ADMONITION NO. 22-01

CLASSIFICATIONS:

Disbursed Funds Creating Negative Client Funds Balance [Mass. R. Prof. C. 1.15(f)(1)(C)]

Record-Keeping Violation [Mass. R. Prof. C. 1.15(f)]

SUMMARY:

The two respondents are partners in a personal injury practice. On July 30, 2019, the respondents sent a client a check for $20,505, written from the respondents' IOLTA account, which held sufficient funds to cover the check. The client gave the check to his brother to deposit. The brother deposited the check and the funds were deducted from the respondents' IOLTA account. The brother's bank subsequently rejected the check. However, the funds were not credited back to the respondents' IOLTA account.

At the request of the client, the respondents wrote a replacement check from the IOLTA account for $20,505. Before writing this check, the respondents failed to check their IOLTA account to confirm whether funds had been credited back to them. The client deposited the replacement check and another $20,505 was deducted from the respondents' IOLTA account. The second deduction resulted in a shortfall in the respondents' IOLTA account, which the respondents failed to notice for over four months.

On or about December 30, 2019, the respondents wrote a $25,017.55 check from their IOLTA account for an unrelated case. The payee attempted to deposit the check on February 20, 2020, but it was dishonored. The respondents issued a replacement check and deposited firm funds into the IOLTA account to cover the shortfall.

The respondents' trust account records were largely compliant with the requirements set forth in Mass. R. Prof. C. 1.15(f), except that the respondents' reconciliation reports were not fully compliant with Mass. R. Prof. C. 1.15(f)(1)(E). Had they been performing proper reconciliations, the respondents would have discovered the shortfall before any check was dishonored.

By negligently creating a negative balance in their IOLTA account with respect to an individual client, the respondents violated Mass. R. Prof. C. 1.15(f)(1)(C).

By failing to create compliant reconciliation reports, the respondents violated Mass. R. Prof. C. 1.15(f)(1)(E).

No harm resulted from the negative balance or the dishonored check. The respondents were admitted in 1987 and 1990, and neither has prior discipline. They received admonitions for their misconduct.

ADMONITION NO. 22-02

CLASSIFICATION:

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

SUMMARY:

The respondent neglected two immigrations matters. In the first matter, the respondent was retained to file a petition of adjustment of status for a client. The client's conditional green card was set to expire on September 17, 2019. The respondent completed an I-751 petition and had the client sign it. The respondent prepared the remainder of the packet, including a notice of appearance, but respondent or his assistant failed to mail it to the appropriate address or failed to mail it when it was due.

The respondent accepted full responsibility for this error and prepared an affidavit for the client's new counsel. In April 2020, successor counsel filed the client's petition, supporting documents and the respondent's affidavit with USCIS. The client was granted an eighteen-month extension on his conditional green card while his petition is being processed.

In the second matter, the respondent represented a client on an appeal to the Immigration Court after a denial of the client's asylum application. The appeal was due on or before January 10, 2020. The respondent prepared the appeal form and dated the document January 7, 2020, but the appeal was not mailed in time and was received by the court on January 13, 2020.

On January 16, 2020, the Board of Immigration Appeals sent a filing receipt to the respondent, which indicated the notice of appeal was received past the deadline for filing. On or about October 26, 2020, successor counsel for the client filed a motion to reopen. The respondent cooperated by providing new counsel with his file as well as an affidavit outlining his error. The client's motion to reopen is pending.

The respondent's conduct in both of these matters constituted lack of diligence in violation of Mass. R. Prof. C. 1.3. In mitigation, during the time of these events the respondent was struggling with alcoholism and depression. In early 2020, the respo ndent entered a 30 day in-treatment program for his addiction and has since been attending AA meetings twice a week.

The respondent was admitted to the Massachusetts bar on December 10, 2003 and has no prior disciplinary history. The respondent received an admonition for his misconduct.

ADMONITION NO. 22-03

CLASSIFICATIONS:

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

Failing to Keep Client Informed or To Respond to Inquiries [Mass. R. Prof. C. 1.4(a)(3), (4)] (on and after 7/1/2015)]

SUMMARY:

In April 2016, the respondent agreed to represent a Massachusetts client in investigating a potential medical malpractice claim on her late father's behalf. They signed an investigation agreement, which did not require the client to pay any fee during the investigation stage. A new agreement would be entered if the respondent concluded that a lawsuit would be viable. The statute of limitations for any such lawsuit was set to expire in September of 2018.

Throughout 2016, the respondent and her client maintained consistent communication as the client compiled her father's medical records and provided them to the respondent. By 2017, however, the respondent ceased responding to the client's requests for updates and information in the status of the respondent's investigation. Even so, the respondent was conducting a diligent investigation of the matter. Among other things, she consulted with three experts and, in doing so, determined that the malpractice claim was not viable.

In June 2018, the respondent accordingly sent her client a rejection letter. The client never received the letter due to the respondent's scrivener's error in the address. As a result, the client mistakenly thought that the respondent was still investigating her concerns and that a lawsuit might follow.

On multiple occasions, both before and after the expiration of the statute of limitations, the client reached out to the respondent to determine the status of the case and the respondent did not reply.

By sending the case rejection letter to the wrong address and thereby failing to ensure that her client received proper notice prior to the expiration of the statute of limitations, the respondent violated Mass. R. Prof. C. 1.3. By failing to respond to her client's inquiries regarding the status of the case throughout the representation, the respondent violated Mass. R. Prof. C. 1.4(a)(3), (4).

The respondent was admitted to the Massachusetts bar on November 30, 2006, and has no prior disciplinary history. The respondent received an admonition for her conduct.

ADMONITION NO. 22-04

CLASSIFICATIONS:

Illegal or Clearly Excessive Fee or Unreasonable Expenses [Mass. R. Prof. C. 1.5(a)]

Failure to Timely Communicate in Writing Basis of Fee or Scope of Work [Mass. R. Prof. C. 1.5(b)(1)]

SUMMARY:

In September 2017, the respondent was retained by a client to represent him in a criminal matter in the district court. The respondent and the client verbally agreed to a $4,000 flat fee, which the client paid to the respondent shortly thereafter. The respondent failed, however, to communicate in writing the scope of the representation and the basis or rate of the fee within a reasonable time after commencing the representation.

In December 2017, the client was indicted on the same charges in the superior court. The respondent and the client executed a fee agreement for the superior court representation. Pursuant to the agreement, the respondent agreed to represent the client in exchange for a flat fee in the amount of $16,000. However, the agreement improperly stated that this fee was non-refundable. Such a fee improperly interfered with the client's right to discharge the respondent as his attorney at any time and his right to the return of any unearned fee. Ultimately, the respondent earned the fees paid to him by the client for the representation.

By failing to communicate in writing the scope of the representation and the basis or rate of the fee within a reasonable time after commencing the representation, the respondent violated Mass. R. Prof. C. 1.5(b)(1).

By providing a written fee agreement with a non-refundable clause, the respondent violated Mass. R. Prof. C. 1.5(a).

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

ADMONITION NO. 22-05

CLASSIFICATIONS:

Failure to Make Available Client's File Upon Request [Mass. R. Prof. C. 1.15A(b)]

Withdrawal without Protecting Client or Refunding Unearned Fee or Expense [Mass. R. Prof. C. 1.16(d)]

Improper Failure to Cooperate in Bar Discipline Investigations [Mass. R. Prof. C. 8.4(g)]

SUMMARY:

The respondent, in association with another Massachusetts lawyer, agreed to serve as plaintiff's counsel in a personal injury case. Shortly after undertaking the representation, the respondent left the country on a pre-planned overseas trip that lasted several weeks. With the statute of limitations approaching, the respondent's co-counsel filed suit on the claim in the respondent's absence.

While the respondent was still abroad, the client decided to terminate the representation and retain new counsel to handle the case. Successor counsel requested in writing that the respondent turn over to him the client's file. The respondent received the request but failed to respond due in part to his limited involvement in the case prior to the client's change of counsel.

Having received no response to his requests from the respondent, the successor counsel over the next several months left multiple telephone messages and sent two written requests for the file to the respondent, who failed to respond. Not until after the successor counsel contacted the Office of Bar Counsel for assistance in the matter did the respondent turn over the contents of his file. The respondent's dilatory conduct did not result in any harm to the client's legal interests.

During the course of the investigation of the aforesaid matter, the respondent failed to provide bar counsel with certain requested information and documents in a timely fashion. Accordingly, pursuant to S.J.C. Rule 4:01 § 3(2), the respondent was administratively suspended for non-cooperation in a disciplinary investigation. Thereafter, the respondent provided the requested information and documents and the administrative suspension was lifted.

By failing to turn over the client's file to successor counsel in a timely fashion upon request following the termination of the representation, the respondent violated Mass. R. Prof. C. 1.15A(b) and 1.16(d). By failing to cooperate with bar counsel's investigation, the respondent violated Mass. R. Prof. C. 8.4(g).

The respondent has been a member of the bar since 1988 and has no prior record of discipline. He received an admonition for his misconduct.

ADMONITION NO. 22-06

IN THE MATTER OF AN ATTORNEY

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

BAR COUNSEL,	*
Petitioner	*
	*
vs.	*
	*
AN ATTORNEY,	*
Respondent	*
	*

Board Memorandum

The respondent misrepresented facts in a motion to vacate a client's 20-year old conviction for soliciting prostitution. Finding that the respondent's misrepresentation arose from inattention to detail, a divided hearing committee has recommended an admonition.[1] Bar counsel appeals, requesting instead "no less than a public reprimand." The respondent does not challenge the recommendation. Subject to exceptions discussed in the body of this Memorandum, we adopt the hearing committee's findings of fact and conclusions of law. Like the committee, we conclude that an admonition is the appropriate level of discipline.

[1] A dissenting committee member would have dismissed the petition, concluding that the respondent's misconduct did not rise to a level sanctionable under the Massachusetts Rules of Professional Conduct.

Findings of Fact

The basic facts are not disputed.

The respondent has practiced law in Massachusetts since 1998, having previously been admitted to the New Hampshire bar in 1995. The respondent focuses on representing individuals in immigration matters, particularly criminal-related immigration cases. During the time relevant to this case, the respondent practiced with one partner, one full-time associate and one part-time associate.

In 1998, an individual we will identify by the pseudonym "ES" was arraigned in the Boston Municipal Court ("BMC") on charges of soliciting sexual conduct for a fee. At his arraignment, ES signed a waiver of counsel form and agreed to proceed *pro se*. He entered into a plea agreement with the government pursuant to which he would admit to sufficient facts, agree to participate in a program called "Project Trust," pay $200 in court costs, and perform four hours of community service. The case was disposed of by way of a three-month continuance without a finding. At all times, Judge Sally Kelly presided over the matter in the BMC.

Consistent with the usual practice in the BMC, ES's plea was memorialized in a two-sided form entitled "Tender of Plea or Admission to Sufficient Facts Waiver of Rights," known colloquially to practitioners as "the green sheet." The defendant, prosecutor, and judge signed the front of the form, indicating that they agreed to the dispositional terms. On the back of the two-page form, ES signed a section entitled "Section IV Defendant's Waiver of Rights (G.L. c. 263, Sec. 6) Alien Rights Notice (G.L. 278, Sec. 29)." Judge Kelly signed the bottom of the second page in a section entitled "Judge's Certification." By signing the certification, the judge indicated her

satisfaction that the defendant, ES, understood the rights he had given up in Section IV; he had done so knowingly, intelligently and voluntarily; there was a factual basis for the charges; and the defendant had been advised of the potential immigration consequences of his plea, including that, if he was not a citizen, "a conviction of the offense with which [he] is charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization."

In addition to the Plea Tender form, the docket sheet for the case contained stamped information indicting "Tender of plea admission filed" with the word "admission" written over plea and the word "accepted" hand-written. In addition, the docket sheet indicated that a plea colloquy and an "alien warning" had been given.

In 2000, ES was charged again with an illicit sex act and again admitted to sufficient facts. The case was continued without a finding for three months, then dismissed.

It was undisputed that in 1998 and 2000, a continuance without a finding did not constitute a "conviction" for immigration purposes. The law was unsettled as to whether a charge of soliciting sex for a fee constituted a "crime of moral turpitude," which would have made it a deportable offense. As of 2004, however, a continuance without a finding based on an admission to sufficient facts was treated as a conviction. Accordingly, a judge was required to provide defendants with the "alien warning" when they admitted to sufficient facts as part of a plea agreement. Similarly, ES's crimes were considered crimes of moral turpitude by the time of the events in this matter.

Moving ahead about twenty years, in November 2017, ES retained the respondent after being arrested earlier in the year on charges of strangulation and witness intimidation, both of which were deportable offenses. The year 2017 was extremely busy for the respondent. The Trump administration had issued a series of executive orders on immigration, including an order mandating that any undocumented immigrant, even someone with no criminal history, was subject to immediate detention and deportation. The order, along with other work caused by changes in immigration law, caused a huge increase in the respondent's practice.

Regarding ES, the respondent's strategy was to try to vacate his 1998 and 2000 convictions.[2] The respondent drafted a motion to vacate (Exhibit 4 at the hearing), something she had done on numerous prior occasions. The respondent used a template and arguments from other motions. The respondent asked one of her associates to review the draft. The associate pointed out to the respondent some mistakes in the draft. By email dated February 23, 2018, the associate wrote back to the respondent: "After looking at the docket sheet i saw some mischaracterized facts i think they may have just been left over from the motion you used as a sample, example: judge didn't sign certified section – here judge did sign there just wasnt a lawyer." (spelling and punctuation as in original).

The draft motion contained handwritten changes to two paragraphs. First, in paragraph 19 of the draft, crossed out in its entirety was a line reading: "Especially where the Judge did not sign the plea agreement form section title 'Judge

[2] Bar counsel charged the respondent with misconduct only in connection with the 1998 case, not the 2000 case.

Certification.'" Over the cross-out, the word "lawyer" is written. Second, the first sentence of paragraph 21 of the draft motion read: "Therefore because the record in this case lacks sufficient evidence that the judge conducted a jury waiver colloquy and is devoid of evidence showing that the court based its conviction on sufficient evidence, the conviction must be vacated." The words "lacks sufficient evidence that the judge conduct a jury waiver colloquy" were crossed out in the draft. There were lines through and under the words "devoid of evidence." At the hearing in this case, the evidence was inconclusive as to who made the changes to the draft motion, the respondent or the associate.

The final version of the motion was filed on or about April 9, 2018 (Exhibit 6 at the hearing). The respondent argued that approximately 20-30 defendants accepted the plea agreement in the same case on the same day and that the judge resolved all of the matters in a single hearing.[3] The respondent further argued that Judge Kelly had failed to adhere to Rule 12 of the Massachusetts Rules of Criminal Procedure. Noting that ES did not have counsel, the motion argued that, "the docket sheet does not reflect any indication that anybody made any disclosure to the defendant regarding his admitting to sufficient facts."

Despite the associate's email, the final motion maintained the (factually incorrect) argument that Judge Kelly had not signed the back of the green sheet in the section entitled "Judge's Certification." It also argued (incorrectly) that ES had not

[3] Apparently, rather than an individual colloquy with each defendant, Judge Kelly conducted the colloquy *en masse* with all of the defendants who had been arrested in the same law enforcement operation. In 2000, two years after the plea colloquy in ES's case, the Court of Appeals held that criminal defendants were entitled to individual plea colloquies. Commonwealth v. Pixley, 48 Mass. App. Ct. 917 (2000).

received an "alien warning" and "alien colloquy." This was untrue, because page 2 of the Tender of Plea green sheet set out the Alien Rights Notice that ES had signed and detailed the alien warnings that the judge had given him.

In support of the motion, the respondent attached the docket sheet and page one of the two-page Tender of Plea green sheet. She did not attach the second page, which contained the Alien Rights Notice and the signed Judge's Certification.

On July 31, 2018, Judge Kelly (the same judge who took ES's plea in 1998) held a hearing on the Motion to Vacate. During the hearing, the respondent described the "mass plea deal" that took place in ES's 1998 case. The respondent mentioned to Judge Kelly that, as a law student working in the court between 1993-1995, the respondent had observed similar plea deals. Neither the prosecutor nor the judge made any statement in response to the respondent's description of the apparently usual practice of mass pleas in multiple defendant prostitution cases.

By order dated December 4, 2018, Judge Kelly denied the Motion to Vacate. She wrote that on May 5, 1998, "[t[]his court after colloquy with the defendant, and after making findings as set out on the docket, Tender of Admission and other pleadings, found facts sufficient to warrant a finding of guilty but instead continued the complaint without a finding for three months."

In addition to the substance of the motion, Judge Kelly held that ES's affidavit failed to comply with the requirements of Mass. R. Crim. P. 30(b), which governs motions for new trial. The respondent had submitted an affidavit from the client that described the events surrounding the 1998 plea colloquy. The client's affidavit began with the words, "I, [ES] do hereby depose and state as follows …". Immediately

before his signature appeared the words, "Sworn to this 20th day of November 2017." Judge Kelly held that the affidavit was insufficient to support the motion because it was not signed under the pains and penalties of perjury, nor was it verified by oath or affirmation before a magistrate.

For tactical reasons, the respondent advised her client to not appeal Judge Kelly's decision.

After a complaint was filed with the Office of Bar Counsel, the respondent appeared for an examination under oath. The respondent was represented by counsel, but a different lawyer and firm than counsel at the hearing in this matter. As we will discuss in more detail, *post*., some of the respondent's testimony at the examination under oath differed from the hearing testimony.

Procedural History

Bar counsel charged the respondent with violations of Rules 1.1 (competence) and 1.3 (diligence) of the Massachusetts Rules of Professional Conduct. He also charged violations of Rule 3.4(e)(2) (fairness to opposing parties and counsel: when appearing before a tribunal, assert personal knowledge of facts except when testifying as a witness), 8.4(d) (conduct prejudicial to the administration of justice), and 8.4(h) (conduct that reflects adversely on the respondent's fitness to practice law).

The hearing committee found some of the statements in the filed motion were factually inaccurate. For example, the argument in paragraph 19 of the motion that the docket sheet and the record from the criminal case did not provide ES with an alien warning were contradicted by the (missing) second page of the green sheet, which contained the Alien Rights Notice that ES signed as well as the warnings that

the judge had given him. In addition, the second page also showed that ES had waived particular rights and the judge had confirmed, after colloquy, that ES understood the rights he was waiving and there was a factual basis for the claim.

The committee found that paragraph 21 of the motion also asserted inaccurate statements of fact. As discussed above, in that paragraph the respondent had written, "[T]he record in this case is devoid of evidence showing that the court based its convictions on sufficient evidence." Immediately after paragraph 21, subheading "a" argued that "[ES] was not fully informed of the elements to [sic] the crime with respect to solicitation of a prostitute and thus his plea cannot be considered intelligent." The committee found that the argument was contrary to the second page of the green sheet.

The hearing committee found the respondent did not intentionally mislead the court when filing the Motion to Vacate, even though the motion package omitted the second page of the Tender of Plea form. It found credible the explanation that the respondent had not reviewed the motion package before it was filed and the admission at the hearing that it was a mistake not to do so. The hearing committee also found that the respondent was not aware of the omission at the time of the hearing on the motion.[4]

Based on the above, a majority of the hearing committee concluded that the respondent violated Rule 1.1 (competence), 1.3 (diligence), and 8.4(d) (conduct that is prejudicial to the administration of justice) of the Massachusetts Rules of Professional

[4] Indeed, bar counsel did not charge the respondent with a violation of Mass. R. Prof. C. 3.3(a), which provides, among other things, that a lawyer shall not make a knowing misstatement of fact to a court.

Conduct.[5] The hearing committee unanimously declined to find a violation of Rule 3.4(e)(2) (when appearing before a tribunal asserting personal knowledge of facts in issue) and 8.4(h) (conduct adversely reflecting on the respondent's fitness to practice law).

The committee found the respondent's experience in immigration law should be considered in aggravation, as well as harm the misconduct caused to the client, although the committee noted that it "struggled" over the question of harm, since the question of a potentially better outcome was speculative. (Hearing Report, para. 85). Based on discrepancies between the hearing testimony and the prior testimony at the examination under oath, the committee found that the respondent displayed a lack of candor. The hearing committee disagreed with bar counsel that the "cumulative effect of multiple violations" should be considered in aggravation. Although there were multiple rules violations, they all stemmed from a common nucleus of facts involving a single client and a single motion.

A majority of the hearing committee recommended an admonition. The dissenting member of the committee would have dismissed the case, concluding that the respondent's representation of ES, although sloppy and unsuccessful, did not rise to the level of an ethical lapse. The majority focused on Matter of Kane, 13 Mass. Att'y Disc. R. 321, 327 (1997), where the Supreme Judicial Court instructed that an admonition provides the appropriate level of discipline where a lawyer fails to act with reasonable diligence and the misconduct causes little or no actual or potential

[5] The dissenting member would have found no violations of the rules.

harm to the client or others. Where the potential or actual harm is more serious, a public reprimand is appropriate. Kane, *supra*. Surveying the case law, the majority concluded that the respondent's representation of ES fell into the "less serious" category.

Bar counsel has appealed. In his brief, bar counsel argues that the committee inconsistently found "harm to a client" as an aggravating factor but concluded that any actual or potential harm was not sufficiently serious to require a more serious sanction. Bar counsel also points to the additional violation of Rule 8.4(d) (conduct that is prejudicial to the administration of justice) as a reason to increase the sanction beyond that recommended by Kane.

The respondent asks us to adopt the recommendation of an admonition.

Conclusions of Law

We adopt the hearing committee's conclusion that the respondent violated Mass. R. Prof. C. 1.1 and 1.3.

Rule 1.1 requires all lawyers to provide "competent representation to a client." The rule's second sentence clarifies the concept as requiring "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." As applied in the Rules of Professional Conduct, "competence" is not simply a question of a lawyer's general "knowledge" and "skill." There is no question that the respondent is a competent immigration lawyer. The respondent has practiced in the field for more than twenty years and has particular experience in representing immigrants in matters involving the intersection of criminal law and immigration law. There is no question that the respondent was capable of representing ES.

Despite having general skill, the respondent did not provide competent lawyering in the particular matter. The second sentence of Rule 1.1 includes "thoroughness" and "preparation." These terms connote the application of the lawyer's skills and knowledge in each case. It is possible for a lawyer to have a generalized level of competence yet fail to provide competent representation in a particular matter. In this case, the hearing committee properly concluded that the respondent's representation of ES failed to meet a basic standard of competence. The respondent failed to make changes to the draft motion when the associate pointed out errors. The motion as filed failed to include the important second page of the Tender of Plea form. The oral argument to the court continued the errors.

For the same reasons, we conclude that the respondent failed to comply with the requirement of Rule 1.3 to provide diligent representation.

With relevance to our recommendation as to disposition, *post*., we conclude that bar counsel has not carried his burden to prove that the misconduct caused actual or potential harm to the client. We do not adopt the hearing committee's finding on this issue.[6] The most potentially consequential aspect of the respondent's motion practice was the failure to file affidavits that conformed with the requirement that they be signed under the pains and penalties of perjury. Judge Kelly devoted a substantial portion of her decision to discussing the affidavits. However, she also

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[6] The hearing committee found that the misconduct caused harm to ES. It noted that, even loss of a weak claim can cause harm. (Hearing Report, para. 85, *citing* Matter of Shaughnessy, 19 Mass. Att'y Disc. R.410, 416, n. 3(2003)), modified on other grounds, 442 Mass. 1012, 1013 (2004). At the same time, the committee acknowledged that it "struggled" with whether the client suffered harm. The issue is not whether the claim was "weak" or "strong," but whether a different outcome would have ensued if the misconduct had not occurred. In this case, bar counsel has not satisfied his burden to prove that the lack of competence and diligence effected the result.

based her decision on the lack of credible information that would have cast doubt on ES's admission. The hearing transcript reflects that the judge noted several defaults. The Tender of Plea form indicated that ES had received the required warnings, which undermined the main thrust of the respondent's argument. Put another way, bar counsel has not proven that, if the form of the affidavits had conformed to Judge Kelly's expectations, the motion likely would have been allowed. Bar counsel's contention that the respondent was not prepared for the oral argument and failed to raise the issue of the mass plea deals in the motion or her own affidavit is speculative as to its consequences. The other misconduct – the factual misrepresentations in the motion and the failure to file the full Tender of Plea form – caused no harm to the client.

We agree with the unanimous committee in rejecting the charged violations of Rule 3.4(e)(2) and 8.4(h). Rule 3.4(e)(2) prohibits lawyers from asserting personal knowledge of facts before a tribunal (other than when testifying as a witness). The charge apparently was based on the respondent's oral argument before Judge Kelly, when the respondent described how the court handled mass plea colloquies in the 1990s. As did the hearing committee, we do not conclude that the advocacy crossed the line from argument into asserting personal knowledge of facts. The "fact" was not material to this specific case; it was more background than foreground. There appeared to be no dispute that, in the 1990s, judges in the BMC occasionally held mass plea colloquies in prostitution cases. The statement arose in the context of an oral argument. Neither the prosecutor nor the judge objected to the assertion. Like the committee, we afford some leeway to lawyers in the heat of the moment. *Cf.* Ad.

19-18, (noting that lawyer's "error" was isolated misstep in the middle of a trial with no time to self-correct).

As to Rule 8.4(h), we agree with the hearing committee that the respondent's misconduct does not adversely reflect on the respondent's fitness to practice law. Although the respondent made several mistakes in representing ES (the factual errors in the motion, the failure to submit affidavits in proper form, and the failure the attach the second page of the green sheet), these errors do not implicate broader concerns about the respondent's fitness to practice. All of the errors occurred in a single case during a time when the respondent was unusually busy. We place the errors in the context of the respondent's practice of over 25 years.

For similar reasons, we do not adopt the committee majority's conclusion that the respondent violated Mass. R. Prof. C. 8.4(d). The rule proscribes conduct that is "prejudicial to the administration of justice." Our jurisprudence in this area instructs that we look holistically at the underlying conduct and its impact on the tribunal.

The standard for violations of Rule 8.4(d) was set twenty five years ago in Matter of Two Attorneys, 421 Mass. 619 (1996). In that case, two lawyers received private discipline when they simultaneously represented the buyer of real estate and a judgment creditor of the seller. The Supreme Judicial Court, adopting the conclusions of the Board, concluded that the respondents violated the predecessors to Rules 1.6 (client confidences) and 1.7 (conflicts of interest) [S.J.C. Rule 3:07, Canon 1, DR 4-101(B)(3) and DR 4-105]. In addition to those rules, bar counsel charged the respondents with violations of the predecessor to Rule 8.4(d) [S.J.C. Rule 3:07, Canon 1, DR 1-102(A)(5)]. The basis of the latter charge was the respondents' role

as escrow agents (in addition to their role as counsel), specifically the failure to disclose to the seller of the property the existence of a trustee process attachment on the sales proceeds. While holding that the lawyers may have had an obligation to disclose, the Court declined to conclude that they had violated DR 1-102(A)(5).

The Two Attorneys court defined the phrase, "prejudicial to the administration of justice" (which appears also in Rule 8.4(d)). Quoting from the Florida Supreme Court, the Supreme Judicial Court held that, "[t]he term is not so broad as to include all conduct which is illegal but rather those activities [such as bribery, perjury, misrepresentations to a court] 'which undermine[ ] the legitimacy of the judicial processes.' " Id., 421 Mass. at 628, *quoting*, Florida Barv. Pettie, 424 So. 2d 734, 737-738 (Fla. 1983), *quoting* Polk v. State Bar of Texas, 374 F.Supp.784, 788 (N.D. Tex. 1974). The Two Attorneys court also held that the rule had been applied only where the conduct was "flagrantly violative of accepted professional norms." Id., *citing* Matter of Hinds, 449 A.2d 483 (N.J. 1982); *see also* Matter of an Attorney, 442 Mass. 660, 20 Mass. Att'y Disc. R. 585, 594 (2004) (to violate Rule 8.4(d), conduct must be "egregious"). Absent such guardrails, the rule could apply in innumerable situations and suffer from a fatal vagueness. Thus, while the respondents in Two Attorneys had unethically elevated the interests of one client over another, their activities did not "undermine the legitimacy of the judicial process." Id, at 629.

Subsequent cases under Rule 8.4(d) or its predecessor have similarly applied the rule only in narrow circumstances. Thus, in Matter of Budnitz, 425 Mass. 1018, 13 Mass. Att'y Disc. R. 62 (1997), the lawyer violated DR 1-102(A)(5) when he lied under oath to a grand jury and perpetuated those lies during bar counsel's

investigation. In Matter of Crossen, 450 Mass. 533, 558-560, 24 Mass. Att'y Disc. R. 126 (2008), three lawyers extorted a Superior Court law clerk (including surreptitious tape recordings and impersonating a potential employer) in an attempt to compel the law clerk to reveal confidential information about the judge for whom he worked.[7] In Matter of Gargano, 460 Mass. 1022, 27 Mass. Att'y Disc. R. 372 (2011), the respondent engaged in myriad misconduct, including making intentionally false statements in court, causing his client to file a false affidavit, and mishandling trust funds. In Matter of Finn, 433 Mass. 418, 17 Mass. Att'y Disc. R. 204 (2001), the respondent lied on his bar application and engaged in the unauthorized practice of law, thereby violating the predecessor to Rule 8.4(d) and other rules. *See also* Matter of Lupo, 447 Mass. 345, 22 Mass. Att'y Disc. R. 513 (2006) (attorney violated Rule 8.4(d) when he filed civil lawsuit against another lawyer who had filed a grievance against him with the Office of Bar Counsel); Matter of Cobb, 445 Mass. 452, 21 Mass. Att'y Disc. R. 93 (2005) (lawyer made unfounded allegations against integrity of judge and other lawyers); Matter of Moran, 479 Mass. 1016, 34 Mass. Att'y Disc. R. 376 (2018) (intentional filing of fraudulent estate accounts in Probate Court); Matter of Gross, 435 Mass. 445, 17 Mass. Att'y Disc. R. 271 (2001) (lawyer solicited client and alibi witness to engage in impersonation scheme to undermine prosecution's effort to identify respondent's client as perpetrator of crime); Matter of Griffith, 440 Mass. 500, 20 Mass. Att'y Disc. R. 174 (2003) (deliberate "pattern of activity" including failure to disclose complete medical records to opposing counsel

[7] *See also* Matter of Curry, 450 Mass. 503, 24 Mass. Att'y Disc. R. 192 (2008); Matter of Donahue, 22 Mass. Att'y Disc. R. 198 (2006).

and court). Other cases finding violations of Rule 8.4(d) involve conduct resulting in felony convictions. Matter of Grella, 438 Mass. 47, 22 Mass. Att'y Disc. R. 368 (2006) (conviction for assault and battery on respondent's estranged wife).

The Supreme Judicial Court has listed three specific examples of conduct that would violate Rule 8.4(d): bribery, perjury, and misrepresentation to a court. While the list is not exhaustive, it informs our application of the rule to the facts in this case. Here, the respondent's conduct falls into none of those categories. As the hearing committee found, the respondent was sloppy, but there was no intention to mislead the court. We conclude that the misconduct, while violative of Rules 1.1 and 1.3, was neither "egregious" or "flagrantly violative of accepted professional norms," nor did it undermine the "legitimacy of the judicial process."

Matters in Mitigation and Aggravation

We agree with the hearing committee that there were no matters in mitigation.

We agree that the respondent's experience should be considered in aggravation, while the allegedly "multiple violations" and alleged "harm to third parties" should not. As discussed above, although the respondent's conduct implicated several rules, the misconduct arose out of one set of facts, one matter, for one client. There was no cognizable harm caused by the respondent's failure to comply with Rules 1.1 and 1.3. As discussed above, it would be speculative to assume that a more fulsome motion and argument would have made a difference to the respondent's client.

Our one disagreement with the hearing committee is its finding that the respondent's lack of candor should be considered in aggravation. We agree that there

were several inconsistencies between the respondent's testimony at trial and the examination under oath. These are summarized at pages 12-14 of the hearing report. Characterizing the testimony as "argumentative," the committee found that during cross examination, the respondent "backed away" from statements made at the earlier examination under oath. We defer to the hearing committee's factual findings, as the committee is in the best position to observe and assess the witness. Thus, we adopt the finding as to lack of candor. However, we do not agree – as a matter of law – that the respondent's demeanor and lack of candor should be considered in aggravation in this case. *See, e.g.,* Matter of Michael Early, 21 Mass. Att'y Disc. R. 220, 223-224 (2005) (appeal panel of board correctly adopted hearing committee's factual findings but refused to find facts sufficient as matter of law to excuse respondent's misconduct). In doing so, we rely on the overall tenor of the circumstances in which the testimony arose. The transcript leaves the impression of a contentious cross examination, but the hearing committee did not find that the respondent testified falsely. While the respondent could have been more forthright and less evasive, the lack of candor does not rise to the level that we would consider an aggravating factor. *Compare* Matter of Crossen, *supra*., 450 Mass. at 580, 24 Mass. Att'y Disc. R. at ___ (lack of candor aggravating factor based on repeated false, misleading, and evasive testimony at disciplinary hearing).

Recommended Disposition

We follow a few established maxims. Each disciplinary case must be decided on its own merits and "every offending attorney must receive the disposition most appropriate under those circumstances." Matter of Kane, *supra*., 13 Mass. Att'y Disc.

R. at 328-329. We are instructed to examine "the totality of the circumstances." Matter of Saab, 406 Mass. 315, 328, 6 Mass. Att'y Disc. R. 278 (1989). At the same time, the discipline we impose or recommend must not be markedly disparate from similar matters. Matter of Griffith, *supra*.

We adopt the hearing committee's analysis of the case law. Analyzing Matter of Kane, the committee concluded that this case more closely resembled those in which we issued an admonition rather than a public reprimand. For the most part, we agree. In addition, although the respondent failed to act competently or diligently, her conduct did not cause actual or potential harm to the client. We also agree with the committee that cases resulting in public reprimands involved conduct (even though also unintentional) that was more serious than the respondent's. (Hearing Report, p. 20).

Although we do not consider the press of business as a mitigating factor, we consider it as part of the totality of the circumstances surrounding the respondent's misconduct. *See, e.g.*, Bar Counsel v. Jane Jones, 29 Mass. Att'y Disc. R. 778, 788-789 (2013) (dismissal of petition based on alleged misconduct in single immigration matter in light of "the context of the entire representation and the diligent work previously performed on the client's behalf"). Moreover, we are aware of no case where lack of attention to detail resulted in public discipline.[8]

[8] Bar counsel's argument in support of a public reprimand rests on the premise that the hearing committee found that the respondent's misconduct caused harm to her client and that the respondent violated Rule 8.4(d). As set forth above, we have not adopted the factual finding or the legal conclusion underpinning this argument.

At the same time, we do not agree with the committee's dissenting member that we dismiss the case. Unquestionably, the respondent failed to provide competent and diligent representation. While not every mistake violates the Rules of Professional Conduct, the inaccuracies in the motion, the failure to file compliant affidavits, the lack of preparation for the hearing, and the failure to attach the second page of the Plea Tender form are derelictions of responsibility. They leave an impression of sloppy and rushed work. Under the circumstances, discipline is warranted, but our precedent instructs that the discipline be private.

Dated: November 8, 2021 BOARD OF BAR OVERSEERS

By_____
Secretary

ADMONITION NO. 22-10

CLASSIFICATIONS:

Failing to Seek Client's Lawful Objectives or Abide by Client's Decisions to Plead, Settle, Testify, or Waive Jury Trial [Mass. R. Prof. C. 1.2(a)]

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

Failing to Keep Client Informed or To Respond to Inquiries [Mass. R. Prof. C. 1.4(a)(3), (4)]
Withdrawal without Tribunal's Permission [Mass. R. Prof. C. 1.16(c)]

Withdrawal without Protecting Client or Refunding Unearned Fee or Expense [Mass. R. Prof. C. 1.16(d)]

SUMMARY:

The client retained the respondent as successor counsel in February 2016 with respect to modifying support orders in a probate and family action. In March, 2016, the respondent entered her appearance on behalf of the client and a March 18 pre-trial conference was continued by agreement. Over the next three years, the pretrial conference was rescheduled numerous times. On September 19, 2019, the pre-trial conference was again rescheduled, set for the "next available date".

In or about early October 2019, a guardian ad litem ("GAL") appointed to the case attempted to reach the respondent several times about assenting to an administrative motion to extend a since-passed August 2019 deadline for filing a GAL report. However, the respondent was hospitalized and then out of work for two weeks due to health issues. In that time, the client also attempted to reach the respondent by text about the GAL's inquiry, asking that the respondent reply to the GAL as soon as possible. The GAL's motion was not premised on needing any information from the client or respondent.

Upon her return to work, the respondent observed multiple messages from the GAL but did not respond before the client called the morning of October 25, 2019 to discuss contacting the GAL. After a heated discussion, in which the client indicated she would obtain successor counsel, the respondent understood the legal representation to be terminated. She directed the client to notify her of the successor counsel and the address to which the client file should be sent. The same day, the GAL filed the motion without speaking with the respondent.

After the termination discussion, the respondent stopped handling or monitoring the client's case. However, she did not file any motion with the court seeking leave to withdraw. The client later asserted that she had not terminated the relationship at that time.

On November 5, 2019, the probate court allowed the GAL's motion administratively without objections, extending the deadline for the GAL report to December 31, 2019. The GAL timely filed the report on December 31, 2019. A pre-trial conference was scheduled for January 21, 2020. The respondent reported never receiving notice of this pre-trial and the docket reveals no issuance of any notice.

On January 13, 2020, the client sent a certified letter to the respondent requesting that she review the GAL's report and advise her, adding that a pre-trial conference was scheduled the following week on January 21 and noting concern that she would be appearing without counsel or representation. The certified letter was not received by the respondent until January 28, 2020.

On January 15, 2020, the former client texted the respondent asking generally whether the respondent would be appearing at court to represent her and whether all relevant documents had been filed. The respondent received the text but did not reply. On Sunday, January 19, 2020, opposing counsel texted the respondent inquiring simply whether the respondent still represented the former client, similarly to which the respondent did not reply.

On January 21, 2020, the respondent did not appear at the pre-trial conference. The client texted the respondent that she was at the courthouse, but the respondent did not reply. Opposing counsel and the former client appeared and filed a joint motion to strike the respondent's appearance on grounds that neither had been able to communicate with the respondent since October 2019. The motion was allowed, and the pre-trial conference was continued. On February 3, 2020, the client texted the respondent requesting her client file and the respondent promptly provided it.

The respondent stopped handling or monitoring the former client's case after the discharge of October 25, 2019. Although terminated by the client, the respondent took no steps to seek permission from the probate court to withdraw from the representation and otherwise took no steps to communicate with the former client or protect her interests in the period between discharge and the former client's request for the client file on February 3, 2020.

By failing to respond timely to the GAL and the client, the respondent violated Mass. R. Prof. C. 1.2(a), 1.3, and 1.4, respectively. By failing to seek permission from the court to withdraw her appearance, and by withdrawing from representation without taking reasonable steps to protect the client's interests including provide the status of the matter or respond to requests for information, the respondent violated Mass. R. Prof. C. 1.3 and 1.16(c) and (d), respectively. The respondent was admitted to practice in 2015 and has received no prior discipline. The respondent received an admonition for her conduct.

ADMONITION NO. 22-07

CLASSIFICATIONS:

Conduct Involving Dishonesty, Fraud, Deceit, Misrepresentation [Mass. R. Prof. C. 8.4 (c)]
Conduct Adversely Reflecting on Fitness to Practice [Mass. R. Prof. C. 8.4 (h)]
Improper Method of Withdrawal [Mass. R. Prof. C. 1.15 (e)(5)]
Record-Keeping Violation [Mass. R. Prof. C. 1.15 (f)(1)(B)]
Record-Keeping Violation [Mass. R. Prof. C. 1.15 (f)(1)(D)]

SUMMARY:

The respondent is a solo practitioner who is appointed and accepts cases defending indigent criminal defendants. The respondent opened an IOLTA account in 2005 that improperly included overdraft protection up to $1,500. Since 2013, the respondent did not hold client funds in his IOLTA account as he only collected earned fees.

In 2018, the respondent had difficulty paying his bills. He began writing checks on his IOLTA account payable to himself and his personal creditors knowing that there were no funds available, but that the overdraft protection would cover the amount. Each time the account was overdrawn, the respondent quickly replenished the balance with personal funds, thus effectively using his IOLTA account as a line of credit. During this period, the respondent failed to keep a personal funds or bank fees ledger.

After writing a check that exceeded the $1,500 overdraft protection limit, the respondent's activity was reported to bar counsel. The respondent thereafter removed the overdraft protection from his IOLTA account, opened a second business account and took out a line of credit.

Bar counsel filed a petition alleging that the respondent violated Mass. R. Prof. C. 8.4 (c) and (h) by intentionally cashing checks on his IOLTA account written to himself, knowing the account did not have sufficient funds and allowing the overdraft protection to temporarily cover the checks. Bar counsel also charged that the respondent violated Mass. R. Prof. C. 1.15(e)(5) by paying personal expenses from his IOLTA account and Mass. R. Prof. C. 1.15(f)(1)(B) and (D) by failing to maintain a personal funds or bank fees ledger. The respondent admitted to the rule violations and a hearing was held on sanction.

The hearing committee recommended that an admonition was the appropriate sanction because the respondent was not hiding his funds from creditors or taxing authorities, held no client funds in his account for years, and quickly replenished the balance in the account after a deficit.

On January 10, 2022, the Board of Bar Overseers voted to accept the hearing committee's findings of fact and conclusions of law and its recommendation of an admonition. However, three members issued a dissenting opinion on the sanction. The dissenting members opined that a public reprimand was a more appropriate sanction where the respondent admitted to the violation of multiple trust accounting rules, as well as dishonesty and conduct adversely reflecting on his fitness to practice law. The dissent characterized the respondent's conduct as an "affront to the integrity of the profession."

The respondent was admitted to the Massachusetts bar on June 18, 1998, and has no prior disciplinary history. The respondent received an admonition for his misconduct.

ADMONITION NO. 22-08

CLASSIFICATIONS:

Trust Account Commingling [Mass. R. Prof. C. 1.15(b)(2)]
Failure to Notify of Receipt or to Disburse Promptly [Mass. R. Prof. C. 1.15(c)]
Record-Keeping Violation [Mass. R. Prof. C. 1.15(f)(1)(E)]

SUMMARY:

The respondent received an admonition for failing to adhere to certain aspects of the recordkeeping requirements set forth in Mass. R. Prof. C. 1.15, as follows.

In 2016, the respondent's law firm dissolved. Although he opened a new firm with its own IOLTA account, he did not close the old firm's IOLTA account based on unresolved litigation payouts. A few years later, in December 2020, the respondent disbursed an attorney's fee on one of the old firm's litigation matters. In doing so, however, he inadvertently issued a check from his new firm's IOLTA account instead of the old firm's IOLTA account. The check was dishonored due to insufficient funds. After being alerted to the problem, the respondent rectified the situation by transferring funds into the new firm's IOLTA account and issuing a replacement check which was negotiated without incident.

During this time period, the respondent also impermissibly deposited $10,000 in firm funds into the new firm's IOLTA account in a misguided effort to prevent any dishonored checks. The respondent has since removed all funds from the account that would exceed those reasonably necessary to cover bank charges.

Additionally, the respondent had failed to promptly disburse approximately $21,000 in funds from both the old firm's IOLTA account and the new firm's IOLTA account. Approximately $11,000 of the tardily disbursed funds were leftover funds from two different litigation matters. The respondent has since disbursed those funds to the appropriate entities. The remaining $10,000 was comprised of undisbursed client funds, which the respondent has since disbursed to the rightful owners.

Lastly, at all relevant times, the respondent's IOLTA records were mostly compliant with the requirements of Mass. R. Prof. C. 1.15(f). However, the respondent neglected to use client ledgers to prepare reconciliation reports and thus was only performing two-way reconciliations rather than the mandatory three-way reconciliations.

The respondent therefore violated the Massachusetts Rules of Professional Conduct in the following respects. By creating two-way reconciliation reports rather than the mandated three-way reconciliation reports, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(E). By depositing non-client firm funds into the IOLTA account other than the permitted minimal sum for bank fees, the respondent violated Mass. R. Prof. C. 1.15(b)(2). By failing to promptly deliver client and third-party funds once they became due, the respondent violated Mass. R. Prof. C. 1.15(c).

The respondent has been a member of the Massachusetts bar since 1989 and has received no prior discipline. He accordingly received an admonition for his misconduct.

ADMONITION NO. 22-09

CLASSIFICATIONS:

Improper Disclosure of Confidential Information [Mass. R. Prof. C. 1.6(a)]
Failing to Communicate with Client for Client Decisions or About Limits of Lawful Representation [Mass. R. Prof. C. 1.4(a)(1) and (b)]

SUMMARY:

In the fall of 2011, the respondent prepared a simple estate plan for a client. In the will, the client devised all of her assets to her only daughter and then to her granddaughters in trust for their education. In that plan, the client's daughter was named as an heir, devisee, personal representative, durable power of attorney, healthcare agent, and healthcare proxy.

Ten years later, when the client was 79 years old, she contacted the respondent by phone. At the time, the respondent was working remotely without access to all his files. The client asked him to change her estate plan so that all net proceeds from the sale of her home would be given to a charity. Having no concerns at this time about the client's competency, the respondent agreed to make the requested changes.

The next day, the respondent went to his office to review the file. Upon review, he realized that the client's home was mortgage free and represented the bulk of her total assets. Further, the requested change to the client's estate plan would effectively disinherit her daughter and her granddaughters. The respondent did not believe that leaving this money to the requested charity was a prudent decision. The respondent became concerned that such a significant and abrupt change after 10 years could be the result of a competency issue or an undue influence.

The respondent did not contact his client to discuss his concerns about her judgment or to better evaluate her competency. Instead, without consulting with his client, he called the client's daughter. During the call, the respondent disclosed that his client asked him to make changes to her will and explained his concerns about the requested changes.

A few days later, the respondent received a call from the client. She had learned of his unauthorized disclosures from her daughter, who also had shared them with two of the client's friends. After hearing her concerns, the respondent determined that the client was, in fact, competent to make the requested changes to her estate plan. Although frustrated by the respondent's contact with her daughter and the resulting personal turmoil, the client decided to continue with the representation. The respondent revised her will as instructed, and the representation concluded.

By revealing confidential information relating to his client's representation, the respondent violated Mass. R. Prof. C. 1.6(a). By failing to consult with his client about speaking with her daughter, the respondent violated Mass. R. Prof. C. 1.4(a)(1) and (b). Although the

respondent was genuinely motivated out of concern for the client and her estate, he did not have a reasonable belief that she lacked capacity. He only knew that he disagreed with her requested change to her estate plan. If he had done a proper investigation of the client's capacity, he would have found her to be competent. The respondent's decision not to contact his client for such further discussion, and to instead contact the person being disinherited, was unreasonable in the circumstances. Moreover, even if there was a reasonable basis to contact the daughter to investigate the competency of her mother, the respondent revealed more information than was necessary to make that determination.

The respondent was admitted to the Massachusetts bar in 1992 and has no history of discipline. The respondent received an admonition for this misconduct.

ADMONITION NO. 22-10

CLASSIFICATIONS:

Failing to Seek Client's Lawful Objectives or Abide by Client's Decisions to Plead, Settle, Testify, or Waive Jury Trial [Mass. R. Prof. C. 1.2(a)]

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

Failing to Keep Client Informed or To Respond to Inquiries [Mass. R. Prof. C. 1.4(a)(3), (4)]
Withdrawal without Tribunal's Permission [Mass. R. Prof. C. 1.16(c)]

Withdrawal without Protecting Client or Refunding Unearned Fee or Expense [Mass. R. Prof. C. 1.16(d)]

SUMMARY:

The client retained the respondent as successor counsel in February 2016 with respect to modifying support orders in a probate and family action. In March, 2016, the respondent entered her appearance on behalf of the client and a March 18 pre-trial conference was continued by agreement. Over the next three years, the pretrial conference was rescheduled numerous times. On September 19, 2019, the pre-trial conference was again rescheduled, set for the "next available date".

In or about early October 2019, a guardian ad litem ("GAL") appointed to the case attempted to reach the respondent several times about assenting to an administrative motion to extend a since-passed August 2019 deadline for filing a GAL report. However, the respondent was hospitalized and then out of work for two weeks due to health issues. In that time, the client also attempted to reach the respondent by text about the GAL's inquiry, asking that the respondent reply to the GAL as soon as possible. The GAL's motion was not premised on needing any information from the client or respondent.

Upon her return to work, the respondent observed multiple messages from the GAL but did not respond before the client called the morning of October 25, 2019 to discuss contacting the GAL. After a heated discussion, in which the client indicated she would obtain successor counsel, the respondent understood the legal representation to be terminated. She directed the client to notify her of the successor counsel and the address to which the client file should be sent. The same day, the GAL filed the motion without speaking with the respondent.

After the termination discussion, the respondent stopped handling or monitoring the client's case. However, she did not file any motion with the court seeking leave to withdraw. The client later asserted that she had not terminated the relationship at that time.

On November 5, 2019, the probate court allowed the GAL's motion administratively without objections, extending the deadline for the GAL report to December 31, 2019. The GAL timely filed the report on December 31, 2019. A pre-trial conference was scheduled for January 21, 2020. The respondent reported never receiving notice of this pre-trial and the docket reveals no issuance of any notice.

On January 13, 2020, the client sent a certified letter to the respondent requesting that she review the GAL's report and advise her, adding that a pre-trial conference was scheduled the following week on January 21 and noting concern that she would be appearing without counsel or representation. The certified letter was not received by the respondent until January 28, 2020.

On January 15, 2020, the former client texted the respondent asking generally whether the respondent would be appearing at court to represent her and whether all relevant documents had been filed. The respondent received the text but did not reply. On Sunday, January 19, 2020, opposing counsel texted the respondent inquiring simply whether the respondent still represented the former client, similarly to which the respondent did not reply.

On January 21, 2020, the respondent did not appear at the pre-trial conference. The client texted the respondent that she was at the courthouse, but the respondent did not reply. Opposing counsel and the former client appeared and filed a joint motion to strike the respondent's appearance on grounds that neither had been able to communicate with the respondent since October 2019. The motion was allowed, and the pre-trial conference was continued. On February 3, 2020, the client texted the respondent requesting her client file and the respondent promptly provided it.

The respondent stopped handling or monitoring the former client's case after the discharge of October 25, 2019. Although terminated by the client, the respondent took no steps to seek permission from the probate court to withdraw from the representation and otherwise took no steps to communicate with the former client or protect her interests in the period between discharge and the former client's request for the client file on February 3, 2020.

By failing to respond timely to the GAL and the client, the respondent violated Mass. R. Prof. C. 1.2(a), 1.3, and 1.4, respectively. By failing to seek permission from the court to withdraw her appearance, and by withdrawing from representation without taking reasonable steps to protect the client's interests including provide the status of the matter or respond to requests for information, the respondent violated Mass. R. Prof. C. 1.3 and 1.16(c) and (d), respectively. The respondent was admitted to practice in 2015 and has received no prior discipline. The respondent received an admonition for her conduct.

ADMONITION NO. 22-11

CLASSIFICATIONS:

Disbursed Funds Creating Negative Client Funds Balance [Mass. R. Prof. C. 1.15(f)(1)(C)]
Record-Keeping Violation [Mass. R. Prof. C. 1.15(f)(1)(E)]

SUMMARY:

The respondent is the managing partner of a small law firm. From March 1, 2020, through September 30, 2020, the respondent disbursed funds from his IOLTA account for three clients before funds were available, causing negative client ledger balances. During the same period, the respondent's reconciliation reports showed non-identical balances.

The respondent's disbursement of funds from the IOLTA account before funds were available for withdrawal causing negative client funds balances violated Mass. R. Prof. C. 1.15(f)(1)(C). The respondent's failure to prepare three-way reconciliation reports showing identical balances violated Mass. R. Prof. C. 1.15(f)(1)(E).

The respondent was admitted to practice law in 1988 and has no prior discipline. The respondent received an admonition for this misconduct.

ADMONITION NO. 22-12

CLASSIFICATIONS:

Failing to Communicate with Client for Client Decisions or About Limits of Lawful Representation [Mass. R. Prof. C. 1.4(a), (1), (2), (5), 1.4(b))] (on and after 7/1/2015)

Failing to Keep Client Informed or To Respond to Inquiries [Mass. R. Prof. C. 1.4(a)(3), (4)] (on and after 7/1/2015)

SUMMARY:

The respondent represented a criminal defendant beginning in December 2019 on a *pro bono* basis at the request of the district court. The client was charged with serious crimes in Massachusetts Superior Court. After two dangerousness hearings, at which the respondent appeared, the client was ordered to be held without bail pending trial. The client told the respondent he did not want to plead guilty and that he wanted to proceed to trial. A pre-trial conference was held on March 3, 2020. At that time, motion hearings were scheduled for April 2020 and a trial was scheduled for May 2020.

Shortly after the pre-trial conference, the Massachusetts Supreme Judicial Court ("SJC") ordered all trial courts, including the Superior Court, to postpone all scheduled jury trials because of the COVID-19 pandemic. On or about March 27, 2020, the clerk's office of the Superior Court informed the respondent that his client's motion and trial dates were therefore postponed. The respondent did not inform his client of these changes in the status of his case.

After the court notified the respondent that the client's hearing dates were suspended, the respondent received a call from a social worker at the jail. The respondent told the caseworker that the trial dates had been suspended.

Due to concerns about the COVID-19 pandemic, in April 2020, the SJC issued an order providing guidelines for the releasing certain pretrial detainees from jail. The respondent reviewed the decision and correctly determined that his client was not a candidate for release because the order excluded pre-trial detainees being held without bail pursuant to a dangerous finding and those who were charged with certain serious offenses inclusive of the charges against his client. The respondent did not inform his client of the SJC order or his determination that the client was not eligible for release.

During the first week of June 2020, the clerk's office of the Superior Court informed the respondent that a teleconference would be held in his client's matter on June 8, 2020. It was the respondent's understanding that the court would be arranging for the jail to provide inmates access to such scheduled teleconferences. The respondent did not inform his client of the scheduled teleconference or otherwise attempt to communicate with him about his case prior to the teleconference.

The teleconference went forward on June 8, 2020. The respondent appeared by telephone, but his client failed to sign-in to the teleconference. The presiding judge therefore continued the case to July 27, 2020 for a status conference, as the court still was not scheduling jury trial dates due to COVID-19. The respondent did not inform his client that the teleconference had been convened or that it was continued.

Before the July 27, 2020 conference date, the respondent and the assistant district attorney assigned to his client's case agreed to continue the conference. In their view, a conference was unneeded because there was no new evidence or information to report to the court and because jury trials were still on hiatus due to COVID-19. The respondent did not inform the client of the agreed-upon continuance.

Between March 2020 and September 2020, the respondent received at least three messages from his client's mother on behalf of her son. The messages sought information about the status of the client's case. The respondent did not contact his client in response to the mother's messages. The client subsequently hired a new attorney.

The respondent violated Rule 1.4(a)(3) and 1.4(b) by repeatedly failing to keep his client reasonably informed about the status of his case, including the scheduling of court proceedings and his assessment of the client's eligibility for release under the SJC's COVID-19 order.

The respondent was admitted to the Massachusetts bar in 2006 and has no prior record of discipline. The respondent received an admonition for his misconduct.

ADMONITION NO. 22-13

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 July of 2015, the respondent agreed to represent a client, a Brazilian citizen, in filing a petition with the United States Citizens and Immigration Services ("USCIS") for approval of an EB-5 investors visa. An EB-5 visa provides a path to permanent residency for non-citizens who make certain types of investments into the U.S. economy. These investments can be made directly to a U.S. company or through a "Regional Center" approved by USCIS. Once an approved investment is made, and as long as the applicant can demonstrate that it created or preserved a certain number of jobs and came from a legitimate funding source, the applicant then may seek approval of their EB-5 visa by filing a Form I-526 and supporting documents with USCIS.

The client paid the respondent a $25,000 flat fee for this visa work at the outset of the representation. The respondent thereafter advised the client to work with a particular Regional Center in order to choose a project and make the required investment. The client chose a project, made a $500,000 investment with the center, and paid the center an administrative fee on October 12, 2016. The client also provided the respondent with financial information relating to the legitimate source of the investment funds. By late 2016, the respondent could have and should have filed the client's Form I-526 and supporting documents in support of an EB-5 visa. Although the respondent informed her client that she would be filing the petition in the near future, she did not do so until a year later. The respondent never disclosed to the client that there had been a delay in the filing.

In May 2018, the respondent properly filed the client's Form I-526 and supporting documents in support of an EB-5 visa. USCIS subsequently approved the client's EB-5 visa.

By failing to represent the client diligently and by failing to keep the client reasonably informed about the status of the matter, the respondent violated Mass. R. Prof. C. 1.3 and 1.4(a)(3). In mitigation, the respondent was in the midst of serious family problems including criminal conduct committed against her and members of her family, which contributed to her delay in filing and failures to communicate. Dealing with these issues interfered with her ability to work on the client's matter. The respondent has since addressed these issues with a therapist.

The respondent was admitted to practice in Massachusetts in 2006. She received an admonition in 2020 for her neglect and poor communications in another client matter; however, the misconduct in that case occurred during the same time period at issue here and also was caused in part by the mitigating personal circumstances described above. Given the overlapping timelines of these matters, and the respondent's successful therapy to address the underlying personal issues, it was determined that a second admonition was appropriate.

ADMONITION NO. 22-14

CLASSIFICATION:

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

SUMMARY:

The respondent was a shareholder in a three-member LLC. The LLC maintained an IOLTA account at the People's Republic Bank. The two other members ("the other partners"), but not the respondent, were signatories on the IOLTA account. The other partners managed and kept records of the account, and the respondent played no part in that function.

During 2020-2021, the IOLTA records were deficient in many ways. The other partners failed to maintain a compliant check register or individual client ledgers and they were unable to perform three-way reconciliations in which the three components matched. The other partners also transferred personal funds to the IOLTA account to address shortages in that account.

As a partner in the firm, the respondent had a duty to make reasonable efforts to ensure that the firm had in effect, measures giving reasonable assurance that all lawyers in the firm conformed to the Rules of Professional Conduct.

The respondent violated Mass. R. Prof. C. 5.1(a) by failing to ensure that her firm had record-keeping practices that complied with the requirements of Mass. R. Prof. C. 1.15(f)(1)(B),(C), (D) and (E), and with Mass. R. Prof. C. 1.15(b).

ADMONITION NO. 22-15

CLASSIFICATIONS:

Failure to Timely Communicate in Writing Basis of Fee or Scope of Work [Mass. R. Prof. C. 1.5(b)(1)]

Failing to Keep Client Informed or Respond to Inquiries [Mass. R. Prof. C. 1.4(a)(3)]

SUMMARY:

The respondent received an admonition for failing to have a fee agreement and failing to adequately communicate with clients.

In March of 2018, the respondent agreed to represent the clients in a hearing before the Department of Children and Families (DCF) regarding the recent removal of their foster children from their home. The respondent entered into a fee agreement with the clients for representation at the hearing. The hearing occurred over the course of several months and ultimately resulted in a ruling unfavorable to the clients. The respondent thereafter agreed to represent the clients in an appeal of the decision in the superior court. The respondent failed, however, to enter into a fee agreement for the appeal. Ultimately, the appeal was dismissed. While the respondent's actions on the appeal were not the cause of the dismissal, she had an obligation to communicate to the clients that their appeal had been dismissed. She failed to do so.

By failing to communicate to the clients in writing the scope of the representation and the basis or rate of the fee for the appeal, the respondent violated Mass. R. Prof. C. 1.5(b)(1). By failing to communicate the dismissal of the appeal to the clients, the respondent violated Mass. R. Prof. C. 1.4(a)(3).

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

ADMONITION NO. 22-16

CLASSIFICATIONS:

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

Conflict with Former Client in Substantially Related Matter [Mass. R. Prof. C. 1.9(a)]

Withdrawal without Protecting Client or Refunding Unearned Fee or Expense [Mass. R. Prof. C. 1.16(d)]

SUMMARY:

The respondent represented an employer. The employer was an individual whose family had established a trust to fund pension benefits for the family members' employees. In 2016, the respondent filed an ERISA lawsuit in federal court on behalf of the employer against the trust administrator, seeking a declaration that the trust was subject to ERISA.

The trust administrator filed a motion to dismiss on the grounds that the employer did not have standing, because she was not an employee. At the suggestion of the court, the respondent amended the complaint to add one of the employer's employees as a party. The respondent from that point forward represented both the employer and the employee in the lawsuit. In response to the amended complaint, the trust administrator filed a counterclaim seeking to make the employer liable for the employee's benefits should the trust be subject to ERISA. The employer subsequently terminated the employee.

There was a significant risk that the respondent's representation of each client would be materially limited by his responsibilities to the other, both with regard to the employee's termination and with regard to the trust. However, the respondent continued to represent both clients in the ERISA litigation, without obtaining informed consent in writing from either regarding any potential or actual conflict of interest.

A few months after terminating the employee, the employer hired new counsel and terminated the respondent's services. The respondent stayed in the case as the employee's counsel, without obtaining informed consent in writing from either the employer or employee. The employer's new counsel requested that the respondent turn over his client file, which the employer needed for the ongoing litigation, but the respondent did not do so in a timely manner.

In 2020, the employee hired new counsel, and the respondent withdrew from the matter altogether. Shortly thereafter, the employee filed an amended pleading seeking to realign the parties and bring claims directly against the employer related to her trust benefits and her termination. Later that year, the employer through new counsel filed a separate state lawsuit against the employee, alleging a breach of fiduciary duty.

The respondent violated Mass. R. Prof. C. 1.7(a) by representing two parties where there was a significant risk that his representation of one would limit his obligations to the other, without obtaining the informed consent of each affected client, confirmed in writing. The respondent violated Mass. R. Prof. C. 1.9 by continuing to represent the employee in the same litigation in which his former client, the employer, was still a party. The respondent violated Mass. R. Prof. C. 1.16 by failing to comply with the client's request for her client file.

The respondent was admitted to practice in 1991 and has no prior discipline. No demonstrable harm was caused by the conflict or by the delay in obtaining the client file. The respondent received an admonition for his misconduct.

ADMONITION NO. 22-17

CLASSIFICATIONS:

Failing to Seek Client's Lawful Objectives or Abide by Client's Decisions to Plead, Settle, Testify, or Waive Jury Trial [Mass. R. Prof. C. 1.2(a)]

Failing to Communicate with Client for Client Decisions or About Limits of Lawful Representation [Mass. R. Prof. C. 1.4(a)(1) and (b)]

SUMMARY:

In 2017, the respondent prepared a will and related estate planning for an elderly client. In 2020, the respondent received a written request, apparently signed by the client, asking that copies of these documents be provided to the client's daughter. The respondent was concerned that the signature on the letter might not be authentic. He questioned the client's competency at this point in time due to his advancing age and worried, based on his awareness of strife within the client's family over a family business, that the daughter might be attempting to obtain a copy of her father's will without his consent. The respondent accordingly sent a letter to his client seeking an in-person meeting. The respondent did not receive any response from the client but did receive emails from the client's daughter demanding a copy of the 2017 will for both herself and her father.

The respondent sent a letter to his client, the daughter, and the two sons asking them to sign a release to permit him to provide the will to the daughter. The client's son and holder of a durable power of attorney ("POA") for his father called the respondent. The son stated that he, in fact, had concerns about the father's mental state and that the daughter might be trying to pressure the father to make changes to his estate plan. The son informed the respondent that he would get his father evaluated to determine his competency. The respondent took no action of his own to evaluate his client's competency or to ascertain from his client if he personally sent the original letter asking for his will to be sent to his daughter.

The respondent suggested that the son, as POA, execute a revocable trust to hold the father's assets in order to preserve them until the father's competency and desire to change the will had been established. The trust would be fiduciary in nature and provide that the assets were only to be passed as delineated in the 2017 estate plan. Because the trust would be revocable, the father could change it in the future.

The son agreed with the respondent's plan and transferred the father's assets to the revocable trust. The respondent, however, never consulted with his client to determine whether he agreed to transfer his assets to a revocable trust pending the outcome of his competence evaluation.

The father died in 2022. At that time, his wishes, as memorialized in the 2017 estate planning documents, remained in place to be carried out through the revocable trust.

By failing to communicate with his client to determine his competency and directing his power of attorney to execute the revocable trust without obtaining his client's consent, the respondent violated Mass. R. Prof. C. 1.4(a)(1) and (b) and 1.2(a).

The respondent was admitted to the Massachusetts bar on December 17, 1997 and has no prior disciplinary history. The respondent received an admonition for his misconduct

ADMONITION NO. 22-18

CLASSIFICATIONS:

Failure to Notify of Receipt or to Disburse Promptly [Mass. R. Prof. C. 1.15(c)]
Record-Keeping Violation [Mass. R. Prof. C. 1.15(f)(1)(E)]

SUMMARY:

The respondent has a high-volume real estate practice. The respondent had maintained an IOLTA balance of more than $20,000 for at least five years, from 2016 through 2021. The balance represented more than 300 uncleared transactions dating back as far as 2012. Many of the uncleared transactions were checks issued for amounts less than $200 payable to towns, counties, and registries for taxes and other costs related to real estate closings. A small number of the uncleared transactions were payable to the firm. Many of the checks were required for real estate closings. The respondent's reconciliation reports from 2020 and 2021 also showed non-identical reconciliation balances. The respondent's failure to make reasonable efforts to promptly disburse funds from the IOLTA account violated Mass. R. Prof. C. 1.15(c). The respondent's failure to prepare three-way reconciliation reports showing identical balances violated Mass. R. Prof. C. 1.15(f)(1)(E).

The respondent was admitted to practice law in Massachusetts in 2008 and has no prior discipline. The respondent received an admonition for this misconduct and agreed to execute an accounting agreement with bar counsel providing that the respondent would hire an accountant, provide records to bar counsel every three months for one year, and make reasonable efforts to investigate and resolve the uncleared transactions.

ADMONITION NO. 22-19

CLASSIFICATIONS:

Failure to Notify of Receipt or to Disburse Promptly [Mass. R. Prof. C. 1.15(c)]
Creating Negative Balance in Client Ledger [Mass. R. Prof. C. 1.15(f)(1)(C)]

SUMMARY:

The respondent owns a small law firm that conducts a high-volume real estate practice. In August 2020, the respondent transferred funds from his primary IOLTA account to an outgoing wire IOLTA account to complete a mortgage refinance payoff for a client. The wire transfer failed due to insufficient information, so the respondent instead wrote a check from his primary IOLTA account for the mortgage payoff amount. The respondent forgot to transfer the funds from the outgoing wire IOLTA account back to the primary IOLTA account. When the respondent issued a subsequent check from his primary IOLTA account for a separate client matter, the check was dishonored for insufficient funds. The respondent corrected the error by transferring the mortgage payoff funds from the outgoing wire IOLTA account back to the primary IOLTA account and reissuing the dishonored check. By issuing a check that was dishonored, the respondent created a negative balance in a client ledger, in violation of Mass. R. Prof. C. 1.15(f)(1)(C).

The respondent's IOLTA account records were fully compliant with the recordkeeping requirements of Mass R. Prof. C. 1.15(f) but showed that the respondent had more than 100 uncleared disbursements in his IOLTA account for at least two years. The uncleared disbursements were mainly checks issued for amounts less than $1,000, payable to towns, counties, the Commonwealth, registries, and title companies for utilities, taxes, or other costs related to real estate closings. The respondent maintained a balance in the primary IOLTA account of more than $20,000 of uncleared disbursements during this period. By failing to make reasonable efforts to promptly disburse client or third-party funds, the respondent violated Mass. R. Prof. C. 1.15(c).

The respondent was admitted to practice law in Massachusetts in 1993 and has no prior discipline. The respondent received an admonition for this misconduct.