar Counsel's failure to produce those source documents until after the third day of the hearing explains his erroneous admission in Exhibit 49 (statement under oath to Bar Counsel) that the $7,500 check to BSI was drawn before earned funds to cover it were available. He

contends that exculpatory evidence was withheld and that his defense was prejudiced as a result. Respondent's PFCs at 1-6, 41-45.

158. We reject that contention. The respondent had already retracted his statement in Exhibit 49 about the $7,500 check to BSI by the time he filed his second amended answer. Ans. ¶ 70, Ex. 39, at BP 1577 to 1579; see also Tr. I:220-222; Tr. II:95-100 (where the respondent is able to testify about matters he now contends were disclosed only in the documents subsequently produced by Bar Counsel). The respondent was given ample opportunity to prepare the cross-examination of Bar Counsel's financial investigator using the documents Bar Counsel produced under this committee's order, having received a continuance of the hearing for that purpose. Respondent's Motion to Continue March 5 Hearing Date, filed 2/25/21, allowed 3/1/21. If additional testimony had been required to address new information, the respondent could have been asked to give it, but he was not. We have accepted the respondent's retraction of his admission concerning the $7,500 check to BSI during his statement under oath (Ex. 49). We conclude that his defense was not prejudiced by any belated production of the bank documents.

159. Count three of the petition for discipline charged the respondent with numerous instances of misuse of funds in his clients' fund IOLTA account. His defense against that charge focused on money in other accounts and on his criticism of Bar Counsel's decision not to examine the real estate IOLTA account for funds deposited in that account by error. That defense does not alter the fact that trust funds in the clients' fund IOLTA account were misused when the respondent drew on them for personal purposes. An attorney may not defend against a charge of misuse of funds in one account by pointing to funds in a different account; trust funds in the first account were misused no matter how much money the attorney may have had elsewhere. See Matter of Strauss, 479 Mass. 294, 299 (2018), in which the Court said that "[Attorneys] may not treat client funds as fungible commodities, using funds belonging to one client for the benefit of another, or even for their own purposes." An IOLTA account is not "a line of credit for attorneys experiencing financial difficulties." Matter of Ablitt, 486 Mass. 1011, 1018 (2021). See also Mass. R. Prof. C. 1.15(f)(1)(c).

160. Bar Counsel contends that by using clients' funds to make four payments to BSI that added up to $16,500, the respondent intentionally misused clients' funds in violation of Mass. R. Prof. C. 8.4(c) (dishonesty, deceit, misrepresentation, or fraud) and 8.4(h) (other conduct reflecting adversely on fitness to practice law). We have found that three of the four payments constituted negligent misuse, but that one of them was an intentional misuse of trust funds because the respondent knew he did not have sufficient earned funds in the account on which he wrote the check when he wrote it. ¶¶ 141-144, 146, 147, above. However, as to all four instances of misuse, Bar Counsel has not proved that deprivation resulted, and we have found that the respondent did not intend to cause deprivation. ¶ 147, above. The misuse did not target any particular client's funds. ¶ 148, above. The misconduct violated rule 1.15, but it did not involve dishonesty, deceit, misrepresentation or fraud in violation of rule 8.4(c). We do conclude that a violation of rule 8.4(h) was established by proof of negligent misuse of trust funds.

161. Bar Counsel charged that by failing to keep clients' funds in a trust account, the respondent violated Mass. R. Prof. C. 1.15(b)(1) (trust funds to be kept in trust account). Bar Counsel did not prove this charge as to the retainer checks alleged under this count. ¶ 149-150, above. However, we conclude that the respondent did violate this rule by his improper disbursement of trust finds for the benefit of BSI and by the other instances of negligent misuse that we found in ¶¶ 151(a) and (b), 152-155 (item (D)), above.

162. Bar Counsel charged that by failing to keep earned fees separate from clients' funds held in a trust account, the respondent violated Mass. R. Prof. C. 1.15(b)(2) (commingling personal funds in trust account prohibited). The respondent testified that he kept earned fees in his trust account (¶¶ 142(b), 143(c), above; and even that he used the account as a rainy day fund ¶ 143(d), above). That testimony is sufficient to establish that commingling violations occurred, and we conclude that they did.

163. Bar counsel charged that by failing to deposit into a trust account legal fees in the form of retainers that had been paid in advance, to be withdrawn only as the fees were earned,

the respondent violated Mass. R. Prof. C. 1.15(b)(3) (fees and expenses paid in advance to be deposited into trust account and withdrawn only as earned). We conclude that Bar Counsel has not proved violations of that rule under this count. ¶¶ 149-150, above.

164. Bar counsel charged that by failing to maintain required accounts and records of trust property, and by failing to preserve those records for at least six years, the respondent violated Mass. R. Prof. C. 1.15(f) (required records, retention for six years after conclusion of representation or distribution of funds). We conclude that the respondent violated that rule by failing to create and maintain required trust account records. ¶¶ 129-137, above.

165. Bar Counsel charged that by authorizing distributions which caused negative balances in his clients' fund IOLTA account, and in individual clients' accounts, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(C). That rule requires maintenance of individual client records and prohibits disbursements that would create a negative balance for any individual client. The respondent admitted infrequent, unintentional negative balances that he claims were cured promptly upon discovery. We conclude that the respondent violated the rule based on our findings that he misused trust funds (¶¶ 146, 151 (a), (b), 155, above); that negative balances occurred in two clients' accounts (¶ 151 (a), (b), above); and that De Los Santos' $5,000 deposit was negligently misused to pay another client's tax bill, resulting in Morgan Russell's inability to balance the De Los Santos account (¶ 155, above).

166. Bar Counsel charged that by making distributions that caused negative balances in his clients' fund IOLTA account, the respondent misused clients' funds in violation of Mass. R. Prof. C. 8.4(c) and (h). We have found that the negative balances were not evidence of intentional misuse. ¶ 151, above. We conclude that the respondent did not violate rule 8.4(c), but that he did violate rule 8.4(h) because the negative balances were caused by his negligence.

167. Bar Counsel contends that the respondent misused De Los Santos' funds in violation of Mass. R. Prof. C. 8.4(c) and 8.4(h) by disbursing those funds to the Town of Georgetown to pay Cimon's tax bill. We conclude that the respondent did not violate rule 8.4(c)

because this was not proved to be an instance of intentional misuse. ¶ 155, above. The respondent did, however, violate rule 8.4(h) by his negligent misuse of those funds.

Aggravation and Mitigation

168. The respondent violated multiple disciplinary rules in multiple cases involving different clients. The cumulative effect of multiple ethical violations is a recognized factor in aggravation. Matter of Grayer, 483 Mass. 1013, 1018-19, 35 Mass. Att'y Disc. R. 231, 240 (2019); Matter of Strauss, 479 Mass. 294, 302 (2018); Matter of Saab, 406 Mass. 315, 326-327, 6 Mass. Att'y Disc. R. 278, 289-290 (1989).

169. The respondent lacks insight into his basic ethical obligations or any evident appreciation of how extensively he violated them. He has not acknowledged the nature, effects, or implications of his misconduct. See Matter of Bailey, 439 Mass. 134, 150 (2003) (failure to recognize or appreciate wrongful nature of misconduct as factor in aggravation); Matter of Eisenhauer, 426 Mass. 448, 456, 14 Mass. Att'y Disc. R. 251 (1998); Matter of Clooney, 403 Mass. 654, 657-658 (1988); ABA Standards §9.22(g). We do not fault the respondent for defending himself in this proceeding, but his testimony displayed a dismissive attitude toward his obligations under the rules of professional conduct, especially those rules designed to prevent the types of misconduct that occurred here. He drew four checks to BSI on his clients' funds IOLTA account in violation of the fundamental requirement that a trust account not be used as a personal line of credit. He did not keep adequate records and, as a result, did not maintain clients' funds intact; instead, he commingled them with his own money. He seems to believe such violations are excusable because things worked out in the end and everyone got the money they were owed. That attitude is unacceptable.

170. The respondent's misconduct caused harm to O'Brien, who was deprived of her unearned fees upon termination of her relationship with the respondent until her suit against him resulted in a settlement years later. Harm to a client is a recognized factor in aggravation. Matter of Grayer, 483 Mass. 1013, 1018-19, 35 Mass. Att'y Disc. R. 231, 240 (2019); Matter of Dawkins, 412 Mass. 90, 94, 8 Mass. Att'y Disc. R. 64, 69 (1992). We decline Bar Counsel's

invitation to conclude that the respondent caused harm to the administration of justice or the legal profession.

171. The respondent failed to provide adequate supervision and guidance to Stephanie McArdle and Morgan Russell as they endeavored to discharge their responsibilities for trust account maintenance and recordkeeping at the respondent's firm. That failure put Russell at professional risk, and it required them both to appear and testify in this proceeding in a sincere but futile effort to defend the firm's poor recordkeeping. The petition for discipline did not charge violations of the rules governing a lawyer's obligation of supervision (Mass. R. Prof. C. 5.1, 5.3), but, as explained above, we may consider such violations – among them, the uncharged misconduct as to rules 8.4(h) and 1.15 that we found above in ¶¶ 48, 49 and 126 – as aggravating the misconduct that was charged, and proved. Matter of the Discipline of an Attorney, 448 Mass. 819, 825 n.6 (2007); Matter of Daniels, 23 Mass. Att'y Disc. R. 102 (2007).

172. Bar Counsel contends that the respondent's misconduct was directed at vulnerable clients in desperate financial straits who had little or no experience in financial matters. Taking advantage of a vulnerable client is a recognized factor in aggravation. Matter of Grayer, 483 Mass. 1013, 1019, 35 Mass. Att'y Disc. R. 231, 240 (2019) (client vulnerable because of immigration status); Matter of Zak, 476 Mass. 1034 (2017); Matter of Greene, 476 Mass. 1006, 1010 (2016); Matter of Lupo, 447 Mass. 345, 354, 357, 22 Mass. Att'y Disc. R. 513, 528, 531-32 (2006). The respondent created serious risks that vulnerable clients could be harmed by his carelessness regarding trust account maintenance and recordkeeping, or could be overcharged. However, on the evidence before us, no such harm occurred, except in O'Brien's case. We conclude that the respondent did not take advantage of vulnerable clients.

173. To the contrary, and in mitigation, we conclude that the ethical transgressions we found in count two arose from the respondent's desire to serve needy clients who otherwise would not have had access to the specialized legal services he was able to provide. Service to an underserved population does not typically weigh in mitigation where it is collateral to the misconduct found. Matter of Jackman, 444 Mass. 1013, 1014, 21 Mass. Att'y Disc. R. 349, 352

(2005) (rescript); Matter of Finn, 433 Mass. 418, 425, 17 Mass. Att'y Disc. R. 200, 213 (2001) (in both cases, attorneys urged that they represented underserved populations; no nexus shown between that fact and the charged misconduct).

174. Here, however, there is a direct connection between the terms of the respondent's fee agreements, which violated the rules in many ways, and his efforts to make his services available. The retainers and monthly payments were designed to allow the respondent to get started on his clients' cases and to continue to work on them, notwithstanding that he would not be paid the time value of his services in periods of intense activity, or even in the long run, absent a rare success fee. See ¶¶ 61, 72, 89, 90, above. The result was that his firm operated on a shoestring, as he put it, and did not earn substantial profits from its mortgage foreclosure defense practice. See ¶ 90, above. His motivations were consistent with the ethical standards of the profession: "A lawyer should be mindful of . . . the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. . . . A lawyer should strive to attain the highest level of skill . . . and to exemplify the legal profession's ideals of public service." S.J.C. Rule 3:07, Massachusetts Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, §§ 4, 5.

175. The respondent demonstrated a sophisticated understanding of the reasons why his foreclosure defense clients were in financial distress, and he held a good-faith belief that the mortgage loan industry, including the secondary market for mortgage-backed securities, had committed injustices toward them, and continues to do so. Tr. II:29-37, 39-48 (respondent). He effectively brought that knowledge to bear in representing his foreclosure defense clients.

176. The respondent was committed to treating his clients with fairness, at least as he understood it. That included continuing to represent some clients even when they were unable to pay, and his willingness not to enforce his fee agreements in some instances. Tr. I:209-212, 270-271, 276-277, 280-281, 297-298; Tr. II:68, 76-77, 88, 209, 248, 253-254, 258; Tr. VI:24, 57-58 (respondent). The testimony of several clients, including foreclosure defense clients and others,

demonstrated the respondent's commitment to fairness, his desire to achieve a good outcome for the client, his commitment to the underprivileged and the community, and his refusal to charge high fees for knowledgeable and competent services. Tr. V:2-65 (Cloutier); Tr. V:81-82, 86, 88, 99 (Wennick); Tr. V:113-115, 119-120, 122-123 (Boguslav); Tr. V:147, 157-160 (Morse); Tr. V:186-188, 210 (Telemaco).

177. A client's assent is no defense to an excessive fee, even when charged in good faith. Matter of Fordham, 423 Mass. 481, 492-493, 12 Mass. Att'y Disc. R. 161 (1996), cert. denied, 519 U.S. 1149 (1997); Matter of an Attorney, 29 Mass. Att'y Disc. R. 727, 735-737 (2013). See also Matter of Zankowski, supra (absence of complaints no defense or mitigation where clients charged for work not performed). Nevertheless, we conclude that the respondent's good faith and sense of fairness mitigated, to some degree, the potentially abusive terms of his fee agreements.

Recommended Disposition

Bar Counsel recommends that the respondent be suspended indefinitely or disbarred. The respondent recommends either a private sanction (i.e., an admonition) or that the committee recommend that his resignation be accepted.[19]

We recommend a suspension of fifteen months. Because of the nature and extent of the disciplinary violations that have been established, we regard it as essential that the respondent apply successfully for reinstatement before he can resume the practice of law. He should, at that time, be required to satisfy the Board and the Court that he has rectified the pervasive problems we have found with respect to the proper handling of fees and client funds, accounting and recordkeeping, fee agreements, client communications, and his overall attitude toward his ethical obligations as a member of the bar.

[19] The affidavit of resignation was rejected by the Board, and withdrawn by the respondent, prior to the evidentiary hearing in this case. We do not address whether resignation remains an option. Any further effort at resignation would presumably require compliance with S.J.C. Rule 4:01 § 15; B.B.O. Rules § 4.1; and Board Policy No. 17.

Review of Violations and Warranted Sanctions

We summarize those disciplinary violations and the usual sanctions for such violations.

Under **count one**, we concluded that the respondent violated Mass. R. Prof. C. 1.4(a)(3) (keep client reasonably informed of status); 1.4(a)(4) (promptly comply with reasonable requests for information); 1.4(b) (explain matters to client for informed decisions); 1.5(a) (charging and collecting a clearly excessive fee); and 1.16(d) (failing to refund unearned fees at termination of relationship).[20, 21] We would have found violations of 1.15(b) (segregation of client funds) and 8.4(h) (unfitness due to misuse of unearned fees paid in advance with deprivation resulting) had they been charged. Instead, we consider such violations in aggravation as uncharged misconduct.

Failure to maintain communication with a client presumptively warrants an admonition.[22]

In the absence of restitution or other mitigation, charging or collecting a clearly excessive fee warrants a public reprimand. Aggravated cases of excessive fees, including those in which the attorney takes advantage of a vulnerable client, have resulted in suspensions measured in months.[23]

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[20] Count one did not charge misuse of client funds with respect to advance fee payments under the rules cited in Bar Counsel's PFCs, i.e., 8.4(c), (h). Nor did it charge such misuse under the rules requiring an attorney to protect and segregate client funds, 1.15(b), (b)(1), (b)(3). Nevertheless, we have concluded that the respondent understood he had been accused of misusing O'Brien's payments to him by not keeping them in an escrow account (Tr. II:139 (respondent)); that the petition charged him with collecting payments from O'Brien that he had not earned; and that those rules were charged elsewhere in the petition. There is no surprise or unfairness to the respondent in considering count one from the perspective of those rules.

[21] We have rejected Bar Counsel's charges under count one that the respondent failed to obtain O'Brien's informed consent to a non-standard contingent fee agreement and failed to put those terms in writing. Bar Counsel did not establish that the respondent ever had a contingent fee agreement with O'Brien.

[22] See, e.g., AD 21-04, 37 Mass. Att'y Disc. R. ____ (2021) (failure to put in writing fee terms for a closing; failure to consult client about brother's handling of closing funds; money ultimately misdirected); AD 21-02, 37 Mass. Att'y Disc. R. ____ (2021) (failure to communicate in writing basis of fee in summary process defense/counterclaim case; failure to adequately communicate to client the status of the opponent's appeal); AD 20-26, 36 Mass. Att'y Disc. R. 528 (2020) (failure to pursue divorce modification filings during dispute over jurisdiction with client's former spouse, who had filed in another state; failure to advise competently and keep client informed about problems with Massachusetts jurisdiction; attorney discharged, successor litigated successfully in other state); AD 20-25, 36 Mass. Att'y Disc. R. 527 (2020) (failure to respond to client inquiries about preparation of estate plan; failure to put basis of fee in writing).

[23] Matter of Moran, 479 Mass. 1016, 1018, 34 Mass. Att'y Disc. R. 376, 379-380 (2018) (fifteen-month suspension for varied misconduct, including excessive fees); Matter of Fordham, 423 Mass. 481, 12 Mass. Att'y Disc. R. 161

Failure to return unearned legal fees, even in combination with other misconduct, warrants an admonition or a public reprimand.[24]

Mis-deposit of an unearned retainer, in the absence of evidence of misuse, and where the retainer was, in the end, fully earned and accounted for, has warranted an admonition.[25]

Charging and collecting fees for work not performed, where the attorney has no good-faith belief that the charged fees have been earned, is conversion and misappropriation of client funds warranting at least a term suspension. Matter of Zankowski, supra, 487 Mass. at 151 (two years for submitting falsely inflated bills). Absent additional egregious misconduct as was present in Matter of Goldstone, supra (respondent disbarred), sanctions have ranged from a year-and-a-day to a four-year suspension. Zankowski, supra, 487 Mass. at 151-152, citing cases.

Misuse of unearned advance fees has warranted substantial term suspensions, depending on the facts of the case, such as whether the misuse was negligent or intentional, the degree of culpability involved in the misuse, whether deprivation resulted, other violations, and

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(1996), cert. denied, 519 U.S. 1149 (1997) (public reprimand; leading case); Matter of Harvey, 31 Mass. Att'y Disc. R. 254 (2015) (public reprimand for failure to timely exercise discretionary power to distribute personal property of estate, resulting in excessive fees for storage and improper charges to estate for legal representation; rules 1.1, 1.2(a), 1.3 also violated). Contrast Matter of Rafferty, 26 Mass. Att'y Disc. R. 538 (2010) (four-month suspension for charging excessive fee; failure to handle case competently and diligently; failure to advise that client's strategy, driven by anger at former employers, was misguided and that likely recovery did not warrant the cost; aggravated by prior discipline and pecuniary motive in seeking to collect a large fee); Matter of Font, 30 Mass. Att'y Disc. R. 155 (2014) (three-month suspension, stayed, with conditions including MPRE, for gross overcharges for non-productive services to vulnerable and distraught client who primarily sought non-monetary relief concerning circumstances of son's death in the military).

[24] Matter of Hooker, 34 Mass. Att'y Disc. R. 198 (2018) (public reprimand; flat fee of $25,000 for services as attorney-in-fact excessive, largely not earned; attorney failed to make refund on ward's demise, instead suggesting additional flat fee for estate administration; restitution only after Bar Counsel contacted); Matter of Ahn, 24 Mass. Att'y Disc. R. 10 (2008) (public reprimand; excessive fees, failure to return unearned fees, failure to account and return client file); AD 20-10, 36 Mass. Att'y Disc. R. 500 (2010) (attorney accepted retainer to work on estate, did no work, failed to respond to client inquiries, failed to return unearned fees; after disciplinary complaint filed, attorney refunded retainer and apologized, mitigated by serious family problems); AD 18-21, 34 Mass. Att'y Disc. R. 614 (2018) (attorney received flat fee for restraining order matter; representation terminated when client charged with crime and sought criminal defense counsel; attorney's promised refund not made until Bar Counsel became involved).

[25] Matter of an Attorney (AD 20-31), 36 Mass. Att'y Disc. R. 537 (2020) (collecting similar cases resulting in admonitions). See also AD 21-11, 37 Mass. Att'y Disc. R. ____ (2021) (admonition for deposit of retainer, paid by credit card, into non-trust account; refund made after client decided not to go forward).

aggravating or mitigating factors.[26] Deprivation is one factor to be considered in setting the appropriate sanction within a range of sanctions.[27]

Under **count two**, we concluded that the respondent violated Mass. R. Prof. C. 1.5(a) by entering into contracts calling for illegal or excessive fees; would have violated rule 1.15(b), had it been charged, and did violate 8.4(h) by depositing unearned retainers and advance fees into his operating account and treating them as earned upon receipt; and violated 1.5(f)(3) by failing to obtain his clients' informed consent to contingent fee terms that varied from the standard forms prescribed by the rules of professional conduct.

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[26] Matter of Pudlo, 460 Mass. 400, 27 Mass. Att'y Disc. R. 736 (2011) (one-year suspension, six months stayed on conditions, for negligent misuse of unearned retainer, improper records, inability to account for expenses received; Court discussed factors to be considered in fashioning case-specific sanction for misuse of retainer); Matter of Sharif, 459 Mass. 558, 27 Mass. Att'y Disc. R. 809 (2011) (three-year suspension, final year stayed, for intentional misuse of unearned retainer where written contract clearly required that retainer be taken only as earned; neglect in that and another matter; fabricated documents submitted to Bar Counsel in both cases; restitution only after client filed suit; mitigated by attorney's depression); Matter of Mahlowitz, 37 Mass. Att'y Disc. R. ___ (2021) (six-month suspension, final three months stayed on conditions, for intentional misuse of retainer, later fully earned, so no deprivation; failure to deposit unearned fees in trust account until earned; failure to communicate in writing scope of work and basis of fee); Matter of Pitman, 36 Mass. Att'y Disc. R. 384 (2020) (year-and-a-day suspension, stayed for two years on conditions, for negligent misuse of retainer, negative balances in client account, lack of diligence, failure to communicate with client, failure to turn over trust funds to client when due (support payments) or to advise client of their receipt, misrepresentations to client, IOLTA recordkeeping violations); Matter of Quigley, 36 Mass. Att'y Disc. R. 388 (2020) (three-year suspension for intentional misuse of unearned retainer, failure to provide competent representation, failure to refund unearned fees on discharge, failure to cooperate with Bar Counsel's investigation, misrepresentations to Bar Counsel during investigation); Matter of Carmel-Montes, 35 Mass. Att'y Disc. R. 35 (2019) (six-month suspension for intentional misuse of retainer collected under hourly fee agreement, no deprivation because retainer fully earned); Matter of Calcagni, 32 Mass. Att'y Disc. R. 60 (2016) (one-year suspension, six months stayed on conditions, for intentional misuse of unearned retainer, nearly all later earned, failure to hold trust funds in trust account, failure to notify of withdrawals, failure to keep required trust account records, failure to account, failure to return unearned fees); Matter of Molloy, 31 Mass. Att'y Disc. R. 463 (2015) (year-and-a-day suspension for two instances of misrepresentation to client about need for retainer and intentional misuse of it, neglect of one case by failure to coordinate with expert; in another matter, neglect of a divorce; failure to account; mitigated by depression and anxiety disorder contributing to misconduct; aggravated by prior discipline); Matter of Sousa, 30 Mass. Att'y Disc. R. 383 (2014) (two-year suspension for two instances of intentional misuse of unearned retainer, multiple neglects with misrepresentation to client, unauthorized settlement, failure to keep client informed, fabricated document to Bar Counsel).

[27] See Matter of Sharif, supra, 459 Mass. at 570, 27 Mass. Att'y Disc. R. at 824; Matter of Pudlo, supra, 460 Mass. at 406, 27 Mass. Att'y Disc. R. at 748 (describing "textured comparison" to similar cases).

The typical sanction for failing to obtain informed consent to variant contingent fee agreements appears to be an admonition. That is based on an analogy to cases involving failure to enter into written contingent fee agreements.[28]

As stated with respect to count one, the typical sanction for collecting clearly excessive fees is a public reprimand. A public reprimand is also the appropriate starting point for determining the sanction for collecting illegal fees. When that misconduct is combined with other serious violations, term suspensions have been imposed.[29]

Likewise, as under count one, the usual sanction for misuse of unearned advance fees by treating them as earned upon receipt is a term suspension of significant length.[30]

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[28] AD 15-03, 31 Mass. Att'y Disc. R. 749 (2015) (plus rule 1.15 notice and earned-fee commingling violations); AD 08-18, 24 Mass. Att'y Disc. R. 895 (2008) (1.5(c) violation and additional misconduct); AD 05-13, 21 Mass. Att'y Disc. R. 698 (2005) (1.5(c) violation and additional misconduct). In a case involving failure to obtain such consent, the attorney received a public reprimand where he also made a false assertion of an attorney's lien after being discharged and neglected another matter with resulting loss of claims. Matter of Zaroulis, 33 Mass. Att'y Disc. R. 534 (2017).

[29] See Matter of Serpa, 30 Mass. Att'y Disc. R. 358, 369 (2014) (noting, before imposing sixty-day suspension for varied misconduct, that "[t]he board determined that the appropriate sanction for charging an illegal or excessive fee is a public reprimand"; among other violations, attorney collected a prohibited private fee in a court-appointed case). Other reported cases do not provide guidance for matters in which the only charge is contracting for or collecting an illegal fee; those cases involved additional serious charges. See, e.g., Matter of Heard, 36 Mass. Att'y Disc. R. 279 (2020) (three-year suspension for multiple violations including charging a fee expressly prohibited by CPCS Assigned Counsel Manual, unearned retainers, neglect, and criminal conviction for domestic violence); Matter of Saletan, 29 Mass. Att'y Disc. R. 574 (2013) (varied misconduct; fee illegal because attorney was engaged in unauthorized practice; six-month-and-a-day suspension). Bar Counsel contends that Matter of Zak, 476 Mass. 1034, 33 Mass. Att'y Disc. R. 522 (2017), which involved charging illegal advance fees in connection with foreclosure-related services, shows that disbarment can result from violations of rules 1.5 and 1.15, as here. Zak is distinguishable, as it involved multiple additional violations, including mortgage rescue scams based on misleading contractual arrangements and deceptive and useless services that preyed on vulnerable clients for the attorney's personal pecuniary gain, false and deceptive advertising, fee-sharing with non-lawyer, paying others to solicit clients, failure to train employees to comply with attorney's ethical obligations, misconduct in connection with three specific cases, and failure to cooperate with Bar Counsel's investigation. The disbarment in Matter of O'Connor, 26 Mass. Att'y Disc. R. 458 (2010), resulted from an illegal fee in a workers compensation case plus misrepresentation to a tribunal, neglect of a civil case, misrepresentation to the client of the status that case, handling that case while suspended from the practice of law, misrepresentation to Bar Counsel and the Court that he had notified clients of his suspension, and a history of prior, progressively more serious discipline. Matter of Diviacchi, 475 Mass. 1013, 32 Mass. Att'y Disc. R. 268 (2016) (twenty-seven month suspension), Matter of Tara, 27 Mass. Att'y Disc. R. 879 (2011) (year and a day suspension), and Matter of Landry, 31 Mass. Att'y Disc. R. 374 (2015) (nine-month suspension), cited by Bar Counsel as warranting term suspensions, are distinguishable because they involved blatant dishonesty toward a court or a client.

[30] See notes 26, 27, supra.

Under **count three**, we concluded that the respondent violated Mass. R. Prof. C. 1.15(b) and 8.4(h) by negligent misuse of trust funds without deprivation; 1.15(b) and 8.4(h), but not 8.4(c), by intentional misuse of trust funds in issuing the $4,000 check to BSI; 1.15(b) by commingling personal funds in a trust account; 1.15(f) by failing to maintain required trust account records; and 1.15(f)(1)(C) by creating negative balances in individual client accounts.[31]

Commingling personal and client funds in a trust account warrants an admonition.[32] Failure to maintain trust account records, together with commingling earned fees in the trust account, warrants an admonition or a public reprimand.[33]

Creating a negative balance in a client's trust account warrants an admonition.[34]

Negligent misuse of trust funds without deprivation warrants a public reprimand.[35] However, a suspension can be appropriate when negligent misuse without deprivation is compounded by additional violations.[36]

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[31] We have rejected the charge that the respondent violated rule 1.15(b)(3) (deposit advance fees into trust account) because retainer checks were not shown to have been unearned when deposited into non-trust accounts.

[32] Matter of Schoepfer, 426 Mass. 183, 187, 13 Mass. Att'y Disc. R. 679, 685 (1997); Matter of the Discipline of an Attorney (Three Attorneys), 392 Mass. 827, 836, 4 Mass. Att'y Disc. R. 155, 166 (1984).

[33] AD 21-21, 37 Mass. Att'y Disc. R. _____ (2021) (admonition; depositing personal funds into trust account, failure to withdraw earned fees promptly, paying personal expenses from trust account, failure to prepare reconciliations); Matter of DeFeo, 37 Mass. Att'y Disc. R. ___ (2021) (public reprimand for violation of trust account recordkeeping rules, commingling).

[34] AD 21-13, 37 Mass. Att'y Disc. R. ____ (2021) (admonition; payout before covering funds were received caused negative balance and overdraft; failure to clear old checks for more than fifteen years resulted in failure to pay trust funds promptly; failure to remove earned fees from trust account resulted in commingling).

[35] Schoepfer, Three Attorneys, supra, note 32; Matter of Parry, 33 Mass. Att'y Disc. R. 389 (2017) (public reprimand; failure to ensure that real estate deposit had been placed in IOLTA account, resulting in drawing on other clients' money to fund closing disbursements, no deprivation; failure to reconcile accounts); Matter of James, 32 Mass. Att'y Disc. 282 (2016) (public reprimand; inadvertent misuse of client funds to pay other client obligations, without deprivation, plus commingling, resulting from failure to keep required records, delegation of recordkeeping to inadequately supervised employees, lack of control systems); Matter of Champion, 25 Mass. Att'y Disc. 109 (2009) (public reprimand; attorney disbursed closing proceeds without confirming loan had been funded, thereby negligently misusing others' money without deprivation; mitigated by prompt efforts to correct, inexperience, malpractice insurance payouts).

[36] See, e.g., Matter of Arthur, 33 Mass. Att'y Disc. R. 18 (2017) (six-month suspension for misconduct in two matters, including negligent misuse without deprivation; commingling; failure to maintain trust funds in trust account; failure to pay when due, in two matters; withdrawing fees before earned; excessive fees by charging legal rate for non-legal work; failure to account on withdrawal and at conclusion of representation; failing to enter into

Intentional misuse of trust funds without deprivation or intent to deprive warrants a suspension "of appropriate length."[37]

Suspensions have ranged from months to years, depending on the facts and circumstances, including other violations.[38]

The Appropriate Sanction

Under each count of the present petition for discipline, Bar Counsel has established one or more violations warranting a term suspension of substantial length: under count one, charging

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written contingent fee agreement); Matter of Roden, 29 Mass. Att'y Disc. R. 564 (2013) (six-month suspension, stayed for two years on conditions, for negligent misuse without deprivation, failure to deliver funds when due, two counts of neglect, IOLTA violations).

[37] Schoepfer, Three Attorneys, supra, note 32.

[38] Matter of Anand, 33 Mass. Att'y Disc. R. 6 (2017) (one-year suspension with conditions on reinstatement for two instances of intentional misuse of funds received in escrow as real estate deposits, one misuse covering for the earlier; plus failure to deposit trust funds in trust account and failure to comply with rules regarding opening of trust accounts); Matter of Johansen, 31 Mass. Att'y Disc. R. 347 (2015) (eighteen-month suspension for two instances of intentional misuse without deprivation or intent to deprive, plus failure to maintain records and contempt for refusal to comply with subpoena); Matter of Kaplan, 31 Mass. Att'y Disc. R. 353 (2015) (two-year suspension where attorney fabricated settlement agreement and payment of purported settlement funds, with bounced checks, and intentional misuse of other client's funds to pay fabricated settlement, without deprivation; neglect and loss of claim; misrepresentations to client about status, plus unauthorized practice in violation of administrative suspension); Matter of Feeney, 29 Mass. Att'y Disc. R. 240 (2013) (year-and-a-day suspension for intentional misuse without deprivation, intentional misuse of unearned retainer, which was never fully earned, submitting fabricated records to Bar Counsel, later retracted, plus trust account maintenance violations); Matter of Webster, 29 Mass. Att'y Disc. R. 663 (2013) (nine-month suspension, with automatic reinstatement conditioned on terms of probation, for misuse of estate funds, without deprivation or intent to deprive where all funds restored in time for payment; compounded by records violations, paying fee without accounting, failure to cooperate with Bar Counsel's investigation); Matter of O'Reilly, 26 Mass. Att'y Disc. R. 470 (2010) (year-and-a-day suspension for single instance of intentional misuse of estate funds repaid without delaying distribution and thus without deprivation, plus failure to file estate returns, aggravated by three instances of misrepresentation to client, including use of fabricated documents, to hide neglect); Matter of MacCallum, 24 Mass. Att'y Disc. R. 452 (2008) (four-month suspension, with conditions, for single instance of misuse of real estate escrow funds with buyer's consent but not his client/seller's consent; money repaid when sale did not close; count two concerned inadequate records and commingling; count three was non-cooperation with Bar Counsel, mitigated by alcoholism and aggravated by long-time IOLTA noncompliance); Matter of Sumption, 15 Mass. Att'y Disc. R. 614 (1999) (three-month suspension for intentional misuse, without deprivation or intent to deprive; restitution made after Bar Counsel notified of dishonored checks; in mitigation, misuse occurred over short period during which attorney had emotional difficulties, and attorney was inexperienced; Matter of Norris, 12 Mass. Att'y Disc. R. 377 (1996) (six-month suspension for intentional misuse without deprivation or intent to deprive, compounded by neglect, misrepresentations to clients about case status, and failure to cooperate with Bar Counsel's investigation); Matter of Callahan, 10 Mass. Att'y Disc. R. 30 (1994) (eighteen-month suspension for commingling and intentional misuse of the entirety of a client's funds from closing, which he was asked by the client to hold until instructed, by various disbursements made with no intent to deprive or deprivation; attorney acknowledged misuse to beneficiaries of client's estate, replaced funds and paid beneficiaries when due).

and collecting clearly excessive fees (text at note 23, above) and misuse of unearned advance fees, with deprivation (text at notes 26, 27, above); under count two, contracting for excessive and illegal fees (text at note 29, above) and misuse of unearned advance fees by treating them as having been earned upon receipt (text at note 30, above); and, under count three, negligent misuse of trust funds (text at note 36, above) and, in one case, intentional misuse of trust funds (text at notes 37, 38), both without deprivation.

Any one of those violations might well have merited a term suspension. Matter of Pudlo, supra, n. 26 (one-year suspension, six months stayed on conditions, for negligent misuse of unearned retainer, failure to refund unearned fees, improper recordkeeping, inability to account for expenses received); Matter of Mahlowitz, supra, n. 26 (six-month suspension, three months stayed on conditions, for intentional misuse that targeted a specific client's retainer, later fully earned and, therefore, no deprivation); Matter of Carmel-Montes, supra, n. 26 (six-month suspension for intentional misuse of retainer collected under unambiguous hourly fee agreement, without deprivation); Matter of MacCallum, supra, n. 38 (four-month suspension for misuse of real estate escrow funds with buyer's consent but not client/seller's consent; money repaid when sale did not close; inadequate records, commingling, non-cooperation with Bar Counsel; mitigated by alcoholism treated by in-patient program); Matter of Daniels, supra (nine-month suspension for single instance of intentional misuse without deprivation; multiple instances of negligent misuse with deprivation and restitution; neglect, misrepresentations, failure to cooperate with Bar Counsel).

Together, the multiple violations established in this case require a more severe sanction than was imposed in those five cases. See Matter of Anand, supra, n. 38 (one-year suspension, with conditions on reinstatement for two instances of intentional misuse of funds to be held in escrow); Matter of Johansen, supra, n. 38 (eighteen-month suspension for two instances of intentional misuse without deprivation); Matter of Molloy, supra, n. 26 (year-and-a-day suspension for two instances of misrepresentation to client about need for retainer and intentional

misuse of it); Matter of Sousa, supra, n. 26 (two-year suspension for two instances of intentional misuse of unearned retainer).

Moreover, we are presented with a dismaying array of violations of rules concerning communication with a client (count one), rules and regulations prescribing the form and substance of fee agreements (count two), and rules governing accounting for trust funds and prohibiting commingling (count three). Those violations taken separately would warrant a public reprimand, but the sheer volume of violations cumulatively warrants a suspension. Matter of Saab, supra, 406 Mass. at 326-327, 6 Mass. Att'y Disc. R. at 289-290 ("The respondent also argues that the imposition of a suspension on the basis of the cumulative effect of, as he has characterized them, 'little tiny matters,' is a 'radical departure' from other disciplinary cases. The simultaneous consideration of separate violations, however, is an established part of the disciplinary system of this Commonwealth.").

In addition to all those violations and the cumulative effect of as many as six separate violations warranting suspension, we have identified numerous aggravating factors, among them uncharged misconduct involving the respondent's failure to adequately train and supervise his subordinates and his demonstrated lack of insight into the nature and effects of his misconduct.

This case does not involve prior discipline or a pattern of dishonesty that has warranted longer suspensions. See, e.g., Matter of Webster, 37 Mass. Att'y Disc. R. __ (2021) (two-and-a-half-year suspension for failure to comply with court order of suspension, filing a false affidavit of compliance with that order, commingling, failure to disburse trust funds promptly, negligent misuse of client funds, failure to respond to Bar Counsel's inquiry, submission of false records to Bar Counsel, trust accounting violations, cash withdrawals from a trust account, aggravated by prior discipline for intentional misuse and trust account violations); Matter of Nissenbaum, 34 Mass. Att'y Disc. R. 410 (2018) (three-year suspension for cumulative effect of false accusations against a judge in an effort to obtain recusal; misrepresentations to court by denying continued representation of sons while also representing guardian of father; clearly excessive fees charged against ward's estate; aggravated by absence of remorse or consciousness of wrongdoing,

vulnerable ward, and uncharged misrepresentations in court filings purportedly on behalf of ward but designed to aid sons).

In this case, the respondent's multiple misuses of retainers and advance fees were more negligent than intentional. His fee agreements did not expressly prohibit him from taking advance fees as earned, although the contract terms did violate rule 1.5(a)'s prohibition on clearly excessive fees.

The respondent's many forms of misconduct were significantly mitigated by a sincere and demonstrated commitment to his clients going beyond what would ordinarily be expected of an attorney; a willingness to make his valuable services available to clients who were often in dire need of them, sometimes at the expense of his firm's profitability; and a commitment to fairness coupled with an impressive command of his field of legal practice.

In this unique case, having sought to balance all the foregoing considerations, we recommend a suspension of fifteen months. We believe the respondent must be required to complete the reinstatement process before he can be permitted to resume the practice of law.

RESPECTFULLY SUBMITTED
By the hearing committee,

Michael G. Tracy

Michael G. Tracy, Esq., Chair

Joseph D. Downing

Joseph D. Downing, Member

Andrew M. Batchelor

Andrew M. Batchelor, Esq., Member

Filed: February 14, 2022