

ADMONITION NO. 17-01

CLASSIFICATIONS:

Handling Legal Matter when Not Competent or without Adequate Preparation [Mass. R. Prof. C. 1.1]

Failing to Seek the Client's Lawful Objectives or Abide by Client's Decisions to Settle or Enter Plea [Mass. R. Prof. C. 1.2(a)]

Failing to Act Diligently [Mass. R. Prof. C. 1.3]

Failing to Communicate Adequately with Client [Mass. R. Prof. C. 1.4]

SUMMARY:

The respondent was appointed to represent a client who was detained pretrial in a criminal matter. The only viable theory of defense was self-defense and the respondent and client agreed on a strategy of attacking the victim's credibility.

The respondent met with the client briefly when he was transported for court appearances, spoke with the client by telephone and responded to the client's letters. The respondent, however, failed to visit the client until the day before the matter was scheduled for trial, which was inadequate to ensure that he and the client were thoroughly prepared. The respondent's failure to earlier visit the client was in violation of standards promulgated by the Committee for Public Counsel Services, which require lawyers to visit clients who are detained pretrial within three business days of being assigned to a case and "as needed and at reasonable intervals" to advise the client and prepare the case.

The client was convicted after trial. The client filed a motion for new trial, an appeal and a request for further appellate review on the grounds of ineffective assistance of counsel. The client's motions and appeal were denied.

The respondent's failure to visit the client until the night before trial violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3 and 1.4 (a) and (b) as in effect prior to July 1, 2015.

The respondent received an admonition for his misconduct in this matter conditioned on attendance a CLE course designated by bar counsel.

ADMONITION NO. 17-02

CLASSIFICATIONS:

Failing to Communicate Adequately with Client [Mass. R. Prof. C. 1.4]

Withdrawal of Fees Without Accounting [Mass. R. Prof. C. 1.5(d)(2)]

IOLTA Violation [Mass. R. Prof C. 1.15(e)(6)]

SUMMARY:

The client engaged the services of the respondent to represent her in a wrongful death matter on a contingent fee basis. The client's son had died while incarcerated after an arrest. The respondent filed an action in federal court against the city and police department.

After the parties agreed to a settlement of \$150,000, the respondent deposited the funds to his IOLTA account. The respondent subsequently withdrew his fees and expenses. The respondent did not send the client an accounting nor did the respondent inform the client that he had withdrawn his fees and expenses from the settlement funds.

During the course of the litigation, it was discovered that the decedent had a minor son. The client wanted the net settlement proceeds to be distributed to the child via a trust with her as the trustee. The respondent engaged a probate attorney to draft a trust and prepare the necessary estate documents. The probate attorney needed court approval for the establishment of the trust, and this issue, plus miscommunications, caused a delay in establishing the trust. The respondent held the client's funds intact but failed to adequately communicate the status of the matter to the client and failed to move the funds to a separate interest-bearing escrow account for over two years. The respondent has since paid the client with interest.

The respondent's failure to adequately communicate with his client was in violation of Mass. R. Prof. C. 1.4. The respondent's failure to inform the client that he withdrew his fees was in violation of Mass. R. Prof C. 1.15(d)(2). The respondent's failure to transfer the client's funds to an individual interest-bearing trust account was in violation of Mass. R. Prof. C. 1.15 (e)(6). The respondent accordingly received an admonition.

The respondent was admitted to the bar in 1989 and has no prior discipline. He received an admonition conditioned upon attending a continuing legal education program designated by bar counsel.

ADMONITION NO. 17-03

CLASSIFICATIONS:

Failure to Act Diligently [Mass. R. Prof. C. 1.3]

Failure to Communicate Adequately With Client [Mass. R. Prof. C. 1.4(a)]

Failure to Cooperate in Bar Discipline Investigations [Mass. R. Prof. C. 8.1(b) and 8.4(g); S.J.C. Rule 4:01, §3]

SUMMARY:

On August 5, 2014, the client retained the respondent to draft and file a patent application with the United States Patent and Trademark Office (“USPTO”) in return for a flat fee of \$1,750. The client paid the respondent \$1,000 in cash as a partial payment that same day. On September 28, 2014, the respondent met with the client to discuss the client’s patent application. The respondent performed no work of any substance on the client’s matter for many months thereafter.

From October 2014 to April 2015, the client and her representative attempted to contact the respondent multiple times to determine whether he had filed the patent application. The respondent was aware of these efforts but did not respond.

On January 2, 2015, the client filed a complaint with bar counsel. Between January 16, 2015 and April 1, 2015 the respondent failed to reply to letters from bar counsel, which had enclosed the client’s complaint and requested a response.

On April 15, 2015, the respondent filed the client’s completed patent application with the USPTO. He did not then furnish the client with a copy of the application.

After April 15, 2015, the client continued her efforts to contact the respondent, who did not return her telephone calls or respond to her letters.

On June 26, 2015, the respondent sent the client a copy of her patent application that he had filed along with a copy of the electronic acknowledgment receipt.

On July 1, 2015, the respondent appeared at the Office of the Bar Counsel with documents that bar counsel had requested and provided full answers to bar counsel’s questions under oath in a recorded interview.

The respondent's failure to take any action of any substance on the client's matter from September 2014 until April 2015 violated Mass. R. Prof. C. 1.3. The respondent's failure to keep his client reasonably informed as to the status of her case violated Mass. R. C. 1.4(a). The respondent's failure to respond to bar counsel's requests for information violated S.J.C. Rule 4:01, §3 and Mass. R. Prof. C. 8.1(b) and 8.4(g).

The respondent was admitted to the bar on December 9, 2008. He has no prior disciplinary history. In September 2015, the respondent and bar counsel entered into a diversion agreement in this matter, intended to provide remedial assistance in lieu of discipline. The diversion agreement was approved by the board on October 1, 2015. As of October 16, 2016, the respondent had not fully complied with the conditions of diversion. He accordingly received an admonition for his misconduct as described above.

ADMONITION NO. 17-04

CLASSIFICATIONS:

Handling Legal Matter when Not Competent or without Adequate Preparation [Mass. R. Prof. C. 1.1]

Failing to Act Diligently [Mass. R. Prof. C. 1.3]

Failing to Communicate Adequately with Client [Mass. R. Prof. C. 1.4]

SUMMARY:

The respondent represented a client on criminal charges in the superior court of trafficking 200 grams or more of heroin. The client was arrested in July 2015 after being searched while he was purchasing an item at a convenience store. The police alleged that a confidential and reliable informant provided information as to a delivery of a large amount of heroin by an out-of-state car in the geographic area of the convenience store. Based on observations of a vehicle with such plates and the movement of the client, the police determined that they had cause to search the client's person at the convenience store. The vehicle was never searched or located.

On November 5, 2015, the respondent filed a motion to suppress the drugs seized pursuant to a warrantless search, alleging that there was a lack of probable cause. The respondent also submitted an affidavit of the client.

The client did not sign the affidavit, nor did the respondent read the contents or discuss the specifics of the affidavit to him before it was filed. The respondent signed the client's name with the respondent's initials in parentheses after the affixed signature. The client gave the respondent authority to sign his name to an affidavit in support of his motion, but not to the specific affidavit that was filed. Regardless, even with the respondent's initials following the signature such that there was no confusion as to who actually signed the affidavit, it is not permissible to sign another person's name to a document under oath.

The affidavit that was filed contained factual errors. It incorrectly stated that the police alleged that the client was driving the vehicle and that the vehicle was searched and seized. The police did not allege that the client was driving any vehicle and the vehicle the police said they observed was never found.

A hearing on the motion to suppress was held on December 17, 2015. The affidavit was not taken into consideration and was not considered evidence on the motion. There was very little dispute as to the underlying facts, including that the vehicle was never searched or seized.

The respondent's failure to diligently and carefully prepare the contents of the affidavit combined with failing to cause the client to review the contents before filing, was conduct in violation of Mass. R. Prof. C. 1.1, 1.3 and 1.4. The respondent's signing the client's name to the affidavit with his own initials in parentheses following the signature is conduct in violation of Mass. R. Prof. C. 1.1.

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The respondent was admitted in 1990 and has no prior discipline. He received an admonition for his misconduct.

ADMONITION NO. 17-05

CLASSIFICATIONS:

Failing to Act Diligently [Mass. R. Prof. C. 1.3]

Failing to Communicate Adequately with Client [Mass. R. Prof. C. 1.4]

No Written Fee Arrangement [Mass. R. Prof. C. 1.5(b)(1)]

SUMMARY:

On January 6, 2016, a minor was arrested by the Quincy Police Department while driving a vehicle. She was charged with a second offense OUI for a person under 21 years of age. She refused a breathalyzer.

On January 12, 2016, the minor retained the respondent and paid him a fee in the amount of \$2,500.00. The respondent did not communicate in writing the scope of the representation or basis or rate of the fee.

Soon after being retained, the respondent met with the client and her parents at her home to discuss the case. The respondent next appeared in court on May 18, 2016. At that time, a pre-trial conference was scheduled for July 20, 2016.

The client appeared in court on July 20, 2016, but the respondent did not. The judge tried to contact the respondent on that day without success. The judge continued the matter and suggested to the client that she retain other counsel.

Between August 8, 2016 and October 24, 2016, the client's mother and father repeatedly phoned and sent letters to the respondent in an effort to obtain an explanation as to why he did not appear in court and to demand a refund. The respondent did not return phone messages or respond. On October 24, 2016, the client retained successor counsel and on October 31, 2016 filed a complaint with bar counsel.

The respondent remitted a \$1,500.00 refund on or about October 22, 2016 and the balance of \$1,000.00 in January 2017, after the complaint was filed. The respondent also apologized to the client for not appearing in court on July 20, 2016.

The respondent's failure to communicate in writing the scope of the representation and the basis and rate of the fee and expenses, is conduct in violation of Mass. R. Prof. C. 1.5(b)(1). The respondent's failure to appear at a duly scheduled pre-trial conference was in violation of Mass. R. Prof. C. 1.3. The respondent's failure to timely respond to requests for information, as described above, was in violation of Mass. R. Prof. C. 1.4.

The respondent was admitted in 1969. He received an admonition for his misconduct.

ADMONITION NO. 17-06

CLASSIFICATIONS:

Failure to Communicate Adequately with Client [Mass. R. Prof. C. 1.4(a) and (b)]

Failure to Return Papers on Discharge [Mass. R. Prof. C. 1.16(e)]

SUMMARY:

On August 25, 2016, bar counsel served an admonition on the respondent. The attached summary of the basis for the admonition asserted that:

The respondent's firm had represented an elderly woman in estate planning and real estate matters for several years. In December 2014, the respondent received a telephone call from a lawyer who advised the respondent that he was taking over the representation and requested that the respondent turn over the client's papers. The respondent advised the caller that, before turning over the file, the respondent would need to confirm that the client in fact wanted to effectuate a change of counsel.

The respondent did not contact the client. Instead, he telephoned the client's adult daughter, who held the client's power of attorney and with whom the respondent had previously dealt in regard to the client's estate planning matters. The daughter told the respondent she was unaware of any desire on her mother's part to change lawyers. After undertaking to gather more information, the daughter soon reported back to the respondent that her mother had recently transferred a substantial amount of her personal funds to another family member. Based on the information the daughter had discovered, she and the respondent concluded that the purported change of counsel was part of a scheme by the other family member to unduly influence the client's disposition of her assets. Acting on that suspicion, the respondent directed the daughter to use her authority under the power of attorney to transfer the remaining balance of the client's personal account into the respondent's client trust account to prevent any further dissipation of the client's assets.

At no point over the next several weeks did the respondent undertake to speak with the client in order to determine whether she had authorized the change of counsel, whether her transfer of funds to the other family member was voluntary, or whether she approved the decision to move her funds into the respondent's IOLTA account. In the meantime, the respondent resisted further requests for turnover of the client's papers to new counsel. Throughout the course of these events, the respondent understood that the client was not mentally impaired and was competent to handle her own legal and financial affairs.

In response to the respondent's actions, the client revoked the daughter's power of attorney. Shortly thereafter, the client and her new counsel succeeded in establishing that her decisions to terminate that respondent's representation and to transfer funds to the other family member had been voluntary and not the product of undue influence. Accordingly, in April 2015, the respondent returned the funds he had been holding and turned over the client's files to her new counsel.

The respondent objected to the admonition and requested an expedited hearing. After an evidentiary hearing conducted by a special hearing officer appointed under S.J.C. Rule 4:01, § 8(4)(a), the special hearing officer issued a report that, for the most part, found the facts as stated in bar counsel's admonition summary. The report, however, included different and additional findings in mitigation and aggravation, as described below.

The special hearing officer found that the respondent's failure to communicate with his client, to ascertain her wishes concerning her choice of counsel and to discuss his suspicions of financial abuse and his efforts to safeguard her funds in his IOLTA account, violated Mass. R. Prof. C. 1.4(a) and (b) as in effect prior to July 1, 2015 (now Mass. R. Prof. C. 1.4(a)(3) and (4) and (b)). The respondent's failure to turn over the client's papers in a timely manner violated Mass. R. Prof. C. 1.16(e).

In mitigation, the respondent was acting under exigent circumstances. The respondent actually believed that he was acting in the best interests of a client who suffered from diminished capacity that rendered her vulnerable to undue influence and warranted the exercise of discretion concerning protective action under Mass. Rule Prof. C. 1.14(b) (client with diminished capacity). Still, in the face of the respondent's failure to contact and communicate with the client, as well as mounting evidence he received of the client's undiminished capacity, the respondent's belief was both wrong and unreasonable. As a result, his belief was not a complete defense under rule 1.14(b), but it was considered in mitigation.

In further mitigation, after the respondent abandoned an unsuccessful petition he had filed seeking the appointment of a conservator for his client, he promptly returned the client's funds and files, and he reimbursed the client for the legal fees she had incurred opposing that petition. The special hearing officer also noted the respondent's otherwise clean disciplinary record since his admission to the Massachusetts bar in 1978.

In aggravation, the respondent engaged in a conflict of interest as between the client and the client's children by representing the children as petitioners for the appointment of a conservator over their mother. The special hearing officer also expressed concern about the respondent's erroneous description, related to the probate court judge at a hearing on the conservatorship petition, of conversations with an assistant bar counsel in which, the respondent said, bar counsel's office had approved his course of conduct. Of greatest concern, however,

was the respondent's continued insistence throughout the hearing that he had done nothing wrong, signifying the potential for recidivism in the absence of some discipline.

The special hearing officer recommended that the respondent be admonished.

Neither party appealed from the special hearing officer's report, which came before the board at its meeting on March 13, 2017. The board voted to adopt the findings and conclusions of the report and that the respondent receive an admonition.

ADMONITION NO. 17-07

CLASSIFICATION:

Conduct Involving Dishonesty, Fraud, Deceit, Misrepresentation [Mass. R. Prof. C. 8.4(c)]

SUMMARY:

The respondent represented a client in a personal injury matter. Prior to suit, the respondent obtained a settlement offer from the responsible party's insurance company. The respondent informed the client of the offer and she agreed to accept it.

As a condition of settlement, the insurance company required the client to execute a formal release of the client's claim, a form of which the company provided to the respondent. In order to expedite the settlement process, the respondent signed the client's name to the release rather than present the document to the client for her signature. The respondent then sent the executed release to the insurance company as if the client had actually signed it. The client received her share of the settlement proceeds in a timely fashion and did not suffer any harm as a result of the false signature on the release.

By furnishing the insurance company with a release he knew had not been signed by the client, the respondent violated Mass. R. Prof. C. 8.4(c).

The respondent was admitted to the bar in 2013 and has no prior discipline. He received an admonition for his conduct, conditioned on attendance at a CLE program in professional ethics designated by bar counsel.

ADMONITION NO. 17-08

CLASSIFICATIONS:

Trust Account Commingling [Mass. R. Prof. C. 1.15(b)(2)]

Improper Method of Withdrawal [Mass. R. Prof. C. 1.15(e)(4)]

SUMMARY:

Over a period of approximately seventeen months, the respondent deposited earned fees into his IOLTA account multiple times while also holding client funds. During a seven-month period, the respondent made several cash withdrawals from his IOLTA account. The respondent's commingling and cash withdrawals from the IOLTA account violated Mass. R. Prof. C. 1.15(b)(2) and (e)(4).

The respondent was admitted in 2010 and has no prior discipline. The respondent received an admonition for his conduct in this matter.

ADMONITION NO. 17-09

CLASSIFICATIONS:

Handling Legal Matter when not Competent or Without Adequate Preparation [Mass. R. Prof. 1.1]

Conduct Prejudicial to the Administration of Justice [Mass. R. Prof. C. 8.4(d)]

SUMMARY:

The respondent was appointed as a guardian ad litem in a divorce case. An order of impoundment of the entire divorce file was entered on August 2, 2012. The respondent was aware of the impoundment order.

On August 7, 2013, the respondent disseminated confidential information about the divorce to two attorneys not involved in the case in an attempt to interest them in becoming involved as parenting coordinators. Although the respondent knew of the impoundment order, she mistakenly believed that it did not apply to these communications. As a result of this breach of the impoundment order, the respondent was removed from the fee-generating appointments list of the Probate and Family Court for two years.

The respondent's conduct in disseminating information she knew to be subject to an impoundment order violated Mass. R. Prof. C. 1.1 and 8.4(d).

The respondent was admitted to practice in Massachusetts in 2002 and has no prior discipline. The respondent received an admonition for this misconduct.

ADMONITION NO 17-10

CLASSIFICATIONS:

Failing to Adequately Communicate with Client [Mass. R. Prof. 1.4(a)]

Failure to Return Papers on Discharge [Mass. R. Prof. C. 1.16(e)]

SUMMARY:

In May or June of 2014, the respondent agreed to review a matter for a prospective client as a courtesy to a colleague. The matter involved the collection of proceeds from a real estate transaction. The client dropped her file off at the respondent's office and called the respondent to ensure he received the file. The respondent failed to return her calls.

The respondent and the client disagree as to whether they later spoke about the case but, between October of 2014 and April of 2015, the client made multiple requests for the return of her file. The respondent finally returned the file in or about May of 2015.

The respondent's failure to communicate adequately with the client violated Mass. R. Prof. C. 1.4(a). The respondent's failure to promptly return the client's file upon request violated Mass. R. Prof. C. 1.16(e).

In a second matter, the respondent represented a client from May of 2012 through January of 2015 in a fee dispute with the client's prior attorney. The matter went to arbitration and an award favorable to the client was made. The client was unhappy with the arbiter's decision and the respondent declined to represent the client further. The client requested a copy of his file from the respondent in September of 2015. Following several miscommunications and failures to communicate, the file was returned to the client in the spring of 2016.

The respondent's failure to communicate adequately with the client violated Mass. R. Prof. C. 1.4(a). The respondent's failure to promptly return the client's file upon request violated Mass. R. Prof. C. 1.16(e).

The respondent was admitted to practice in Massachusetts in 1996. He has no prior discipline. The respondent received an admonition for his conduct in these matters.

ADMONITION NO. 17-11

CLASSIFICATION:

Conduct Adversely Reflecting on Fitness to Practice [Mass. R. Prof. C. 8.4h]

SUMMARY:

The respondent represented an ex-wife regarding a petition for contempt pending in the Worcester Probate and Family Court. In March 2016, there was an issue regarding alleged unpaid medical bills on the part of the ex-husband.

On March 16, 2016, during a mediation session with a family service officer of the Court, an issue arose about the ex-husband's refusal to pay \$25.00 for non-prescription glasses for a child of the marriage. The respondent stood up in a verbally aggressive manner and said to the *pro se* ex-husband, "this isn't [expletive] Egypt." The ex-husband is a native of Egypt and has been a U.S. citizen for some 20 years. The respondent knew he was a native of Egypt.

The probation officers present made a contemporaneous report to the presiding justice. They reported to bar counsel that the respondent was calm and professional until the husband refused to pay \$25.00 for the glasses. The respondent admits he got frustrated over the husband protesting the payment of \$25.00.

The respondent's conduct in referring to the ex-husband's nationality in a derogatory way, with no relevance to the merits of the issue in mediation, reflects adversely on the respondent's fitness to practice and was in violation of Mass. R. Prof. C. 8.4(h).

The respondent was admitted in 1995 and has no prior discipline. The respondent received an admonition for his misconduct.

ADMONITION NO. 17-12

CLASSIFICATIONS:

Failing to Act Diligently [Mass. R. Prof. C. 1.3]

Failure to Seek Client's Lawful Objectives [Mass. R. Prof. C. 1.2(a)]

SUMMARY:

The respondent represented a client in an alien removal proceeding pending in the Boston Immigration Court. The client at the time was living in Texas. The respondent had advised, and the client knew, that he was obligated to attend all hearings. In September 2014, both the respondent and the client knowingly missed a scheduled hearing on the merits of the matter. The respondent was unable to attend for personal reasons and notified the Court of her inability to attend prior to the hearing and requested a continuance. At the hearing, the court issued an *in absentia* deportation order for the client's removal.

After the order was received, the client requested, and the respondent agreed, to file a motion to reopen on the client's behalf. The client alleged he was unable to attend due to financial hardship and an alleged medical appointment. The respondent then failed to file the motion within the 180-day statutorily defined time limit or to advise her client that she would not file the motion. A motion to reopen, filed much later by successor counsel, was denied by the court on the ground that, even were it to accept the late motion, the client's offered reasons for failing to attend did not demonstrate extraordinary circumstances for which the court could reasonably exercise its *sua sponte* authority to reopen. The client accordingly was not harmed by the respondent's inaction.

By failing to timely file a motion to reopen as agreed, the respondent violated Mass. R. Prof. C. 1.2(a) and 1.3. She received an admonition for her conduct in this matter.

ADMONITION NO. 17-13

CLASSIFICATION:

Trust account commingling [Mass. R. Prof. C. 1.15(b)(2)]

SUMMARY:

Beginning in September 2012, the respondent represented a couple in real estate related matters. In October 2012, the couple tendered to the respondent four payments that were earmarked for payment to a mortgage servicer in order to reinstate a mortgage. The respondent deposited the funds directly into her business operating account. The funds were held short term and properly transferred by wire to the loan servicer. The funds were client trust funds and as such were required to be deposited into the respondent's IOLTA account. The respondent's commingling of the funds was in violation of Mass. R. Prof. C. 1.15(b)(2).

During the representation, the respondent received payments from the couple for legal services. For the most part, the amounts tendered represented payments for services rendered that were past due. The respondent properly deposited those funds into her operating account. However, from time to time, the couple paid amounts that were in excess of earned fees, and in those cases, the respondent failed to deposit the amounts, or the amount in excess of earned fees, into her IOLTA account. She anticipated that the fees would be quickly earned. The respondent's conduct constituted commingling in violation of Mass. R. Prof. C. 1.15(b)(2).

The respondent has no prior discipline. She accordingly received an admonition for her misconduct.

ADMONITION NO. 17-14

CLASSIFICATIONS:

Failing to Act Diligently [Mass. R. Prof. C. 1.3]

Failing to Communicate Adequately with Client [Mass. R. Prof. C. 1.4]

SUMMARY:

On July 22, 2009, the client engaged the services of the respondent to represent him in a personal injury matter relative to an automobile accident, which occurred on July 15, 2009. On July 22, 2009, the client and the respondent executed a contingent fee agreement. The respondent gave the client a reduced rate because the client was a close family friend.

On or about August 30, 2013, the case settled for \$25,000. The respondent received and deposited the settlement funds to his IOLTA account and withdrew his fee and expenses. He did not, however, disburse any funds to the client due to a Medicare lien in an unknown amount.

On March 21, 2014, the respondent's office sent a fax to Medicare, informing them of the settlement and asking for any outstanding amount due for the Medicare lien. On May 29, 2014, Medicare sent a request for a final settlement agreement and other details to the respondent and the client. When the client telephoned the respondent inquiring about the status of this correspondence, the respondent and/or his office assistant informed the client that the document would be completed and returned to Medicare. However, the respondent concedes that he neglected to follow-up with Medicare.

Between 2013 and 2017, the client regularly requested information from the respondent regarding the status of the settlement funds, and the Medicare lien. After seeing no results from the respondent, in January of 2017, the client's long-time companion telephoned Medicare and was able to negotiate the medical lien directly with Medicare to \$666.66. The client paid Medicare this amount, and informed the respondent. The respondent then disbursed to the client his settlement funds.

The respondent's failure to follow-up with Medicare constituted neglect in violation of Mass. R. Prof. C. 1.3. The respondent's failure to adequately communicate with his client violated Mass. R. Prof. C. 1.4.

The respondent was admitted in December 15, 1993, and has no prior disciplinary history. At all times, the settlement funds were present in the respondent's IOLTA account. The respondent received an admonition with a requirement that the respondent attend a CLE program designated by bar counsel.

ADMONITION NO. 17-15

CLASSIFICATIONS:

Failing to act diligently [Mass. R. Prof. C. 1.3]

Failing to communicate adequately with client [Mass. R. Prof. C. 1.4(a)]

SUMMARY:

The respondent represented the client in an employment dispute. In 2011, the respondent assisted the client in appealing his termination at a hearing before the employer, and demanded that the employer submit the dispute to arbitration as provided under the terms of employment. Between 2012 and 2017, the employer did not respond to the respondent's demand for arbitration.

Aside from assisting the client at a hearing to obtain retirement benefits in 2012, the respondent performed no work of substance on the employment matter between January 2012 and January 2014. In mitigation, sometime during that time period, the respondent began suffering from depression and between January 2014 and January 2015, he took a medical leave of absence due to severe depression. During his absence, the other lawyers at the firm attempted to cover for him. When he returned to the firm in February 2015, the respondent resumed sole responsibility for the client's case.

During 2015 and through the first half of 2016, the respondent failed to respond to a number of calls from the client inquiring about the status of his case. The client filed a request for investigation with bar counsel in July 2016.

In December 2016, the client and the respondent resolved their differences. They agreed that the respondent would file a complaint against the employer for breach of contract, and seek injunctive relief requiring the employer to arbitrate the claim. The respondent and the client also agreed to modify their fee arrangement, which had provided for an hourly fee, and signed a new contingent fee agreement.

The respondent filed a Superior Court lawsuit against the employer, alleging breach of an employment contract due to the employer's failure to arbitrate the employment claim. The respondent also filed a demand for arbitration with the American Arbitration Association (AAA), which accepted the claim. Both matters are currently in active litigation.

By failing to act with reasonable diligence and promptness in representing a client, the respondent violated Mass. R. Prof. C. 1.3. By failing to promptly respond to the client's reasonable requests for information about the status of his case, the respondent violated Mass. R. Prof. C. 1.4(a).

The respondent was admitted to practice in 1974, and had received no prior discipline. The respondent received an admonition for his conduct.

ADMONITION 17-16

CLASSIFICATIONS:

Failing to Act Diligently [Mass. R. Prof. C. 1.3]

Responsibilities of Partner or Supervisory Lawyer [Mass. R. Prof. C. 5.1(b)]

SUMMARY:

Respondent A was an associate at a small firm specializing in immigration cases. Respondent B was the proprietor of the law firm and Respondent A's immediate supervisor.

Respondent B assigned cases or discrete portions of cases to Respondent A. Respondent B failed to carefully track the matters he assigned to Respondent A and often failed to specify the tasks for which Respondent A would be responsible.

In November 2014, Respondent B instructed Respondent A to appear for a hearing on a client's request for cancellation of removal. Due to logistical problems, the client failed to appear in court for the hearing. As a result, the court ordered that the client be deported. Because his failure to appear for the hearing was unintentional, the client wished to pursue a motion to reopen his immigration case. Although there was no strict deadline for filing such a motion, pursuant to immigration practice guidelines, it should have been filed within ninety days of the order of deportation. However, Respondent A failed to file the motion to reopen within ninety days. Such failure was due in part to the law firm's failure to implement effective case management systems and to supervise Respondent A appropriately.

In March 2015, the client was arrested by U.S. Immigration and Customs Enforcement. Upon learning of the arrest, Respondent A immediately filed an emergency motion to reopen and to stay removal. The court allowed the motion and the client was released from custody after several days of detention. The client's case was not otherwise prejudiced by the delay in filing the motion to reopen.

By failing to exercise reasonable diligence, Respondent A violated Mass. R. Prof. C. 1.3.

By failing to implement reasonable measures to ensure that his associate's work conformed to the Rules of Professional Conduct, Respondent B violated Mass. R. Prof. C. 5.1(b).

Respondent A was admitted to practice in Massachusetts in 2008 and has no record of prior discipline. Respondent B was admitted to practice in Massachusetts in 1985. In aggravation, he received a public reprimand in 1997 for neglecting a personal injury matter.

Both respondents received admonitions for their misconduct.

ADMONITION NO. 17-17

CLASSIFICATIONS:

Trust Account Commingling [Mass. R. Prof. C. 1.15(b)(2)]

Improper Method of Withdrawal [Mass. R. Prof. C. 1.15(e)(5)]

SUMMARY:

During a period of time from January 1, 2015 through December 31, 2016, the respondent withdrew earned fees from his IOLTA account on multiple occasions by paying personal obligations directly from the IOLTA account. In addition to the deposit and disbursement of client funds, the respondent made multiple deposits of personal funds into his IOLTA account.

The respondent's conduct in maintaining personal funds in his IOLTA account and in withdrawing funds by paying personal expenses directly from an IOLTA account violated Mass. R. Prof. C. 1.15(b)(2) and (e)(5).

The respondent has no prior discipline. He accordingly received an admonition with one-year accounting probation for his conduct in this matter.

ADMONITION NO. 17-18

CLASSIFICATIONS:

Conflict Directly Adverse to Another Client or from Responsibilities to Another Client or Lawyer's Own Interests [Mass. R. Prof. C. 1.7]

Failure to Withdraw Generally [Mass. R. Prof. C. 1.16(a)]

SUMMARY:

In March 2014, the company hired the respondent as co-counsel to defend it in a contract action brought against the company by a vendor that claimed it had not been paid for services. At the time, the company was owned by three shareholders, all of whom were directors and two of whom were also company employees. The majority shareholder was not employed by the company but was a member of the board of directors, along with the two minority shareholders.

On or about July 1, the two minority shareholders/directors approached the respondent about representing them individually in matters involving the company. Those issues included the fact that a former shareholder, who was married to the majority shareholder, was meddling in the company's affairs in violation of certain agreements, and that the majority shareholder had seized checks to the minority shareholders, which checks were compensation based on the company's profit. The minority shareholders/directors noted that they represented a controlling majority of the board of directors, that they wanted to stop the former shareholder from having any involvement in the company and they expected their checks to be released to them.

The respondent agreed to represent the minority shareholders. He explained to them that a conflict of interest might arise between them and the company and that if it did, he would withdraw as co-counsel to the company in the contract case brought by the vendor. On July 15, the majority shareholder took control of the board of directors; the minority shareholders ceased to be board members. On July 21, 2014, while still representing the company in the litigation brought by the vendor, the respondent sent a demand letter to the majority shareholder and the company on behalf of the minority shareholders. The letter alleged violations of the Wage Act and other claims. The respondent did not at any time seek the informed consent of the company to his representation of the minority shareholders in a claim against the company.

By letter of July 23, 2014, the respondent resigned as the company's counsel in the contract litigation. On July 31, 2014, the respondent filed with the Court a notice to withdraw as co-counsel to the company.

By agreeing to represent the minority shareholders in a matter potentially adverse to the company and by proceeding with the representation of the minority shareholders in a matter adverse to the company while he was still representing the company in a pending case, the respondent violated Mass. R. Prof. C. 1.16(a) (lawyer shall not represent a client if the representation will result in violation of the rules of professional conduct) and Mass. R. Prof. C 1.7 (lawyer shall not represent one client in a matter directly adverse to another client, without an informed waiver).

ADMONITION NO. 17-19

CLASSIFICATIONS:

Handling Legal Matter when Not Competent or without Adequate Preparation [Mass. R. Prof. C. 1.1]

Failing to Act Diligently [Mass. R. Prof. C. 1.3]

Failing to Communicate Adequately with Client [Mass. R. Prof. C. 1.4]

SUMMARY:

In July 2012, the respondent was retained by three siblings to probate their mother's estate and to sell her home in New Bedford. After the clients' father died in 2007, the respondent had prepared a new deed for the mother's home giving her a life estate in the home and leaving the remainder to her three children. The property consisted of two lots, but by mistake, the respondent prepared a deed that only referred to one lot and recorded that deed in 2007.

Just prior to a closing on the home in November 2012, the buyers' counsel discovered that there was a separate back lot contiguous to the house that was not included in the sellers' title. The parties agreed to a hold-back and the buyers provided the respondent with \$16,000 from the sale proceeds to be held in escrow until a new deed for the second lot could be provided. In order to provide that deed, the mother's estate needed to be probated.

Between November 2012 and August 2016, the respondent failed to take any steps of substance to probate the estate so that the back lot could be transferred to the buyers. In addition, the mother had left three CDs and a bank account totaling about \$100,000 in her name. Since the respondent failed to probate the estate, the siblings were unable to gain access to the funds from 2012 through 2016.

During the relevant time, the siblings called and wrote to the respondent seeking information on the status of the probate of the estate. The respondent failed to promptly comply with reasonable requests for information from the beneficiaries on the status of the estate, return telephone calls and respond to letters.

In February 2017, the beneficiaries hired new counsel to probate the estate of their mother.

By failing to provide competent representation, the respondent violated Rule 1.1 of the Massachusetts Rules of Professional Conduct. By failing to file a petition for probate for over four years, the respondent neglected a legal matter entrusted to her in violation of Rule 1.3. By failing to keep the clients reasonably informed about the status of the estate matter and failing to comply with reasonable requests for information, the respondent violated Rule 1.4.

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The respondent was admitted to practice in 1990 and had no disciplinary history. In mitigation, the respondent suffered from health problems and neuropathy stemming from diabetes during the relevant period.

The respondent received an admonition with a requirement that the respondent attend a CLE program designated by bar counsel.

ADMONITION NO. 17-20

CLASSIFICATIONS:

Failure to Act Diligently [Mass. R. Prof. C. 1.3]

Failure to Communicate Adequately With Client [Mass. R. Prof. C. 1.4(a)]

SUMMARY:

In 2011, the respondent was retained by a client in connection with a contract dispute. On June 10, 2011, the respondent filed suit on behalf of the client in the Worcester Superior Court. The defendant failed to file an answer to the complaint and was defaulted in October of 2011. A judgment entered in December of 2011 and on February 3, 2012, the respondent obtained an execution in the amount of \$53,225.35.

The respondent commenced a supplementary process action in the Worcester Superior Court in August of 2012 in an effort to satisfy the judgment. At defendant's counsel's request, the supplementary process hearing was continued to afford counsel an opportunity to review the case, to provide the respondent with information concerning the financial condition and corporate structure of the defendant company, and to enable the parties to explore settlement.

Over the next several months, the respondent explored settlement options with defendant's counsel. On December 12, 2013, the client authorized the respondent to settle its claim against the defendant company for \$16,200 payable in installments of \$450 per month for 36 months. The respondent failed to convey this to counsel for the defendant. The respondent became less communicative with his client and, by March of 2014, ceased all communications with the client.

After the respondent was advised that the client filed a complaint with the Office of the Bar Counsel, he requested that a new supplementary process hearing be scheduled and contacted his client to restore the attorney-client relationship. With his client's approval, the respondent settled the matter in July of 2016 on substantially the same terms as the December 2013 settlement proposal.

The respondent's failure to take any action of any substance on the client's matter from December of 2013 until June of 2016 violated Mass. R. Prof. C. Rule 1.3. The respondent's failure to keep his client reasonably informed as to the status of his case violated Mass. R. Prof. C. Rule 1.4 (a).

The respondent was admitted to the Massachusetts bar on January 14, 1977. He has had no prior disciplinary history. The respondent received an admonition for his misconduct as described above.

ADMONITION NO. 17-21

CLASSIFICATIONS:

Failure to Communicate Adequately with Client [Mass. R. Prof. C. 1.4]

Failure to Timely Communicate Basis of Fee [Mass. R. Prof. C. 1.5b]

SUMMARY:

The respondent was hired by a decedent's son to contest a will executed by his mother shortly before her death. This will left everything to the son's brother, who had offered it for probate as the named executor. The son signed an hourly fee agreement for the representation. At the son's request, his niece and nephew (decedent's grandchildren) told the respondent that they wanted to participate in the will contest. The respondent thereafter represented all three clients in the matter. The respondent never entered into a fee agreement with the grandchildren, informed them of her rates, or told them that they would or could be liable for any fees.

Over the next few years, the respondent engaged in hotly contested and costly litigation in the probate court to invalidate the will and recover funds of the decedent's that had been taken by the brother during her lifetime. The respondent learned in discovery and informed the clients that the mother had made two prior wills, the latter of which (second will) excluded the son but left a one-third share to the grandchildren. The earliest will provided for a one-third share to the son and smaller shares to the grandchildren. The brother was a one-third taker under both prior wills.

The clients agreed among themselves to divide whatever amount any of them might realize under either of the prior wills. The mother had left only a modest estate, but the son was determined to pursue the litigation regardless of cost because he believed that his brother had mistreated and coerced their mother. The grandchildren were content to follow their uncle's lead in the belief that he was and would be paying the respondent's fees. The respondent sent monthly invoices to the son but not to the grandchildren. The son made fee payments for a time but eventually accumulated a large overdue balance. The son did not share the invoices with the grandchildren, and they were not aware of the mounting fees. The grandchildren likely would not have continued with the litigation had they been aware of any fee obligation on their part.

After an extensive trial, the probate court entered a judgment invalidating the final will and ordering the brother to return substantial funds to the mother's estate. The respondent withdrew from representation at that point. The brother then offered the second will for probate, and it was allowed without objection. The respondent, however, noticed an attorney's lien on the grandchildren's share under that will. This was the grandchildren's first notice that they had any responsibility for the respondent's fees. After consulting counsel, the grandchildren decided that it was too costly to contest the lien, and so they agreed to pay the respondent most of their recovery to satisfy her claim.

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The respondent's failure to inform the grandchildren or assure that they were adequately informed about her fees and their responsibility for the fees violated Mass. R. Prof. C. 1.4(b) as then in effect (failure to explain a matter to the extent reasonably necessary to permit a client's informed decisions regarding the representation). Her failure to communicate the basis or rate of her fees to those clients before or within a reasonable time after commencing the representation violated Mass. R. Prof. C. 1.5(b) as in effect prior to January 1, 2013.

The respondent had no history of discipline and made a substantial refund of the fees collected from the grandchildren. She received an admonition for her misconduct.

IN THE MATTER OF AN ATTORNEY
S.J.C. BD-2016-116

Order (Issuance of an Admonition) entered by Justice Lowy on May 22, 2017 with supporting Memorandum of Decision

ORDER FOR ISSUANCE OF AN ADMONITION BY BAR COUNSEL

This matter came before the Court, Lowy, J., on an Information and Record of Proceedings pursuant to S.J.C. Rule 4:01, § 8(6), with the Vote and Recommendation of the Board of Bar Overseers (Board) filed by the Board on November 10, 2016. After a hearing was held on February 27, 2017, attended by assistant bar counsel and the lawyer and in accordance with the Memorandum of Decision dated May 2, 2017;

It is Ordered that the board's decision that an admonition be administered to the lawyer be, and the same hereby is affirmed.

By the Court, (Lowy, J.)
Maura S. Doyle, Clerk

Entered: May 22, 2017

MEMORANDUM OF DECISION

Following a recommendation by the Board of Bar Overseers (board) that the respondent, an attorney licensed to practice in Massachusetts, receive an admonition, the respondent and Bar Counsel appealed. The board found that the respondent failed to maintain adequate communication with a criminal defense client. The petition for discipline was filed in March, 2015. In April, 2016, a hearing committee recommended that the respondent receive a public reprimand. The respondent appealed and in July, 2016 oral argument was heard before the board. In September, 2016, the board adopted the findings and conclusions of the board but ordered that the respondent receive an admonition, rather than a public reprimand. Bar Counsel demanded, pursuant to § 3.57(a) of the Rules of the Board of Bar Overseers, that the board file an information with the county court seeking review of the board's recommendation of an admonition. The board filed an information. Bar Counsel now seeks a public reprimand.

The facts found by the committee and its conclusions of law are summarized as follows. The client retained the respondent in May 2010 to represent the client's LLC in civil litigation relating to a charge of fraud. Another attorney appeared pro hac vice to lead the defense of the civil matter. The respondent's involvement with the civil case was intended to

prepare him for federal criminal proceedings that he and the client anticipated would arise from the same fraud claims.

In January, 2013, the respondent became the lead defense counsel for the client when he was indicted. The attorney who appeared pro hac vice and was lead counsel for the civil matter, also became co-counsel for the criminal matter. Co-counsel was to act as the chief liaison with the client.

The client was charged with wire fraud and unlawful monetary transactions that arose from the same facts as the civil suit. A superseding indictment filed in April, 2013, added two counts of filing false tax returns. The client and the respondent agreed to a \$60,000 flat fee for the defense work, but the respondent only received \$15,000.

During January, 2013, the client told the respondent that he wanted to try the case, and not plea bargain. Over the coming months, the respondent spoke with the Assistant United States Attorney assigned to the case about the relevant federal sentencing guidelines to get the AUSA's view of them application, which was the respondent's standard practice. The respondent did not discuss these conversations with the client.

In July, 2013, the trial date was set for October 28, 2013. The respondent relied on co-counsel's electronic access to the docket entries to inform the client of the trial date. The respondent never directly communicated the trial date to co-counsel or the client.

Over the coming months, the client reached out to the respondent via electronic mail and telephone several times but did not receive any responses. During this time, as the trial date approached, the respondent -- without prior discussion and consultation with the client -- moved to continue the trial based on the AUSA's failure to provide certain pre-trial discovery. The motion was granted and a new trial date was set for February 3, 2014. The client learned of the new trial date from co-counsel.

In December, 2013, the client called and e-mailed the respondent to express his concerns that the case might not be ready for trial and to inquire about a continuance. The respondent did not respond.

In January, 2014, the respondent spoke over the telephone with co-counsel and offered to Set up a conference call with the client. This was the first contact that either co-counsel or the client had had with the respondent in months. The conference call never materialized.

Later that same month, an AUSA newly assigned to the case disclosed his intention to introduce evidence of alleged mortgage fraud committed by the client. This was a new issue in the case. Co-counsel informed the client of this new issue via

e-mail. This disclosure caused the client to panic and he reached out to the respondent several times to discuss the implications of this new evidence. The respondent failed to respond.

On January 21, 2014, the client wrote to the respondent to demand that he file a motion to continue. On January 22, the client sent an e-mail repeating his demand that a motion to continue to be filed and asked for a return of the "retainer" so he could hire new counsel. On January 23, the respondent sent a one-sentence reply to the client: "Will file today but don't count on it see you Sunday for two-day prep." This was the first direct substantive communication between the respondent and the client in seven months. The client wrote back, telling the respondent to hold off on filing the motion until he spoke with co-counsel. Still, that same day, the respondent replied to the client that he was filing a motion to withdraw. Despite the client's instruction to wait to file the motion to continue, the respondent filed the motion, which was styled as a motion to continue and cited the breakdown of the attorney-client relationship as grounds. The client wrote back to again demand a refund and identified successor counsel.

On January 27, the court granted the motion to continue and allowed the respondent to withdraw.

Based essentially on the above findings, the hearing committee found that the respondent had violated Mass. R. Prof. C. 1.4(a) (keep the client reasonably informed about the status of the matter and promptly comply with requests for information) and 1.4(b) (explain matter to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation).

The committee made three findings in aggravation: the respondent committed multiple violations of the rules; the respondent had substantial experience in the practice of law at the time of his violations; and the respondent had been previously disciplined. No factors were found in mitigation, and the committee generally did not credit the respondent's explanations for his lack of communication.

Bar Counsel's primary argument on appeal is that by rejecting the committee's recommended sanction of a public reprimand, the board's decision was arbitrary and deviated from "the longstanding policy that, in the absence of mitigating factors, discipline should proceed in increments of escalating severity."

I note that this case is a bit unusual in that the board adopted the findings of the hearing committee but then ordered less harsh discipline (i.e., an admonition) than the discipline recommended by the committee (i.e., a public reprimand). The

action of the board is also unusual in that the respondent had already received an admonition in 2007 for conduct substantially similar to the conduct in the instant case.

However, "[w]e generally afford substantial deference to the board's recommended disciplinary sanction." In re Lupo, 447 Mass. 345, 356 (2006). Further, "each case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of the Discipline of an Attorney, 392 Mass 827, 837 (1984).

Recent discipline cases show that the existence of prior discipline does not necessarily compel conduct that, in a vacuum, would result in an admonition to be sanctioned with a public reprimand, particularly where, as here, no harm has befallen the client. See Admonition 14-13, 30 Mass. Att'y Disc. R. (2014) (admonition imposed on attorney for neglect and failure to communicate, after a prior admonition for neglect); Admonition 13-21, 29 Mass. Att'y Disc. R. 747(2013) (admonition imposed for failure to communicate after admonition for lack of diligence and competence). Bar Counsel's attempt to distinguish these cases on their facts are unpersuasive.

Conclusion. The substantial deference owed to the board's recommendation, combined with the principle that each case must be decided on its own facts and merits, convinces me that an admonition is the appropriate sanction in this case.

David A. Lowy
Associate Justice

Entered: May 2, 2017

ADMONITION NO. 17-22

CLASSIFICATION:

Improper Disclosure of Confidential Information [Mass. R. Prof. C. 1.6(a)]

SUMMARY:

The respondent was a new associate in the litigation department at a law firm. After an informal discussion in late December 2015 over lunch with a partner and a supervising attorney, the respondent mistakenly believed that he was authorized to post a job advertisement at local law schools for a law clerk position at the firm. The respondent did not show the advertisement to anyone at the firm before posting the job listing. In early January 2016, the respondent set up and conducted interviews with at least three law school graduates at the firm. The respondent did not notify the firm management in advance that he was scheduling or conducting the interviews, share the resumes and writing samples he had collected, or introduce the job candidates to any other lawyers at the firm.

During the interviews, the respondent requested that the job applicants prepare and submit supplemental writing samples based on actual client matters being handled by the respondent at the firm. The respondent provided to the job applicants documents from the clients' files without first obtaining client consent to release confidential client documents to individuals who were not employed at the firm. The respondent did not inform his supervising attorneys that he was asking job applicants to submit supplemental writing samples based on actual client cases. On January 19, 2016, the respondent filed one supplemental writing sample, a motion to dismiss with supporting memorandum, with slight modifications, in a client matter pending in the U.S. Bankruptcy Court.

By improperly disclosing client confidential information without prior client consent, the respondent violated Mass. R. Prof. C. 1.6(a).

The respondent was admitted to practice in 2010, and had received no prior discipline. The respondent, through the firm, reimbursed the job applicants for the time they spent on the writing assignments. The respondent has now opened his own law practice, and has found an experienced lawyer to act as a mentor. The respondent received an admonition for his conduct, based on his agreement to attend a continuing education program on ethics, and to contact the Law Office Management Assistance Program (LOMAP) for assistance with his solo law office management practices.

ADMONITION NO. 17-23

CLASSIFICATION:

Improper Business Transaction with Client [Mass. R. Prof. C. 1.8a]

SUMMARY:

In 2010, the respondent was retained by a client to represent her in a personal injury matter on a contingent fee basis. While that matter was pending, in late 2011 or early 2012 the boyfriend of the personal injury client hired the respondent to represent him in a criminal case pending in Superior Court. Because the criminal client could not afford the respondent's \$25,000 flat fee at the outset of representation, the personal injury client agreed with the respondent to contribute some of her eventual personal injury settlement to the respondent's fee on the criminal case. This agreement between the respondent and the personal injury client was a business transaction. The respondent did not convey the terms of this agreement to the personal injury client in writing, did not advise her to seek independent counsel or give her an opportunity to do so, and did not get her consent to the agreement in writing.

In the fall of 2012, the respondent settled the personal injury client's bodily injury claim for \$18,750. The respondent applied the entirety of the personal injury client's portion of the settlement – \$10,203.85 – to the criminal defendant's fee. The personal injury client was informed of this and did not object.

Later in 2012, an arbitrator issued an award of \$18,000 to the personal injury client on her remaining underinsured motorist claim. In January 2013, the respondent wrote to the personal injury client informing her that he was applying the personal injury client's share of the settlement – totaling \$12,000 – to the criminal client's fee as well. The personal injury client did not consent to the application of this portion of her settlement to the respondent's fee on the criminal case.

The respondent's conduct in entering into a business transaction with the personal injury client without conveying the terms of the agreement to the client in writing, advising her of her opportunity to seek the advice of independent counsel, and obtaining her consent in writing to the arrangement violated Mass. R. Prof. C. 1.8(a), as in effect prior to July 1, 2015. In mitigation, the respondent has agreed to repay the \$12,000 in dispute to the personal injury client.

The respondent has been a member of the Massachusetts bar since 1972 and has no prior discipline. He received an admonition for his conduct.

ADMONITION NO. 17-24

CLASSIFICATIONS:

Failing to Act Diligently [Mass. R. Prof. C. 1.3]

Failing to Communicate Adequately with Client [Mass. R. Prof. C. 1.4]

SUMMARY:

In February 2010, the respondent agreed to represent a client in a personal injury suit against a nightclub. The client sustained injuries when he was hit over the head with a bottle during a fight at the club in October 2009. After he took the case, the respondent sent a letter of representation to the club and to its owner and began to collect the client's medical records.

The respondent filed suit in superior court on the day before the statute of limitations was to run on the action, and he made service on both defendants. The respondent failed to file the returns of service with the court and as a result, was not able to file a request for the defendants to be defaulted. The case was dismissed by the court in February 2013, for failure to make service on the defendants.

Although he was aware that the case had been dismissed, the respondent did not tell the client until over a year after the dismissal and did not act to vacate the dismissal. He then filed a motion to restore the case, which was denied by the court.

By failing to file returns of service and allowing the case to be dismissed, and failing to file a motion to restore the case within a reasonable time after the dismissal, the respondent failed to act diligently and violated Mass. R. Prof. C. 1.3, as in effect prior to July 1, 2015. By failing to inform his client of the dismissal of the case, the respondent violated Mass. R. Prof. C. 1.4(a) and (b), as in effect prior to July 1, 2015. In mitigation, the respondent settled the client's legal malpractice suit against him.

The respondent has been a member of the Massachusetts bar since 1993 and has no prior discipline. He received an admonition for his conduct conditioned upon his agreement to undergo an evaluation by the Law Office Management Assistance Program (LOMAP), and to attend a continuing legal education program designated by bar counsel.

ADMONITION NO. 17-25

CLASSIFICATION:

Failing to Timely Communicate Basis for Fee [Mass. R. Prof. C. 1.5(b)]

SUMMARY:

Beginning in late 2015, the respondent represented a client in four matters arising out of her relationship with her ex-husband. These matters consisted of the client's divorce case, the sale of a parcel of land in connection with the divorce, a request for a restraining order, and a criminal complaint. The respondent handled the divorce matter on an hourly-fee basis. On each of the other three matters, he charged the client a flat fee.

In violation of Mass. R. Prof. C. 1.5(b)(1), the respondent failed to communicate to the client, in writing, either before commencing the representation or within a reasonable time thereafter, the scope of the representation and the basis or rate of his fee in each of these matters.

The respondent was admitted to practice in Massachusetts in 1990 and has no prior record of discipline. He received an admonition for his misconduct.

ADMONITION NO. 17-26

CLASSIFICATION:

Improper Business Transaction with Client [Mass. R. Prof. C. 1.8(a)]

SUMMARY:

The respondent entered into a business transaction with clients in violation of Mass. R. Prof. C. 1.8(a) when he acted as a real estate broker, while simultaneously representing the sellers.

The respondent represented the executrix of an estate pending in the probate court. The testator's will bequeathed commercial real estate that she owned to three of her four children. The property was devised to the three children as tenants in common, each sibling having an undivided interest in the whole. The assent of all three co-tenants was required to sell the property.

The respondent represented two of the three co-tenants in connection with the administration of the estate. One of the siblings was also the named and appointed executrix and the respondent represented her in that capacity as well. Another attorney represented the third sibling.

In May 2016, the property was listed for sale. The respondent, who is a licensed real estate broker, acted as a real estate broker in connection with the transaction and performed brokerage services. Two of the three siblings agreed that the respondent could act as real estate broker in the transaction. The third sibling did not consent to the respondent acting as sellers' agent.

The respondent did not advise each sibling in writing of the desirability of seeking the advice of independent counsel and did not obtain the informed written consent of each sibling to the essential terms of the transaction or the respondent's role in the transaction, including, without limitation, how his role as broker might potentially conflict with his role as attorney for the sellers. The conduct in this respect was in violation of Mass. R. Prof. C. 1.8(a)(2) and (3).

On or about July 7, 2016, the respondent informed the attorney for the third sibling (and co-tenant) that he intended to be listed as broker on the purchase and sale agreement. The attorney for the third sibling promptly protested. The parties then negotiated and in August 2016, the sale was consummated, subject to holding a portion of the real estate commission in escrow pending resolution of the respondent's claimed entitlement to a portion of the commission.

AD NO. 17-26

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Ultimately, the dispute was arbitrated and on October 13, 2016, the arbitrator ruled that the respondent was not entitled to any commission because there was no written agreement with the three siblings that designated the respondent as the sellers' broker.

The respondent was admitted in 1977 and has no prior discipline. His conduct did not result in any ultimate harm. He accordingly received an admonition.

ADMONITION NO. 17-27

CLASSIFICATION:

Unauthorized Practice of Law [Mass. R. Prof. C. 5.5(a)]

SUMMARY:

The respondent practiced law while on retirement status in Massachusetts by engaging in the unauthorized practice of law in Florida.

The respondent posted on the internet that he provides legal research and writing to lawyers and nonlawyers. Beginning in July 2017, the respondent and a Florida resident communicated electronically regarding the resident's desire to appeal an adverse judgment against her in a local small claims court in Florida.

The respondent is on retirement status in Massachusetts and is not admitted to practice in Florida or in any other jurisdiction. The respondent disclosed to the resident that he was not licensed in Florida and could not provide her with legal advice. However, he offered to draft a civil complaint for her in order to appeal the small claims judgment.

By August 7, 2017, the resident became dissatisfied with the contents of a draft complaint the respondent had prepared. She also learned that the draft complaint (which was prepared at the last minute, days before the appeal period expired) was directed to the wrong forum. The resident refused to pay the respondent's bill and when the respondent persisted, she complained to bar counsel and, subsequently, to the Florida Bar, Unauthorized Practice of Law Division.

The Florida Bar investigated the matter and on October 27, 2017 determined that the respondent engaged in the unauthorized practice of law in Florida. The Florida Bar resolved the matter with a "letter of advice".

The respondent's unauthorized practice of law in Florida is conduct in violation of Mass. R. Prof. C. 5.5(a). The practice of law is also prohibited conduct for an attorney on retired status in Massachusetts, in violation of Mass. R. Prof. C. 5.5(a) and S.J.C. Rule 4:02(5) (Retirement).

The respondent was admitted in 1979 and has no prior discipline. In light of the above violations, the respondent received an admonition for his misconduct.

ADMONITION NO. 17-28

CLASSIFICATIONS:

Failing to Act Diligently [Mass. R. Prof. C. 1.3]

Failure to Notify of Receipt or to Disburse Promptly [Mass. R. Prof. C. 1.15(c)]

SUMMARY:

The respondent is an experienced personal injury lawyer who has handled many cases in which MassHealth liens had been asserted against his client's prospective recovery. In four instances from approximately 2010 to 2013, the respondent negligently failed to note the existence of a MassHealth lien prior to distributing settlement proceeds to his clients and other payees. As a result, funds that should have been paid in satisfaction of the liens were instead included in the clients' share of the proceeds. The amounts of the liens in the four cases ranged from approximately \$190 to approximately \$500. Following a complaint to bar counsel concerning the outstanding liens, the respondent acknowledged his failure to ensure that the MassHealth liens were noted and accounted for in the settlement process. Accordingly, he reimbursed the relevant agency for the amounts that were due.

By failing to pay off the liens in a timely manner, the respondent violated Mass. R. Prof. C. 1.3 and 1.15(c).

The respondent was admitted to the bar in 1986 and has no prior record of discipline. He received an admonition for his misconduct.

IN THE MATTER OF AN ATTORNEY
S.J.C. BD-2016-116

Order (Issuance of an Admonition) entered by Justice Lowy on May 22, 2017 with supporting Memorandum of Decision

ORDER FOR ISSUANCE OF AN ADMONITION BY BAR COUNSEL

This matter came before the Court, Lowy, J., on an Information and Record of Proceedings pursuant to S.J.C. Rule 4:01, § 8(6), with the Vote and Recommendation of the Board of Bar Overseers (Board) filed by the Board on November 10, 2016. After a hearing was held on February 27, 2017, attended by assistant bar counsel and the lawyer and in accordance with the Memorandum of Decision dated May 2, 2017;

It is Ordered that the board's decision that an admonition be administered to the lawyer be, and the same hereby is affirmed.

By the Court, (Lowy, J.)
Maura S. Doyle, Clerk

Entered: May 22, 2017

MEMORANDUM OF DECISION

Following a recommendation by the Board of Bar Overseers (board) that the respondent, an attorney licensed to practice in Massachusetts, receive an admonition, the respondent and Bar Counsel appealed. The board found that the respondent failed to maintain adequate communication with a criminal defense client. The petition for discipline was filed in March, 2015. In April, 2016, a hearing committee recommended that the respondent receive a public reprimand. The respondent appealed and in July, 2016 oral argument was heard before the board. In September, 2016, the board adopted the findings and conclusions of the board but ordered that the respondent receive an admonition, rather than a public reprimand. Bar Counsel demanded, pursuant to § 3.57(a) of the Rules of the Board of Bar Overseers, that the board file an information with the county court seeking review of the board's recommendation of an admonition. The board filed an information. Bar Counsel now seeks a public reprimand.

The facts found by the committee and its conclusions of law are summarized as follows. The client retained the respondent in May 2010 to represent the client's LLC in civil litigation relating to a charge of fraud. Another attorney appeared pro hac vice to lead the defense of the civil matter. The respondent's involvement with the civil case was intended to

prepare him for federal criminal proceedings that he and the client anticipated would arise from the same fraud claims.

In January, 2013, the respondent became the lead defense counsel for the client when he was indicted. The attorney who appeared pro hac vice and was lead counsel for the civil matter, also became co-counsel for the criminal matter. Co-counsel was to act as the chief liaison with the client.

The client was charged with wire fraud and unlawful monetary transactions that arose from the same facts as the civil suit. A superseding indictment filed in April, 2013, added two counts of filing false tax returns. The client and the respondent agreed to a \$60,000 flat fee for the defense work, but the respondent only received \$15,000.

During January, 2013, the client told the respondent that he wanted to try the case, and not plea bargain. Over the coming months, the respondent spoke with the Assistant United States Attorney assigned to the case about the relevant federal sentencing guidelines to get the AUSA's view of them application, which was the respondent's standard practice. The respondent did not discuss these conversations with the client.

In July, 2013, the trial date was set for October 28, 2013. The respondent relied on co-counsel's electronic access to the docket entries to inform the client of the trial date. The respondent never directly communicated the trial date to co-counsel or the client.

Over the coming months, the client reached out to the respondent via electronic mail and telephone several times but did not receive any responses. During this time, as the trial date approached, the respondent -- without prior discussion and consultation with the client -- moved to continue the trial based on the AUSA's failure to provide certain pre-trial discovery. The motion was granted and a new trial date was set for February 3, 2014. The client learned of the new trial date from co-counsel.

In December, 2013, the client called and e-mailed the respondent to express his concerns that the case might not be ready for trial and to inquire about a continuance. The respondent did not respond.

In January, 2014, the respondent spoke over the telephone with co-counsel and offered to Set up a conference call with the client. This was the first contact that either co-counsel or the client had had with the respondent in months. The conference call never materialized.

Later that same month, an AUSA newly assigned to the case disclosed his intention to introduce evidence of alleged mortgage fraud committed by the client. This was a new issue in the case. Co-counsel informed the client of this new issue via

e-mail. This disclosure caused the client to panic and he reached out to the respondent several times to discuss the implications of this new evidence. The respondent failed to respond.

On January 21, 2014, the client wrote to the respondent to demand that he file a motion to continue. On January 22, the client sent an e-mail repeating his demand that a motion to continue to be filed and asked for a return of the "retainer" so he could hire new counsel. On January 23, the respondent sent a one-sentence reply to the client: "Will file today but don't count on it see you Sunday for two-day prep." This was the first direct substantive communication between the respondent and the client in seven months. The client wrote back, telling the respondent to hold off on filing the motion until he spoke with co-counsel. Still, that same day, the respondent replied to the client that he was filing a motion to withdraw. Despite the client's instruction to wait to file the motion to continue, the respondent filed the motion, which was styled as a motion to continue and cited the breakdown of the attorney-client relationship as grounds. The client wrote back to again demand a refund and identified successor counsel.

On January 27, the court granted the motion to continue and allowed the respondent to withdraw.

Based essentially on the above findings, the hearing committee found that the respondent had violated Mass. R. Prof. C. 1.4(a) (keep the client reasonably informed about the status of the matter and promptly comply with requests for information) and 1.4(b) (explain matter to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation).

The committee made three findings in aggravation: the respondent committed multiple violations of the rules; the respondent had substantial experience in the practice of law at the time of his violations; and the respondent had been previously disciplined. No factors were found in mitigation, and the committee generally did not credit the respondent's explanations for his lack of communication.

Bar Counsel's primary argument on appeal is that by rejecting the committee's recommended sanction of a public reprimand, the board's decision was arbitrary and deviated from "the longstanding policy that, in the absence of mitigating factors, discipline should proceed in increments of escalating severity."

I note that this case is a bit unusual in that the board adopted the findings of the hearing committee but then ordered less harsh discipline (i.e., an admonition) than the discipline recommended by the committee (i.e., a public reprimand). The

action of the board is also unusual in that the respondent had already received an admonition in 2007 for conduct substantially similar to the conduct in the instant case.

However, "[w]e generally afford substantial deference to the board's recommended disciplinary sanction." In re Lupo, 447 Mass. 345, 356 (2006). Further, "each case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of the Discipline of an Attorney, 392 Mass 827, 837 (1984).

Recent discipline cases show that the existence of prior discipline does not necessarily compel conduct that, in a vacuum, would result in an admonition to be sanctioned with a public reprimand, particularly where, as here, no harm has befallen the client. See Admonition 14-13, 30 Mass. Att'y Disc. R. (2014) (admonition imposed on attorney for neglect and failure to communicate, after a prior admonition for neglect); Admonition 13-21, 29 Mass. Att'y Disc. R. 747(2013) (admonition imposed for failure to communicate after admonition for lack of diligence and competence). Bar Counsel's attempt to distinguish these cases on their facts are unpersuasive.

Conclusion. The substantial deference owed to the board's recommendation, combined with the principle that each case must be decided on its own facts and merits, convinces me that an admonition is the appropriate sanction in this case.

David A. Lowy
Associate Justice

Entered: May 2, 2017