# 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.

# ADMONITION NO. 22-20

## CLASSIFICATION:

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

## SUMMARY:

The respondent is a real estate conveyancing practitioner. The respondent's IOLTA account contained undisbursed funds from numerous real estate matters in the total amount of $54,528. These funds accumulated in the IOLTA account primarily as a result of numerous uncleared transactions, with a few dating back to 2011. The respondent's IOLTA records were otherwise substantially compliant with Mass. R. Prof. C. 1.15. Upon bar counsel's request, the respondent promptly addressed these uncleared and undisbursed items and has reduced the outstanding balance in the IOLTA account to $4,111.02 as of June of 2022. The respondent agreed to make good faith efforts to disburse these remaining funds.

By failing to promptly deliver to clients and third parties funds that they were entitled to receive, the respondent violated Mass. R. Prof. C. 1.15(c).

The respondent was admitted to the bar of Massachusetts in 1985 and has no prior discipline. He received an admonition for his misconduct.

# ADMONITION NO. 22-21

## CLASSIFICATION:

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

## SUMMARY:

In May of 2018 and in August of 2019, the respondent deposited personal funds into his IOLTA account. Beginning in August of 2019 through July of 2020, the respondent used these funds to pay personal obligations directly from his IOLTA account.

The respondent's conduct in maintaining personal funds in his IOLTA account violated Mass. R. Prof. C. 1.15(b)(2).

The respondent has been a member of the bar of the Commonwealth since 1988 and has no prior discipline. He accordingly received an admonition for his conduct in this matter.

# ADMONITION NO. 22-22

## CLASSIFICATIONS:

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

In October 2020, the respondent was hired by a couple (the "buyers") to create a trust, of which the buyers would serve as trustees, and to represent the trust in its purchase of a piece of real estate. The respondent did not communicate to the buyers in writing the scope of the representation and the basis or rate of the fee and expenses for which the buyers were responsible.

The respondent drafted a Purchase and Sale Agreement ("PSA") for the real estate transaction, which was executed by the buyers and seller in October 2020. The buyers made a $10,000 deposit upon execution of the PSA. In accordance with the PSA, the deposit was held in escrow by the respondent in her IOLTA account. The PSA also provided that, in the event of a disagreement between the buyers and seller, the deposit was to be retained by the respondent until she received instructions mutually given by both the buyers and seller for the disposition of the funds. The closing was scheduled for December 2020.

On the closing date, the parties were not ready to complete the purchase, and the PSA expired. In early January 2021, the buyers asked the respondent to return the $10,000 deposit she was still holding in her IOLTA account. The respondent informed the buyers that she needed a written release signed by the buyers and seller. On or about January 22, 2021, the buyers provided the respondent with a written release signed by the buyers and seller, instructing her to return the funds. However, the respondent did not return the funds at that time, and did not explain to the buyers at that time why she was not returning the funds.

The buyers hired a new lawyer to demand that the respondent return the funds. On or about March 10, 2021, the respondent communicated to the new lawyer that she had not returned the funds because the release had not been notarized. This was the first time that the respondent had demanded notarization, and notarization was not required by the PSA. The new lawyer nevertheless obtained a notarized release and mailed it to the respondent on or about March 15, 2021. On March 19, 2021, the respondent refunded the $10,000 deposit to the buyers.

In violation of Mass. R. Prof. C. 1.5(b), the respondent failed to communicate in writing to the buyers the scope of her representation and the basis or rate of the fee and expenses for which the buyers were responsible before or within a reasonable time after commencing the representation. In violation of Mass. R. Prof. C. 1.3 and 1.15(c), the respondent failed to act with reasonable diligence and promptness in disbursing the escrow funds after she received mutual instructions from the buyers and seller to release the funds.

The respondent was admitted in 2008. She has no prior discipline. The respondent received an admonition for her conduct.

# ADMONITION NO. 22-23

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. BD-2021-011

**IN RE: IN THE MATTER OF AN ATTORNEY**

**JUDGMENT AFTER RESCRIPT**

This matter came before the Court, and in accordance with the Rescript Opinion that was entered in the Full Court in SJC-13183 on May 9, 2022, it is ORDERED and ADJUDGED that the following entry of Judgment be, and the same hereby is, made:

"Order of admonition affirmed."

By the Court, (Kafker, J.)

/s/ Maura S. Doyle
Maura S. Doyle, Clerk

ENTERED: June 10, 2022

SJC-13183

IN THE MATTER OF THE DISCIPLINE OF AN ATTORNEY.

May 9, 2022.

Attorney at Law, Disciplinary proceeding, Admonition.

Bar counsel appeals from an order of a single justice of this court, acting on an information filed by the Board of Bar Overseers (board), ordering that the respondent attorney be privately admonished for violation of multiple rules of professional conduct. We affirm.[1]

1. Background. Bar counsel filed a two-count petition for discipline against the respondent, alleging multiple acts of misconduct arising out the respondent's several roles as special personal representative for the estate of an elderly client (grandmother), guardian and coguardian for her disabled grandson (ward), and cotrustee of a special needs trust established for the ward's benefit. A hearing committee of the board conducted an evidentiary hearing and thereafter issued a report of its findings, concluding that bar counsel had established some of the misconduct -- primarily a lack of diligence -- alleged in count one, but none of the violations alleged in count two. It recommended that the respondent be admonished. One member filed a substantial dissent; that member would have found additional misconduct and recommended that the respondent be suspended from the practice of law for six months and a day.

[1] This bar discipline appeal is subject to the court's standing order governing such appeals. See S.J.C. Rule 2:23, 471 Mass. 1303 (2015). We have reviewed the materials filed. Pursuant to our standing order, we dispense with oral argument.

Both the respondent and bar counsel appealed to the board. After a nonevidentiary hearing, the board adopted the hearing committee's report "in part," and "correct[ed]" certain findings "as indicated," essentially accepting many of the dissenting committee member's findings and making additional findings of its own, including that the respondent acted without competence and charged and collected an excessive fee. Considering matters in aggravation and the cumulative effect of the misconduct, the board voted to recommend to the court that the respondent be suspended from the practice of law for three months.

When the matter came before a single justice of this court, she reviewed the information and record of proceedings and concluded, as the hearing committee had previously, that bar counsel established violations of some of the allegations contained in count one but none of the violations in count two, and that the misconduct warranted a private admonition. She concluded that the differences between the hearing committee and the board as to misconduct largely revolved around disputes of fact, which in turn rested substantially on witness credibility. She also reasoned that the differences in the recommended sanctions rested principally on the weight given to certain aggravating factors and the extent to which the individual violations were treated as part of the same misconduct. We agree that the substantial evidence supports the single justice's findings and that an admonition is the appropriate sanction.

2. Sufficiency of the evidence of misconduct. The single justice reviewed the record and concluded that, in amending the hearing committee's findings and making certain additional findings of misconduct, the board failed to accept the hearing committee's role as the "sole judge of the credibility of the testimony presented at the hearing," as S.J.C. Rule 4:01, § 8 (5) (a), as appearing in 453 Mass. 1310 (2009), requires. See Matter of Dasent, 446 Mass. 1010, 1012 (2006); Matter of Tobin, 417 Mass. 81, 85-86 (1994); Matter of Saab, 406 Mass. 315, 328 (1989). She agreed with the board, however, that there was substantial evidence to support the misconduct that the hearing committee did find. See Matter of Abbott, 437 Mass. 384, 393-394 (2002), and cases cited. See also Matter of Segal, 430 Mass. 359, 364 (1999) ("as long as there is substantial evidence, we do not disturb the board's finding, even if we would have come to a different conclusion if considering the matter de novo"). On appeal, "[w]e review the single justice's decision (on issues other than the initial choice of a sanction at the disciplinary stage) to determine whether there has been

an abuse of discretion or clear error of law." Matter of Weiss, 474 Mass. 1001, 1002 (2016).

We agree with the single justice that the hearing committee's findings of misconduct are supported by the record and the evidence the hearing committee found credible.

a. Count one. Count one concerned the respondent's role as a coguardian and guardian for the ward and trustee of the ward's special needs trust. It alleged that the respondent handled a matter when he was not competent to do so, failed to familiarize himself with procedures and law applicable to his role as coguardian, engaged in a conflict of interest, and failed to represent the ward's interests competently and diligently and to seek the client's objectives in violation of Mass. R. Prof. C. 1.1, as appearing in 471 Mass. 1311 (2005); Mass. R. Prof. C. 1.2 (a), as appearing in 471 Mass. 1313 (2015); Mass. R. Prof. C. 1.3, as appearing in 471 Mass. 1318 (2015); and Mass. R. Prof. C. 1.7, as appearing in 471 Mass. 1335 (2015); that he paid himself his legal fees as guardian without obtaining approval from the Probate and Family Court, in violation of Mass. R. Prof. C. 1.5 (a), as amended, 480 Mass. 1315 (2018); and that he failed promptly to release retirement funds that he was holding in his Interest on Lawyers' Trust Account (IOLTA account) on the ward's behalf after a conservator had been appointed, in violation of Mass. R. Prof. C. 1.15 (c), as appearing in 471 Mass. 1380 (2015).

The hearing committee determined that bar counsel proved a subset of the charged misconduct, conduct that it found manifested a lack of diligence but not incompetence. In particular, the hearing committee found, and the board agreed, that the respondent failed to act diligently as guardian and coguardian for the ward, in violation of Mass R. Prof. C. 1.3 (diligence), in two respects: by failing to file annual care plans, see G. L. c. 190B, § 5-309 (b); and failing to secure a home for the ward that was not "unclean, littered with clutter, and had dog and rodent feces in it."[2] In addition, the respondent deposited the ward's income and benefits into his IOLTA account rather than a special needs trust or other individual interest bearing account, in violation of Mass. R. Prof. C. 1.15 (e) (5), as appearing in 440 Mass. 1338 (2004) (prior to July 1, 2015), and Mass. R. Prof. C. 1.15 (e) (6)

[2] A majority of the hearing committee determined that bar counsel had not proved violation of Mass. R. Prof. C. 1.1 (lack of competence) for the same conduct.

(after July 1, 2015). Finally, after conservators were appointed for the ward, the respondent delayed remitting to the conservators funds that the respondent held on the ward's behalf, in violation of Mass. R. Prof. C. 1.2 (a), and Mass. R. Prof. C. 1.15 (c).[3,4]

The board, however, disagreed with the hearing committee's findings in several respects, concluding in particular that the respondent's conduct also reflected a lack of competence. As the single justice correctly observed, however, factual findings predicated on the credibility of witnesses are the province of the hearing committee. See S.J.C. Rule 4:01, § 8 (5) (a); Matter of Saab, 406 Mass. at 328, quoting Salem v. Massachusetts Comm'n Against Discrimination, 404 Mass. 170, 174 (1989) ("[a] mere reading of the transcript is not an adequate substitute for actually observing and hearing the witnesses in determining credibility"). See also Matter of Barrett, 447 Mass. 453, 460 (2006). They "will not be rejected unless it can be 'said with certainty' that [a] finding was 'wholly inconsistent with another implicit finding.'" Matter of Murray, 455 Mass. 872, 880 (2010), quoting Matter of Barrett, supra. Although the board may have accorded weight to certain testimony that the committee did not, that "does not render the evidence supporting

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[3] A majority of the hearing committee concluded that the respondent did not violate Mass. R. Prof. C. 1.15 (c) by continuing to receive income on the ward's behalf into his IOLTA account after successor fiduciaries were appointed because it was not the respondent's obligation to notify the payor retirement board to send the funds elsewhere. It also determined that the respondent did not fail to seek the lawful objectives of his client in refusing to assent to a petition for partition, in violation of Mass. R. Prof. C. 1.2 (a); engage in a conflict of interest, in violation of Mass. R. Prof. C. 1.7 (b), as amended, 430 Mass. 1301 (1999) (prior to July 1, 2015), and Mass. R. Prof. C. 1.7 (a) (2) (after July 1, 2015); or charge a "clearly excessive" or "illegal" fee, in violation of Mass. R. Prof. C. 1.5 (a).

[4] The respondent alleged that the dissenting member of the hearing committee had a conflict of interest, arising out of his representation of the spouse of a witness called by bar counsel, who was an adult child of the grandmother. The board considered the claim on appeal, noted that the respondent was aware of the connection before the hearing, and waived his objection based on the member's disclosure and representations. It stated that the board "discern[s] no bias in the dissent."

the committee's findings 'not substantial,'" Matter of Dasent, 446 Mass. at 1012, or inconsistent.

We acknowledge that, pursuant to S.J.C. Rule 4:01, § 8 (5), the board "may revise[] the findings of fact, conclusions of law, and recommendation of the hearing committee." That said, the single justice determined that the board's "corrections" in this case failed to "accord the committee's findings appropriate deference." Matter of Dasent, 446 Mass. at 1012. The board was not free, for example, to reject the hearing committee's findings concerning the credibility of witnesses who testified about the condition of the grandmother's home, the respondent's testimony concerning the relationship between the ward and a relative who provided care for the ward, or the respondent's explanation as to why he did not join the petition to partition the grandmother's home or act with respect to the mortgage on it. The board similarly was not free to reject the respondent's explanation for retaining certain funds in his IOLTA account. Although the hearing committee did find that the respondent "concealed" from (by failing to disclose to) the conservator that he withheld funds from which he planned to take his legal fees, it credited his testimony that he reasonably believed that, had he sought payment from the conservator, she would not have paid the bill. See Mass. R. Prof. C. 1.15. Because the hearing committee credited the respondent's testimony concerning the remaining funds in his IOLTA account, the single justice's determination that the length of the delay was "minimal" is not clearly wrong.

With respect to the respondent's failure to file an annual "care plan" for the ward, pursuant to G. L. c. 190B, § 5-309 (b), the hearing committee credited the respondent's testimony in support of its finding that the respondent's failure constituted a lack of diligence, in violation of Mass. R. Prof. C. 1.3, but not a lack of competence, in violation of Mass. R. Prof. C. 1.1. Although not specifically referenced in the hearing committee's findings, for example, there was testimony that the respondent attended at least one annual meeting to determine an individual education plan for the ward, which the respondent testified were more detailed that the general care plan required by statute.

With respect to the issue of excessive or illegal fees and the respondent's withholding of funds to pay his fees, the hearing committee determined that an attorney does not violate Mass. R. Prof. C. 1.15 (c) by retaining funds to pay a fee if the attorney has a reasonable belief that the fee otherwise

would not be paid. See Mass. R. Prof. C. 1.15 comment 3. The hearing committee also determined that the respondent was not required to obtain court approval before retaining a reasonable fee for his services. See G. L. c. 190B, § 5-413 (providing for reasonable compensation for attorneys, guardians, and others without prior court order); Mass. R. Prof. C. 1.5 (a). We agree with the single justice that the fact of withholding the fee, without obtaining an initial court order, did not itself establish a violation of the rules of professional conduct, and that where there is a reasonable "risk that the client may divert the funds [from which the lawyer's fees will be paid] without paying the fee," a "lawyer is not required to remit the portion from which the fee is to be paid," provided that any disputed portion must be kept in trust until the dispute is resolved. Mass. R. Prof. C. 1.15 comment 3.

b. Count two. The second count of the petition charged misconduct associated with the respondent's temporary role as special personal representative of the grandmother's estate. It alleged that the respondent failed to exercise his duties and obligations to preserve assets and administer the estate, and failed to take action on certain lawsuits and claims filed against the estate, in violation of Mass. R. Prof. C. 1.1 (competence), 1.2 (a) (seeking lawful objectives of client), and 1.3 (diligence); that he failed promptly to deliver $6,064.20 of estate funds that he was holding in his IOLTA account to a successor personal representative, in violation of Mass. R. Prof. C. 1.15 (c); and that he performed few services for the estate and paid himself a clearly excessive fee, in violation of Mass. R. Prof. C. 1.5 (a).

A majority of the hearing committee determined that bar counsel did not prove the charged violations. It credited the respondent's explanations for his actions as special personal representative. With respect to the delivery of estate funds in particular, the hearing committee concluded that the respondent did not violate Mass. R. Prof. C. 1.15 (c) by failing promptly to deliver a portion of the funds to a successor representative. Citing comment 3 to the rule, the hearing committee reasoned that the respondent was not required to remit the portion of the funds from which he would be paid, considering his testimony that there was a risk that his fees would not be paid.[5] It also

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[5] Comment 3 to Mass. R. Prof. C. 1.15 provides:

"Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the

determined there was no intent to defraud or misappropriate client funds, but only a lack of promptness in accounting. Finally, the hearing committee found that bar counsel did not establish that the respondent's fee was illegal or excessive.

The board generally declined to accept the hearing committee's findings as to this count. It concluded that the evidence established that the respondent failed to marshal the grandmother's estate assets and failed to respond to litigation involving a nursing facility and a foreclosure notice on the grandmother's home, in violation of Mass. R. Prof. C. 1.1 (competence) and 1.2 (a) (seeking lawful objectives of client), and failed promptly to deliver to a successor fiduciary relevant funds held in his IOLTA account, in violation of Mass. R. Prof. C. 1.15 (c). It concluded that comment 3 to Mass. R. Prof. C. 1.15 (c) did not apply in these circumstances, because the comment concerns a "client" who may divert a fee, and not third parties such as a conservator or personal representative. We disagree. For purposes of comment 3, the term "client" includes a fiduciary who acts on behalf of the client. The board also found that the fee charged by the respondent, more than $6,000, was excessive, in violation of Mass. R. Prof. C. 1.5 (a), and that it was "illegal" because he collected the fee without court approval, at a time after he had resigned as special personal representative. Although the single justice did not separately address this point, the hearing committee considered the evidence and the respondent's testimony. It concluded that although the respondent was "sloppy" in his record keeping and lacked diligence in his accounting, the "services performed and the amounts charged appear to be reasonable." Although the respondent did not seek court approval for the fees, they were not "illegal." Cf. G. L. c. 190B, § 5-413. When the hearing committee's determination is accorded due deference, we cannot say there was error in its conclusion.

Finally, we note that the board made certain additional findings concerning uncharged misconduct. We agree with the single justice that, to the extent that any determination was

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client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a layer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed."

made that the respondent used funds from the grandmother's estate to pay expenses for various services at her home solely to benefit one of her family members, it was not charged in the petition for discipline. See Matter of the Discipline of an Attorney, 448 Mass. 819, 825 n.6 (2007) ("The petition did not charge the respondent with deceiving bar counsel. To the extent that the hearing committee determined that the respondent violated disciplinary rules for [the deceptive act], we determine this to be error"); Matter of Orfanello, 411 Mass 551, 556 (1992) (error to rule that attorney violated disciplinary rule that was not charged).

3. Appropriate sanction. The findings adopted by the board amply support the conclusion that the respondent violated multiple rules of professional conduct. Turning to the question of sanction, we consider whether the sanction imposed by the single justice is "markedly disparate from those ordinarily entered by the various single justices in similar cases." Matter of Alter, 389 Mass. 153, 156 (1983). Considering the "cumulative effect of the several violations committed by the respondent," Matter of Palmer, 413 Mass. 33, 38 (1992), we conclude that an admonition is appropriate. See Matter of Gordon, 385 Mass. 48, 58 (1982) (although board's recommendation as to sanction is entitled to substantial deference, "the ultimate duty of decision rests with this court"). Although we give "substantial deference" to the board's recommendation, ultimately, we "decide every case on its own merits such that every offending attorney receives the disposition most appropriate in the circumstances" (alterations and citation omitted). Matter of Moran, 479 Mass. 1016, 1021 (2018).

a. Respondent's conduct. In the main, the facts establish that the respondent failed to act with reasonable diligence in his role as guardian, coguardian, and trustee. The hearing committee did not, however, find that the conduct constituted a pattern or repeated failure, nor that there was either serious harm or a potential for serious harm an issue here: among other things, although not excusing the misconduct, the hearing committee considered that the conduct occurred in the context of the respondent's undertaking multiple roles at the behest of his long-standing client, the grandmother, and that he was placed in the "unenviable position between family members who were hostile to each other."

Absent aggravating factors, similar misconduct has typically resulted in either a private admonition or a public reprimand. See Matter of Kirby, 29 Mass. Att'y Discipline Rep.

366 (2013) (public reprimand for neglect of one matter, with aggravating factors); Matter of Berkland, 26 Mass. Att'y Discipline Rep. 40 (2010) (public reprimand for failure of diligence, failure to seek client's lawful objectives, and failure to communicate adequately, in one matter); Admonition No. 05-20, 21 Mass. Att'y Discipline Rep. 712 (2005) (admonition for neglect of one matter, without actual harm); Matter of Kane, 13 Mass. Att'y Discipline Rep. 321 (1997). In this case, the hearing committee expressly did not find that the respondent's lack of diligence constituted a pattern, nor were repeated failure, serious harm, or potential for serious harm at issue. Because the misconduct was limited to one ward and the period surrounding the grandmother's death, the respondent's lack of diligence is not as egregious as the conduct involved in Matter of Kane, 13 Mass. Att'y Discipline R. at 328 (absent aggravating and mitigating factors, suspension is warranted for "misconduct involving repeated failures to act with reasonable diligence, or when a lawyer has engaged in a pattern of neglect, and the lawyer's misconduct causes serious injury or potentially serious injury to a client or others").

Likewise, failing to place the ward's funds in a trust or separate interest-bearing account, in violation of Mass. R. Prof. C. 1.15 (e), would typically warrant a private admonition or a public reprimand, as would the respondent's multiple violations of accounting requirements. See Admonition No. 15-19, 31 Mass. Att'y Discipline Rep. 779 (2015); Admonition No. 15-25, 31 Mass. Att'y Discipline Rep. 791 (2015). Although he retained third-party funds and failed promptly to remit the funds to the client's fiduciary, he kept the funds in an IOLTA account under the client's name, without commingling, without an intention to convert the funds, and without deprivation to the client. In the circumstances, an admonition is warranted.

b. Aggravating and mitigating factors. Like the hearing committee, the board weighed in aggravation the respondent's substantial experience in the practice of law, his having engaged in multiple violations of the rules of professional conduct (albeit over the course of related matters), and his failure to disclose that he was withholding funds to pay himself for services that had not been billed. See Matter of Gillis, 5 Mass. Att'y Discipline Rep. 136, 141 (1987) (substantial experience in practice of law weighed in aggravation).

Although the hearing committee found no explicit factors to weigh in mitigation of sanction, implicit in its recommendation of an admonition was its acknowledgement that the respondent

"found himself in the middle of a squabble between a dysfunctional family," and its recognition that his "several lapses, other than failure to promptly account for and remit monies, were the result of a combination of a very difficult family situation and his lack of diligence, not a result of any malfeasance." Although we agree with the board that neither a difficult assignment nor lack of harm is considered a special mitigating factor, it does serve to provide context for the misconduct. Considering all the circumstances, we agree with the single justice that an admonition is most appropriate in these circumstances, and we accordingly affirm her order.

So ordered.

The case was submitted on the record, accompanied by a memorandum of law.

Christine A. Helsel, Assistant Bar Counsel.

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

| | |
|---|---|
| BAR COUNSEL, | ) |
| Petitioner, | ) |
| v. | ) |
| RESPONDENT, | ) |
| Respondent. | ) |

# BOARD MEMORANDUM

## Introduction

In two counts, bar counsel charged the respondent with misconduct in his work as special personal representative for an elderly client and as co-trustee and guardian for her disabled grandson. The majority of a divided hearing committee recommended we impose an admonition, while the dissenting member recommended a license suspension of six months and one day. We agree with the dissenting member that the respondent's misconduct warrants a suspension, although under the circumstances of the case we recommend a suspension of three months, not six. Our reasons follow:

## Factual Background[1]

The Family[2]

As of January 1997, Mother and her adult son, Son 1, owned a single family home in Massachusetts as joint tenants with right of survivorship ("the property" or "the home"). Another adult son, Son 2, lived at the property. Two adult daughters of Mother, Daughter 1 and Daughter 2, lived outside the home: Daughter 2 part-time in Massachusetts and Daughter 1 in another state.[3] Son 1 had a son, Grandson, who was disabled. Grandson's mother died when Grandson was six years old; Son 1 died twelve years later, leaving Grandson an orphan at the age of 18. In 2010, Mother, who was of an advanced age at the time, was diagnosed with dementia. She continued to live in the property with Son 2 and Grandson.

Grandson lived at the property and attended a special school until approximately 2012, when he was over 20 years old. At that time, he moved to a specialized group home in Massachusetts, where he stayed during the week. He returned to Mother's home (where Son 2 also lived) on weekends.

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[1] Except where noted, the material facts are not in dispute among the parties, the majority of the hearing committee, or its dissenting member. They were alleged in the Petition for Discipline without denial by the respondent, found by the hearing committee majority by a preponderance of the evidence, or found by the dissenting committee member by a preponderance of the evidence and without contradiction by the majority. Although the hearing committee majority and the dissent disagreed about many issues, their disputes were less about the facts themselves than interpretations of the facts.

[2] As the Respondent will be receiving private discipline, all identifying information has been changed in this Board Memorandum.

[3] The hearing committee majority described the Family as "highly dysfunctional … with a great deal of internal animosity." (Hearing Committee Report ("HCR") ¶ 14). The animosity appears to have existed among Mother and her two daughters. The dissent disagreed (HCR Dissent ¶ 2-3 and 101). Their disagreement on this point is immaterial.

Mother's Estate Planning

The respondent has practiced law in Massachusetts since 1984 and during the time of the events in this case had his own law practice. For many years, he had represented Mother, including in a divorce matter. His practice focused on income tax, with some work in real estate and wills. Prior to the events of this case, he had virtually no experience in estate administration.

In 1997, the respondent drafted the Mother's Irrevocable Trust as well as a deed transferring Mother's one-half interest in the property to that trust (the other half interest belonging to Son 1 while he was living). In March 1998, the one-half interest owned by Mother's trust was conveyed to Mother and Son 1 individually, as joint tenants with right of survivorship. When Son 1 died, Mother owned the house individually, free of any trusts.

In 2008, the respondent drafted a special needs trust for Grandson, referred to as the Trust for Grandson ("Grandson's Trust"), with Mother designated as sole trustee. Upon Mother's death or removal, the respondent and one of Mother's daughters, Daughter 1, would serve as co-trustees. Grandson's Trust would be funded after Mother's death based on the terms in her will, as described in the next paragraph.

On the same date in 2008, Respondent drafted Mother's Last Will and Testament, naming himself as executor and bequeathing as follows: 1) equal one-half shares in the property to Son 2 and the trustee of Grandson's Trust; 2) equal one-half shares in unimproved land in another state to Son 2 and Mother's niece; 3) all household furniture and tangible property to Son 2; and 4) the first $100,000 of the residue of the estate to Grandson's Trust and the remainder, if any, to Mother's three surviving adult children as follows: eighty percent (80%) to Son 2 and ten percent (10%) each to Daughter 1 and Daughter 2.

A few months later in 2008, the respondent and Mother filed a petition in the Probate Court for guardianship of Grandson. In late 2008, the petition was granted, naming the respondent and Mother as co-guardians.

The Respondent's Actions as Co-Guardian and Guardian of Grandson

After Son 1's death and while Mother was alive and competent, she handled all of Grandson's affairs, even though the Probate Court had named the respondent as co-guardian with her. The hearing committee majority and the dissent disagree about the date Mother stopped handling Grandson's affairs such that the respondent became the de facto sole guardian. The majority dates this milestone as occurring in 2013; the dissent places it much earlier, in 2010, when Mother was diagnosed with "acute dementia." The disagreement is immaterial, since there is no dispute that Mother was incompetent and incapable of caring for Grandson no later than 2013, when the misconduct commenced. During the final months of her life, between September 2013 and her death in 2014, Mother did not live at the property other than a few days in March 2014. She lived either in a nursing home or a hospital. During this time, her son, Son 2, was the property's sole full-time resident, with Grandson continuing to live there during weekends until two months after Mother's passing. Upon Mother's death, the respondent became sole guardian of Grandson and the co-trustee with Daughter 1 of Grandson's Trust. He was the sole payee of retirement benefits due to Grandson's late father, Son 1.

During Mother's absence from the home, and continuing after her death, the respondent did not visit Grandson at the property or the group home. He was unaware of the following facts concerning the daily life of his ward: whether Grandson took daily medications and the details thereof; whether Grandson kept clothing at the home; Grandson's relationship with his uncle, Son 2; and whether Grandson was restricted in the home or could move about freely. (HCR, ¶27-28).

No later than February 2014 (while Mother was still alive), the respondent knew that conditions at the property were unsanitary and unsafe. Specifically, Daughter 1 told him that the property was a "cluttered mess." (HCR ¶ 29(a)). The manager of the home care program for Mother informed the respondent in March of 2014 of the presence of rodent feces, expired food, and inappropriate materials in food preparation areas. Son 2, who lived full-time in the home, had failed to stock up on basic food items. On the same date, the respondent was informed, "[t]he entry to the in-law apartment is also covered, almost completely, in dog feces and the smell is terrible and it is not a safe condition for people to be entering and exiting the house." (HCR ¶ 29(d)). In July 2014, Daughter 1 called the respondent and left him a message that the home was a "house of horrors." (HCR ¶ 29(f)). They spoke directly in August 2014, during which time the respondent admitted that he had taken no steps to verify the information or report the conditions to Grandson's group home. (HCR ¶ 29(g)). Soon after their mother's death, Daughter 1 and Daughter 2 visited the property and observed dog feces, bird feathers, thick dust over carpeting and furniture, boxes and furniture everywhere (which created narrow passageways), holes in the ceiling that were covered with duct tape, as well as basement mold and mildew. (HCR ¶ 29(e)). A subsequent inspection by the local Board of Health concluded that the home presented a "severe hoarding situation." (HCR ¶ 29(i)). The health inspector testified that she warned the respondent, "under no circumstances does Grandson go back there until I have reinspected, and I did say that there was a lot of material there." (HCR ¶ 33(e) and Dissent ¶ 12).[4]

[4] The hearing committee majority opined that it was, "[n]ot persuaded that the condition of the house was as terrible as various reports appear to indicate." (HCR ¶ 32). We reject this finding. It is inconsistent with findings elsewhere in the majority opinion, for example, paragraphs 29, 33, and 34. To be clear, we accept the findings by both the majority and dissent that, no later than February 2014 the condition of the home where Grandson spent his weekends was unsafe and unsanitary and (as we discuss in the next paragraph) the respondent knew or should have known of these facts. To the extent the majority declined to credit a witness's testimony (for example, Daughter 2, Daughter 1, or the health inspector as to the condition of the home), the majority failed to explain the reasons it rejected the

The majority did not credit the respondent's denial of knowledge about the condition of the property. We accept this finding. As the hearing report notes, the respondent was informed on multiple occasions about the situation at the property. During the period immediately preceding and following Mother's death, he visited the home and thus, "should have known that the condition of the house may well have posed a threat to Grandson's well-being, and that not attending to it – at least to carefully evaluate its condition – constituted a lack of diligence in his duties as guardian." (HCR ¶ 34). Moreover, as we will discuss later in this Memorandum, the respondent owed a duty to Grandson to stay informed of the conditions in which he was living. Despite his professions of ignorance, he cannot rely on self-serving testimony that he was not made aware of facts he was obligated to know on his own. In the words of a time-worn cliché: "ignorance is no excuse."

In addition to the physical state of the home, Son 2's mental state and behavior constituted a threat to Grandson's well-being. Again, the hearing committee majority and dissent did not disagree on the salient points. Before her death, Mother voiced to the respondent her concerns about Son 2's "temperament issues." (HCR ¶ 35). In March 2014, Daughter 1 emailed the respondent with concerns about Son 2's "psychotic behavior" as well as his acting "belligerent and non-compliant." (HCR ¶ 40). To the respondent, she expressed her concerns for Grandson's well-being. (Id). In July 2014, Son 2 confided to the respondent that he wanted to see a psychologist with an eye toward treating his anxiety (perhaps with medication). After the respondent communicated to Daughter 1 about the conversation, she related to him that Son 2 had

credibility of the witnesses and failed to cite any evidence in the record to support the rejection. Accordingly, the rejection of the witness's testimony cannot stand. Matter of Strauss, 479 Mass. 294, 298, 34 Mass. Att'y Disc. R. 522, 527 (2018). The majority noted the absence of photos that would have recorded the condition of the home, but it did not explicitly rely on the lack of photos as a reason to reject the witnesses' credibility, nor would we accept such a reason.

suffered from anger management and explosive rage issues throughout his adult life. (HCR ¶ 43). The manager from the home care agency, in addition to relating her concerns about the physical state of the home, expressed to the respondent her apprehension about Son 2, so much so that she threatened to call Elder Protective Services. (HCR, ¶ 38).

In August 2014, Daughter 1 filed for an abuse prevention order against Son 2 after the two were involved in a verbal altercation at the home, a fact the respondent knew "at some point." (Petition for Discipline and Answer ¶ 20). Daughter 1 also informed the respondent that Son 2 kept guns in the home and these may not have been secured in a locked compartment as required by law. Despite this information, the respondent testified that his knowledge about Son 2 did not raise any concerns about Grandson's well-being. He did nothing to assess Son 2's conduct toward Grandson during his weekend stays.

After Daughter 2 complained to "numerous authorities" (HCR ¶ 44), Grandson's weekend visits to the property were halted during the first week of September 2014. In October 2014, Daughter 2 filed a motion to remove the respondent as Grandson's guardian and substitute herself and her son (a nurse) as co-guardians. The motion was accompanied by a five-page affidavit reciting her concerns about the physical condition of the property as well as Son 2's behavior.[5] The respondent did not contact the home where Grandson stayed during the week to inquire about the issues raised in Daughter 2's motion and affidavit. In November 2014, the Probate Court appointed a guardian *ad litem* for Grandson. In July 2015, the respondent agreed to relinquish his role as guardian for Grandson. He was succeeded by Attorney 2 and Daughter 2 as temporary co-

[5] Among other assertions, Daughter 2 testified in the Probate Court that she had heard from employees at the group home that Grandson became agitated when he heard Son 2's name and that Grandson returned to the group home after one weekend with scrapes on his knees. At the hearing in this case, the respondent denied knowledge of these specific facts, and the majority accepted his testimony. (HCR ¶ 47). We reject the finding as it is contradicted by the evidence, specifically, the affidavit Daughter 2 filed in Probate Court. Even if we were to agree with the majority on this finding, the record contains a wealth of additional evidence that the respondent knew of the situation with Son 2.

guardians. He took the position (consistent with what he asserted were Mother's wishes) that none of Mother's children be appointed in his place due to their inability to get along.[6]

At no time while he was co-guardian or guardian for Grandson did the respondent file a yearly care plan with the Probate Court. Filing such plans was required by the Massachusetts Uniform Probate Code. The respondent did not research the code, nor did he attend any classes on it, even though he admitted his limited experience as a guardian.

The Respondent's Handling of Funds on Behalf of Grandson

After her son, Son 1's, death, Mother received Son 1's retirement benefits from the local Retirement Board. She used the money to pay for Grandson's care. In June 2014, the respondent requested that the retirement board send the checks to him, as Grandson's co-guardian.[7] From June 2014 through March 2017, the respondent deposited a total of approximately $21,641 of the retirement benefits into his IOLTA account. He did not establish a separate interest-bearing trust account for Grandson such as a special needs trust (assuming the money would soon become part of Grandson's trust once it was funded after Mother's death by her will), nor did he research the impact, if any, these funds would have on Grandson's eligibility for state and federal benefits he was receiving.[8] The respondent knew of the regulations and assumed "there must have been some liability," but he did nothing to protect the assets. (HCR, ¶58). Although this dereliction of duty exposed Grandson to a potential loss of benefits, no actual loss was brought to the attention of the hearing committee.

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[6] The dissent disagreed with the majority that the asserted intra-family quarrels were a sufficient reason for the respondent to not step down as guardian. We need not resolve the issue, as his reasons for not doing so are not relevant to our analysis.

[7] On that date, Mother was still alive. The record does not explain the reason Respondent requested that the money be sent to him rather than Mother while she was living. The question is immaterial to our recommendation.

[8] The majority noted that income over $2,000 per month could disqualify Grandson from MassHealth benefits. Placing the money in a special needs trust, as opposed to holding them in the respondent's IOLTA account, would have protected the funds. (HCR ¶¶ 57-58; HCR Dissent ¶ 36, *citing* 310 CMR Sec. 520.003(A)(1)).

In September 2015, the respondent sent a check in the amount of $10,383 to Attorney 2, one of Grandson's successor temporary co-guardians (along with Daughter 1).[9] The amount represented "most" of the funds in the respondent's IOLTA account on behalf of Grandson. He withheld $1,200.59, which he intended to retain as his fee, as well as an additional $2,338.31. After July 2015 (when he stepped down as Grandson's guardian), the respondent continued to receive the retirement benefits, and he continued to deposit them into his IOLTA account.[10] He continued to do so even after the appointment of Grandson's conservators in June 2016. In his defense, the respondent argued that it was not his responsibility to contact the local Retirement Board and request that the funds be redirected. The majority opinion noted that the respondent did not (but should have) notified the new trustees or the conservators that he was still receiving the benefits. (HCR ¶ 55). In September 2016, Attorney 3 wrote to the respondent, advising him that she had been appointed as co-conservator and inquiring about funds held by the respondent on Grandson's behalf. Not until May 2017 (about nine months later) did the respondent send a payment, in the amount of $10,000, which was not the full amount he held at the time. Even then, he continued to hold back his asserted guardian's fee of $1,200.59 as well as the additional $2,338.31 (this latter amount was not paid until December 2017, and the guardian fee was never paid to Grandson).

The majority found that the respondent had "properly turned over the assets he had been holding for support of Grandson, as his guardian." (HCR ¶ 52). We disagree. The finding is inconsistent with the majority's own findings (based on the documents) that the respondent retained $1,200 as a fee as well as an additional $2,338.31. It is also inconsistent with the

[9] Daughter 2 and her son were not appointed as co-guardians until January 2016; the respondent had resigned in July 2015 and had been replaced by Daughter 1 and Attorney 2 in the interim.
[10] In addition to Son 1's retirement benefits, the respondent received two other checks, which he likewise deposited into his IOLTA account.

majority's findings (discussed in the prior paragraph) that the respondent waited nine months (from September 2016 until May 2017) to transfer funds from his IOLTA account to the conservator; even then, it was not the full amount. (HCR ¶ 94). As the majority notes, the respondent did not disclose the withholding of his fee and admitted he wrongfully withheld the additional $2,338.31. (HCR ¶ 64). In addition, the majority found the respondent's purported invoice for his guardianship fee was incomplete and inadequate. (HCR ¶ 77 and fn. 4). In December 2017, bar counsel instructed the respondent to release to co-conservator Attorney 3 the funds he still held. As the majority notes, this request came fifteen months after Attorney 3's first request. (HCR ¶ 80). Eight days later, the respondent sent to Attorney 3 the amount of $2,338.31, but he continued to hold back his asserted fee of $1,200.59, without disclosing that he was doing so. The respondent paid himself his guardianship fee in January 2018. The payment was neither approved by the Probate Court, nor reported to Attorney 3. The majority concluded that the respondent "concealed" his fee from Attorney 3. (HCR ¶ 82).

The Respondent's Actions as Co-Trustee of Grandson's Trust

When Mother died in 2014, the respondent and Daughter 1 became co-trustees of Grandson's Trust. Also, the respondent became sole payee of Son 1's retirement benefits. On May 10, 2016, Daughter 1 filed a petition for the removal of the respondent as co-trustee of Grandson's Trust. The respondent objected, again on the basis that Mother did not want her children to serve as trustees. About eight months later, in January 2017, the respondent agreed to resign as co-trustee.

While the motion to remove the respondent as trustee was pending, in September 2016, Attorney 3 (on behalf of her client, Daughter 1) requested the respondent, as the other trustee of Grandson's Trust, to sign a Petition for Partition of the property against Son 2 so the property

could be sold and the proceeds used to fund Grandson's Trust. At the time, Son 2, who had inherited his half share on Mother's death, and Grandson's Trust each owned a one-half interest in the property. The need for a Petition for Partition arose because Son 2, who lived rent-free in the home and received payment for his weekend supervision of Grandson, refused to sell it. By contrast, Grandson depended on the property's sale to fund his trust. As the hearing committee majority observed, sale of the property was in Grandson's "best interest." (HCR, ¶ 71). The respondent refused to assent to the petition. He claimed four issues that needed to be resolved before he would assent. As the hearing committee dissent noted (and there is no contrary evidence from the majority), the respondent's four issues were irrelevant to the Petition for Partition. (HCR Dissent ¶ 46). Whatever his reasons, the respondent's refusal to cooperate in the sale of the home caused an unnecessary delay in the funding of his ward's trust. The petition was filed without his assent. Subsequently, he resigned as trustee.

The Respondent's Conduct as Special Personal Representative for Mother's Estate

Count II of the Petition for Discipline concerned the respondent's conduct as special personal representative (SPR) for Mother's estate.

In August 2014, the respondent filed a Petition for Probate of Mother's Will and a request that he be appointed as SPR. In November 2014, the Probate Court judge appointed Attorney 3 as guardian ad litem to represent Grandson's interests in the estate matter. In January 2015, Attorney 3 filed an objection to the respondent's Petition for Probate, arguing that he had a conflict among his roles as personal representative of the estate, co-trustee of Grandson's Trust, and sole guardian for Grandson. In March 2015, the Probate Court appointed the respondent as SPR with the full authority of a personal representative pending the appointment of one. The appointment was to last for 90 days, until June 2015.

Prior to the respondent's appointment as SPR, Nursing Home, filed a lawsuit in the Superior Court for the unpaid balance due for Mother's stay and treatment during her final illness. In December 2014, Nursing Home filed a Notice of Priority Claim in the Probate Court matter of Mother's estate. In January 2015, the respondent had been served with the Summons and Complaint in his capacity as personal representative (prior to the filing of Attorney 3's objections). Despite being served with the complaint, the respondent did not answer, leading to a default judgment against in the estate in favor of the nursing home in the approximate amount of $25,180. After his appointment as SPR, the respondent failed to take any action to remove the judgment or negotiate a settlement with Nursing Home.

In May 2015, Mortgage Company filed a Complaint for Foreclosure against the property, alleging that the mortgage was in default. The respondent was named a defendant in his capacity as estate SPR. The respondent did not answer the Complaint. He was aware that Son 2 had not paid the mortgage since Mother's death. Although he believed that there were defenses to Mortgage Company's claim, (in the nature of a defect in title) he failed to contact the Mortgage Company's lawyers during his tenure as SPR. The majority cited with approval the testimony of the successor personal representative that prompt action by the respondent would have saved the estate several thousand dollars in the dispute with Mortgage Company. (HCR ¶ 130).

In June 2015, the respondent's appointment as SPR expired. The Probate Court appointed a successor personal representative. At the time his term as SPR ended, the respondent held approximately $6,065 in estate funds. Six days later, the respondent filed an Inventory of the estate, the principal assets of which were the home and investments in two bank accounts.[11] In

[11] In May 2015, the respondent transferred $5,000 from one of the bank accounts into his estate account. From this amount, the respondent paid four bills (a veterinarian's bill, a water bill, a rubbish bill, and a cable bill). Bar counsel alleged that these bills were paid for the benefit of Son 2, who continued to live in the home after his mother's death.

July 2015, the respondent filed his First and Final Account as SPR. Included in the account was the respondent's $7,650 bills for executor fees and legal expenses. In April 2016, without disclosure to the successor personal representative, the respondent paid himself $6,065 as a fee for serving as SPR.

## Procedural History

The Petition for Discipline

In February 2019, bar counsel filed a Petition for Discipline in two counts. Count I charged misconduct in connection with the respondent's work as guardian for Grandson and trustee of Grandson's Trust. Count II charged misconduct in the respondent's work as SPR for Mother's estate. The respondent answered in April 2019, denying any misconduct, while admitting certain facts as described in the prior section of this Memorandum.

The Petition charged the following violations of the Massachusetts Rules of Professional Conduct in Count I:

> Rules 1.1, 1.2(a), and 1.3: Lack of competence, lack of diligence, and failing to protect Grandson's interests in the respondent's role as guardian and trustee.
> Rule 1.5(a): Paying himself a fee as guardian without court approval and for paying himself an "excessive fee."
> Rule 1.7(b) (prior to July 1, 2015) and 1.7(a)(2) (after July 1, 2015): Conflict of interest based on divided loyalties between Grandson and Son 2.
> Rule 1.15(e)(5) (prior to July 1, 205) and 1.15(e)(6) (after July 1, 2015): Failure to place Grandson's retirement benefits in a special needs trust account or other interest-bearing account.
> Rule 1.15(c): Failure to promptly release the retirement benefits after the appointment of the conservators.
>
> In Count II:
>
> Rules 1.1, 1.2(a) and 1.3: Lack of competence, lack of diligence, and failing to protect Grandson's interests in the respondent's role

The majority rejected the allegation. We accept the majority's finding. Bar counsel did not sustain his burden of proof to show that the bills were incurred for services solely after Mother's death.

as SPR for Mother's estate by failing to respond to claims and lawsuits against the estate.
Rule 1.15(c): Failure to promptly deliver to the successor personal representative $6,065.20 in estate funds.
Rule 1.5(a): Excessive fee of $6,065.20 for providing "virtually no services" as SPR.

The Legal Conclusions of the Hearing Committee Majority

Count One

*Lack of diligence: Mass. R. Prof. C. 1.3*

The hearing committee majority concluded that bar counsel had proven violations of Rule 1.3 (lack of diligence) The majority rested its conclusion about lack of diligence on the respondent's failure to ensure that his ward lived in a home free from garbage, feces, and extreme clutter. Similarly, the majority concluded that the respondent's failure to deposit the retirement funds in a separate interest-bearing account constituted a lack of diligence. However, the majority declined to find a Rule 1.1 violation (lack of competence) for the same conduct.

*Trust account violations: Mass. R. Prof. C. 1.15(e)(5) (before 7/1/15) and 1.15(e)(6) (after 7/1/15)*

The majority also concluded that the respondent's failure to deposit the retirement funds in a separate interest-bearing account violated Rule 1.15(e)(5) (prior to July 1, 2015) and Rule 1.15(e)(6) (after July 1, 2015). The rule requires that funds in an amount that is more than "nominal" or which will be held for more than a "short period of time" be deposited into a separate interest-bearing account.

*Trust Account Violations: Mass. R. Prof. C. 1.15(c)*

The majority concluded that the respondent's delay in paying the money from his IOLTA account to the conservators violated Rule 1.15 as well as Rule 1.2(a) (failing to protect the interests of the ward by not transferring funds to the conservator). It also held that he violated

both rules by delaying payment of $2,338.31 to the conservator.[12] The majority did not conclude that the respondent violated Rule 1.15(c) by continuing to receive Son 1's retirement funds into his IOLTA account. The majority reasoned that it was not necessarily the respondent's obligation to notify the local Retirement Board to send the money to his successor co-guardians or the co-conservators.

*Incompetence: Mass. R. Prof. C. 1.1*

As discussed above, the majority concluded that the respondent did not violate Rule 1.1 by his failure to ensure a safe living situation for Grandson. In addition, the majority rejected the charge that the respondent violated Rule 1.1, due to his failure to file the annual care plan as required by the Uniform Probate Code. It reasoned that filing the care plan was a "ministerial act" and, "there is more to legal competence than the filing of forms." (HCR, ¶ 87).

*Failure to seek lawful objectives of the client: Mass. R. Prof. C. 1.2(a)*

The hearing committee majority also concluded that bar counsel had failed to prove a violation of Rule 1.2(a), based on the respondent's refusal to assent to the Petition for Partition. The majority concluded that, "the respondent did not even actually refuse to assent, only to condition his assent on answers to 4 [sic] questions." (HCR, ¶ 88). However, as discussed above, the majority did find a Rule 1.2(a) violation due to the delay in remitting the retirement funds to the successor guardians or the conservators.

[12]The majority described the period of delay as nine months. (HCR, ¶ 96). As we will discuss below, the actual delay was much longer. In addition, the majority did not find a violation of the rule based on the respondent's retention of $1,200.59 against his fee, reasoning that he "reasonably feared he would not get paid." (HCR ¶ 96).

*Conflict of Interest: Mass. R. Prof. C. 1.7(b) (before 7/1/15) and 1.7(a)(2) (after 7/1/15)*

Bar counsel charged the respondent with violating Rule 1.7, which precludes representation of a client where, "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." Bar counsel asserted that the respondent's obligations as trustee were compromised by his loyalty to Son 2, whom the respondent had formerly represented in unrelated matters. Bar counsel asserted that the divided loyalty was the cause of the respondent's refusal to assent to the Petition for Partition against Son 2 for the sale of the home. The majority did not find a Rule 1.7 violation. While it noted the prior relationship, the majority concluded there was no evidence that the prior relationship was the reason for the respondent's actions relative to the home.

*Excessive fees; Mass. R. Prof. c. 1.5(a)*

Lastly on Count One, the hearing committee majority concluded that bar counsel had not proven that the respondent's fee for his service as guardian (in the amount of $1,200.59) was "clearly excessive" or "illegal" in violation of Rule 1.5(a). Bar counsel charged two distinct violations of the rule: (1) the amount of the bill as compared to the services actually rendered; and (2) the fact that the respondent paid himself without seeking court approval. Reviewing his bill for his services as guardian, the majority held that, "the time charges do not appear to us to be clearly excessive." (HCR, ¶ 100). The majority concluded that the respondent was not required to seek approval of the court or the ward's representative before taking a fee. It also held that the fee was not excessive in light of the services provided.

Count Two

The hearing committee majority held that the respondent violated no rules in connection with Count Two, concluding that bar counsel did not prove violations of Rules 1.1, 1.2, and 1.3 based on the allegation that the respondent had failed to marshal estate assets or address the Nursing Home lawsuit or the mortgage. The majority concluded that the respondent had not violated Rule 1.15(c) by failing to promptly deliver the $6,065.20 to the successor personal representative. The majority relied on comment [3] to the rule, which permits a lawyer to retain funds if necessary to pay his fee. The majority concluded that the respondent did not intend to defraud the estate, even if he did not act promptly. Lastly, the majority concluded that the respondent's guardianship fee was not excessive, although it conceded "lack of diligence in his accounting." (HCR ¶ 145).

The Hearing Committee's Recommended Sanction

As we have written, there were virtually no important factual differences between the majority of the hearing committee and the dissenting member. They also largely agreed on the rules the respondent had violated, at least on Count I. Despite this, they came to disparate recommendations for sanction. While the majority recommended an admonition, the dissent recommended a license suspension of six months.

On appeal, the respondent has argued that the dissenting member of the committee (who was also the committee chair) was biased against him because he had formerly represented one of the hearing witnesses, Witness 1 (the husband of Grandson's aunt, Daughter 2). In addition, the law firm where the chair is a partner had done other legal work with Witness 1. We reject the argument. The respondent knew of the connection before the hearing, and he waived his objections based on the chair's disclosure and representation that it would not have an impact on

his objectivity. More importantly, we discern no bias in the dissent. The dissent's legal conclusions and his recommendation for a sanction are legally correct under our case law.

## Conclusions of Law

### Count One

Lack of Diligence. We agree with the hearing committee that the respondent violated Rule 1.3 in several respects. His tenure as Grandson's co-guardian, sole guardian, and co-trustee of Grandson's Trust was characterized by lack of diligence. In reaching this conclusion, we accept the following facts as found by all three members of the committee (majority and dissent): (1) the respondent knew or should have known of the abysmal condition of the home where Grandson spent his weekends, yet he did nothing to remedy the situation; (2) at no time during the relevant period did the respondent visit his ward either at the property or the group home, and he knew virtually nothing about his daily living situation; and (3) the respondent failed to deposit Grandson's income (his father, Son 1's, retirement benefits) into a separate interest-bearing account, thereby exposing Grandson to a potential loss of state or federal benefits. All of the above actions (or, more accurately, inactions) violated Rule 1.3.

Unlike the hearing committee majority, we further conclude that the respondent knew or should have known that Grandson's Uncle, Son 2, was an unfit person to supervise Grandson on the weekends after Mother died, and this misconduct constitutes an additional violation of Rule 1.3 as well as rule 1.1.[13] We do not accept the hearing committee majority's finding that the respondent did not know of Son 2's strange behavior nor that he should not have known about it.

[13] Section 5-209(b)(2) of the Massachusetts Uniform Probate Code (Mass. G.L. c. 190B, sec. 5-309(b)) (MUPC) provides that the guardian of a ward or incapacitated person shall, "[b]ecome or remain personally acquainted with the ward or incapacitated person and maintain sufficient contact with the person to know of his or her capacities, limitations, needs, opportunities, and physical and mental health." The respondent's ignorance of Grandson's situation represents a clear violation of the statute. It was incompetent. He offered no reason or excuse for his dereliction of basic responsibility to a vulnerable ward.

The finding is contradicted by voluminous evidence about Son 2's erratic and potentially dangerous behavior, including evidence noted by the majority such as a communication from Daughter 2 to the respondent about Son 2's "mental instability" and his keeping guns in the home. (HCR ¶ 46). (The hearing committee dissent recites the evidence at his paragraphs 21-23). Allowing Grandson to remain in the home with Son 2 exposed him to a perilous situation.

Failing to seek the lawful objectives of his client. Further, we disagree with the hearing committee majority as to the respondent's refusal to cooperate in the sale of the home. We conclude that the respondent's failure to cooperate as trustee of Grandson's Trust in the sale of the home violated Rule 1.2(a) (seeking the lawful objectives of the client). In reaching this conclusion, we reject the hearing committee majority's finding that the respondent had valid reasons for his obduracy regarding the sale of the home or that there is a distinction between the respondent's interposing numerous questions about the transaction and a lack of assent. (HCR, ¶ 88). Lack of assent is lack of assent. There was no evidence that the respondent advanced Grandson's interests by refusing to cooperate. There was no basis for the home not to be sold.[14] His refusal to cooperate compelled litigation and legal expense to the trust.

Incompetence. We disagree with the hearing committee majority that the respondent's failure to file an annual care plan with the Probate Court did not run afoul of Rule 1.1. Section 5-209(b)(6) of the MUPC provides in pertinent part that the guardian of a ward or incapacitated person shall,

> [r]eport the condition of the ward or protected person and of his or her estate that has been subject to the guardian's possession or

[14] On the other hand, we agree with the majority that bar counsel did not prove a violation of Rule 1.7 based on an asserted conflict of interest between the respondent's responsibility to Grandson and his assumed loyalty to Son 2. As did the majority, we find bar counsel's proof on this point speculative and lacking in hard evidence. While Son 2 may have had an interest in remaining in the property, there was no evidence that Son 2's objectives were the cause of the respondent's obstinance. Regardless of the respondent's motives, his failure to cooperate in the sale of the property was a violation of Rule 1.2(a).

> control, as ordered by the court on petition of any person interested in the [ward's] welfare or as required by court rule, but not less than annually.

To characterize the filing of a care plan in the words of the hearing committee majority as a "ministerial act" misses the mark; filing the plan is an important component of ensuring that a ward receives adequate care and attention. It is required by statute. More than simply "filing a form," a care plan requires a detailed report by the guardian. In this case, a care plan would have focused attention on Grandson's situation and the apparent apathy the respondent exhibited to his ward. Filing the document with the court requires competence at its most basic level.

The respondent had virtually no experience as a guardian. He admitted he did not research the MUPC. He admitted he did not attend any classes on the statute. His disregard of his duties represents not only a lack of diligence, but incompetence as well. As explained in comment [5] to Rule 1.1, "Competent handling of a particular matter includes inquiry into and analysis of the actual and legal elements of the problem, and use of methods and procedures meeting the standard of competent practitioners." Matter of Cohen, 27 Mass. Att'y Disc. R. 143 (2011) (attorney violated Rule 1.1 by doing no work after being retained); Matter of Thompson, 16 Mass. Att'y Disc. R. 390 (2000) (same). We have no difficulty in concluding that the respondent's failure to attend to Grandson's living conditions and to file an annual care plan – caused at least in part by his ignorance of the statute – fits the definition of incompetence.

Trust account violations. With respect to the handling of Grandson's income, we also agree with the hearing committee that the failure to set up a separate account violated Rule 1.15(e)(5) (prior to July 1, 2015) and Rule 1.15(e)(6) (after July 1, 2015). The rule requires that trust funds in an amount that is more than nominal or which will be held for more than a short time be deposited into a separate interest-bearing account. The respondent accepted Son 1's

retirement benefits on behalf of Grandson from June 2014 until March 2017, a period of almost three years. The total amount that he accepted was approximately $21,641, which we conclude is more than "nominal." (HCR ¶ 51). Although the respondent occasionally remitted some of the money to his successor guardian and to the conservators (once they were appointed), the crux of the Rule 1.15(e) violation is the duration of the account and the amount that flowed through it.

Not only did the respondent fail to establish a separate special needs trust account, he delayed remitting the money in his IOLTA account to the successor guardian and (later) the conservators. The majority concluded, and we agree, that the respondent's delay in turning over the funds violated Rule 1.2 and Rule 1.15(c), which requires prompt notice and delivery of trust property to third persons. However, we disagree with the majority that the period of delay was minimal (either nine months or 2 and ½ months according to the hearing committee). (HCR, ¶ 96 and 99). Although even a delay of that length would violate the rule, the respondent's recalcitrance was far worse.

For ease of reference, the chronology of events and payments is as follows:

i) June 2014: respondent first receives retirement funds
ii) July 2015: respondent resigns as guardian and is replaced by temporary successor guardians, Attorney 2 and Daughter 2
iii) September 2015: respondent pays $10,383 to successor temporary guardians (representing all but $1,200.59 and $2,338 of the money he held, which he did not disclose)
iv) January 2016; Daughter 2 and son appointed permanent guardians for Grandson
v) February 2016: Daughter 2 demands respondent pay all funds in his IOLTA account in addition to those paid in September 2015
vi) June 2016: Attorney 3 and Daughter 2 appointed co-conservators
vii) September 2016: Conservator Attorney 3 inquires of respondent about the status of the retirement funds and explains her duty to marshal assets
viii) November 2016: Attorney 3 requests that respondent turn over to her all funds he holds on behalf of Grandson and asserts his lack of authority to receive funds
ix) January 2017: Respondent sends Attorney 3 his bill for services as guardian
x) April 2017: Attorney 3 again demands respondent remit all funds to her

xi) May 2017: Respondent remits payment of $10,000 to Attorney 3, continuing to hold back the $1,200.59 and $2,338.31, again without disclosing what he was retaining

xii) December 2017: Respondent sends to Attorney 3 a payment of $2,338.31, again without disclosing that he was withholding his fee of $1,200.59

xiii) January 2018: Respondent transfers $1,200.59 from his IOLTA account to himself as his fee.

As made clear by the chronology, no later than February 2016, the successor guardians demanded the respondent pay them the remaining funds in his IOLTA account. (HCR, ¶ 67). However, the next payment was not until May 2017 and even then he continued to hold back about $3,000. Setting aside the money he withheld for his fee, he continued to hold $2,338.31 until December 2017, almost two years after the initial demand. As the court noted in Matter of Grossman, 448 Mass. 151, 23 Mass. Att'y Disc. R 242 (2007), even small amounts of money (in that case less than $1,000) violate the rule. Bar counsel proved that there was no basis for the respondent to not immediately turn over the money to his successor guardians or the conservators.

Excessive fees. Lastly as to Count One, we do not accept the hearing committee's conclusion that the respondent complied with Rule 1.5(a) when he paid himself the guardian's fee of $1,200.59 without obtaining approval from the conservator (Attorney 3) or the court, despite twice trying to do so. As the majority found, the respondent "concealed" the payment to himself from the court and Attorney 3. (HCR, ¶ 82). Rule 1.5(a) prohibits fees that are not only "clearly excessive," but also those that are "illegal." Since court approval was required before payment (the respondent was no longer the guardian) and based on the majority's finding of concealment, we have no difficulty in concluding that the respondent ran afoul of the rule.[15]

[15] We decline to make a finding whether the amount of the guardianship fee ($1,200.59) was excessive under the rule. The respondent's invoice (Ex. 66) detailed nine hours of work, most of which appears reasonably necessary for the tasks at hand. The math works out to about $133 per hour. The committee was provided no evidence that the rate was unfair.

**Count Two**

The hearing committee concluded that the respondent did not violate any of the rules charged in Count Two. We disagree.

The respondent performed no substantive work in his role as SPR. The majority's own findings establish his failure to marshal estate assets and failure to respond to the Nursing Home complaint and the Mortgage Company foreclosure notice. While the respondent testified that he had valid arguments to contest the mortgage, the majority noted that he never asserted those arguments. (HCR, ¶ 130). Indeed, he never contacted anyone from the Mortgage Company to negotiate a resolution, and he failed to pay the property insurance and taxes. The majority quoted with approval the successor personal representative's testimony that timely action by the respondent could likely have lowered the cost to redeem the property from foreclosure. (HCR, ¶ 130). The majority's explanation for the respondent's inattention to the matter – that he was in a difficult spot of responding to competing interests of squabbling family members – is not a defense to the misconduct. Indeed, the respondent knew at the time he took the assignment that, in the words of the hearing committee majority, the family was "dysfunctional." His petition for appointment as SPR specifically referenced the Nursing Home claim and other bills that required prompt attention. (HCR ¶ 114). Yet, he did nothing.

In similar cases, we have concluded that lawyers violated Rules 1.1, 1.2(a), and 1.3. Matter of Harvey, 31 Mass. Att'y Disc. R. 254 (2015) (failure to disburse personal property and breach of fiduciary duties as estate executor); Matter of Kasilowski, 31 Mass. Att'y Disc. R. 357 (2015) (failure to file estate tax returns and to pay estate taxes); Matter of Kydd, 25 Mass. Att'y Disc. R. 341 (2009 (delayed probate of estate, failure to timely marshal estate assets, failure to file estate tax returns). Lawyers representing themselves as fiduciary have been held to violate Rule

1.2(a) (seek lawful objectives of client). Matter of Brogna, 27 Mass. Att'y Disc. R. 78 (2011) (lawyer as estate executor failed to timely file inventory and account).

Lastly as to Count Two, we do not accept the majority's conclusion on Rule 1.15(c), specifically the fee the respondent paid himself as SPR. As discussed above, the respondent held back from his successor (the successor personal representative) the amount of $6,064. The successor personal representative was appointed in August 2015. The respondent waited until March 2016 to transfer the money from his IOLTA account to a personal account. He did so without notifying the successor personal representative or the Probate Court. He did so at a time when he was no longer the SPR, so he had no legal authority to do so. Contrary to the hearing committee majority's conclusion, this conduct violated the rule. The majority held that the respondent could properly retain his fee pursuant to comment [3] of Rule 1.15(c), which permits a lawyer to hold onto his or her fee if there is a risk that a client or third party may divert the fee. The disputed portion of the fee must be held in trust, while the undisputed portion must be paid promptly.

Comment [3] does not apply to this case. It refers to "clients" who may divert a fee, not third parties such as a conservator or personal representative. Moreover, even if the comment applied, the respondent did not follow the procedure of setting aside in escrow only the disputed part of the fee. Finally, the majority noted that some of the work for which the respondent charged the estate was irrelevant to his work as SPR. (HR, ¶ 140-141).

Under these circumstances, paying himself a fee in excess of $6,000 in a case where he performed no discernable work is a violation of Rule 1.15(c). The same conduct also violates Rule 1.5(a). The fee was excessive, since it appears that the respondent did no work of any use to

the estate. Indeed, he failed to respond to at least two pressing issues: the Nursing Home lawsuit and the mortgage foreclosure.

## Matters in Mitigation and Aggravation

### Mitigation

The respondent pled no facts in mitigation. *Sua sponte*, the hearing committee concluded that,

> [t]he respondent found himself in the middle of a squabble between [sic] a dysfunctional family … His several lapses, other than failure to promptly account for and remit monies, were the result of a combination of a very difficult family situation and his lack of diligence, not as a result of any malfeasance. In addition, it is noted that none of the violations proved resulted in substantial harm or risk of substantial harm.

(HCR, ¶ 149).

Even accepting the observation as true (and we do not adopt the premise that the respondent's misconduct posed no risk of substantial harm), factors such as a difficult assignment or lack of harm are not mitigating. *See* Massachusetts Bar Discipline: History, Practice and Procedure, Chapter 18, Section 2(B) (2018) (discussing special mitigating factors). And, as the majority acknowledges, not all of the violations may be blamed on a "dysfunctional family." Lastly, the respondent did not plead this factor in mitigation as part of his Answer to the Petition for Discipline, thereby waiving it. Matter of Patch, 466 Mass. 1016 (2007); B.B.O Rules, Sec. 3.15(f).

**Aggravation**

The hearing committee majority found the following aggravating factors, which we adopt: the respondent's many years of experience as a lawyer; his engaging in multiple disciplinary violations; and his concealment from Attorney 3, the successor personal representative, and their clients his withholding funds in order to pay himself.

The majority did not find that harm to Grandson should be considered in aggravation based on legal fees incurred to replace the respondent as guardian. We agree. In whatever form, the harm or risk of harm to Grandson is already considered on the merits of the charges. Further, bar counsel has not provided evidence that the respondent should not have objected to his removal. We also approve the majority's declining to find in aggravation the respondent's "evasive" testimony. The committee observed first-hand the respondent's demeanor. We defer to the majority's assessment. On appeal, bar counsel points to several instances where witnesses contradicted the respondent's testimony. (Bar Counsel's Objections to and Appeal from Hearing Committee Report, page 24-25). That a respondent's testimony was contradicted on a certain point or multiple points does not require a finding that the testimony was evasive or lacked candor.

Likewise, we defer to the majority's assessment that the respondent did not fail to acknowledge, "the nature, effects and implications of his conduct relative to Grandson's wellbeing, and the failure of the [r]espondent to settle the mortgage foreclosure issue." (HCR, ¶ 155). Again, the committee was in the best position to make this assessment.

A lawyer who takes advantage of a vulnerable client may also be subject to an increased sanction. Matter of Lupo, 447 Mass. 345, 354, 22 Mass. Att'y Disc. R. 513 (2006). On appeal, bar counsel has urged this factor, which the hearing committee majority rejected. We agree with

the majority. While Grandson was clearly vulnerable, the factor has been applied only when the respondent takes advantage of the vulnerability. Id.; Matter of Font, 30 Mass. Att'y Disc. R. 155, 156 (2014). In this case, the respondent did not do so. This is not a case, for example, where a lawyer defrauded an intellectually challenged person. Matter of Pemstein, 16 Mass. Att'y Disc. R. 339, 345 (2000).

In sum, we affirm the hearing committee majority's findings in aggravation both as to those the majority took into account and those it rejected.

**The Appropriate Sanction**

In the final analysis, we conclude the respondent violated Rules 1.1, 1.2(a), 1.3, 1.5, and 1.15(c) and 1.15(e). We also affirm the hearing committee majority's application of several aggravating factors. While bar counsel did not prove specific, actual harm to Grandson, the respondent's misconduct potentially caused a great deal of harm, both financially and otherwise.

In recommending a sanction, we inquire whether our recommendation is "markedly disparate from those ordinarily entered" in similar cases. Matter of Alter, 389 mass. 153, 156 (1983). Ultimately, each case must be decided on its own merits, "such that every offending attorney … receive[s] the disposition most appropriate in the circumstances." Matter of Lupo, 447 Mass. 345, 356 (2006).

We begin with Matter of Kane, 13 Mass. Att'y Disc. R. 321, 329 (1997). Under the well-accepted standards of that case, absent aggravating factors, suspension is the appropriate sanction when a lawyer's repeated failure to act with reasonable diligence or a lawyer's pattern of neglect causes serious injury or potentially serious injury. In Matter of Kydd, *supra*., the respondent's license was suspended for three months for his protracted neglect of an estate matter, aggravated by non-cooperation with bar counsel. Attorney Kydd's neglect caused actual harm to his ward.

Similarly, in Matter of Lansky, 22 Mass. Att'y Disc. R. 446 (2006), we recommended a six-month suspension for neglect in two estate matters and engaging in a conflict of interest, aggravated by prior discipline. In Matter of Ross, 19 Mass. Att'y Disc. R. 376 (2003), we suspended the respondent's license for one year (with six months stayed) for neglect and mismanagement of a ward's affairs. In that case, we found that the respondent's reimbursement to compensate for the financial harm was a mitigating factor.

This case falls squarely within our precedent. While bar counsel did not quantify financial harm to Grandson, the respondent's misconduct indisputably created a risk of harm. For example, the failure to deposit the retirement benefits into a separate special needs trust account exposed Grandson to losing important financial benefits. The respondent's refusal (for no apparently valid reason) to cooperate in the sale of the home could have led to the loss of the single most valuable estate asset. In any event, it caused a delay in the sale and additional costs. Similarly, the failure to contest the Mortgage Company foreclosure (or to negotiate a settlement), could have led to loss of the property. Not answering the Nursing Home complaint (allowing it to proceed to default judgment) created a risk of substantial harm. And, while it is impossible to discern actual harm to Grandson caused by the situation at the property (both its physical condition and Son 2's behavior), it is reasonable to conclude that he suffered a great deal of damage. The respondent's basic duty to his vulnerable ward was to ensure his health and safety. Due to incompetence, neglect, or a combination of both, the respondent fell down on this most fundamental responsibility.

On top of the neglect and incompetence, we are faced with the respondent's failure to comply with trust accounting rules. He failed to deposit checks, such as Son 1's retirement funds in a separate special needs trust. He did not promptly notify the conservators of the funds he was

holding. He also failed to promptly remit funds. When he finally did so, he wrongfully held back money, some of which he claimed as a fee and then paid himself without the required notice to the representative and the court. Absent deprivation or an intent to deprive the client or ward of money, failing to promptly pay funds to a third party warrants a public reprimand. Matter of Hughes, 25 Mass. Att'y Disc. R. 277 (2009); Matter of Coyne, 28 Mass. Att'y Disc. R. 162 (2012).

Violations of Rule 1.5(a) for collecting a clearly excessive or illegal fee are also sanctioned typically by a public reprimand. Matter of Fordham, 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996).

On their own, each of the rules violations would warrant no more than a public reprimand or a short suspension. Also, we are mindful of the lack of significant, actual harm. Nevertheless, we are confronted by numerous breaches as well as several aggravating factors. We must consider the cumulative effect of the respondent's several violations. Matter of Palmer, 413 Mass. 33, 38 (1992). Serving as a guardian and estate representative is a solemn undertaking. Grandson deserved more attention and care than the respondent gave him. Under our case law, we recommend that the Supreme Judicial Court suspend the respondent's law license for three months.

/s/ April C. English
April C. English, Esq.
Secretary

Dated: February 8, 2021

# ADMONITION NO. 22-24

## CLASSIFICATION:

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

## SUMMARY:

An admonition was issued by the Board of Bar Overseers following the respondent's representation of adverse parties in related litigation matters.

In May 2019, a client ("grandfather") retained the respondent to explore obtaining guardianship of his granddaughters who had been removed from his daughter's custody by the Department of Children and Families and placed with other family members who were appointed as guardians. The guardianship matters were pending in the probate and family court. The respondent instead recommended to the grandfather that he file a petition for grandparent visitation and prepared the petition. The petition was not filed with the court by the respondent.

In November of 2020, the respondent was retained by the grandfather to represent the daughter in a petition for removal of the guardians of her children. The grandfather agreed to pay the respondent for representation of his daughter. The respondent believed this approach furthered the interests of both the daughter and grandfather. Before undertaking representation of the daughter, the respondent did not advise her to consult with independent counsel. The representation of the daughter involved a concurrent conflict of interest as there was a significant risk that the representation of the daughter would be materially limited by the respondent's responsibilities to the grandfather. Despite the existence of a concurrent conflict of interest, the respondent failed to obtain informed consent to the conflict in writing from the grandfather and daughter.

On April 1, 2021, the respondent filed petitions for removal of guardians of the minor children on behalf of the daughter in the guardianship matter. The respondent believed he was pursuing a "team" approach that would further the interests of both daughter and grandfather, because having family support would bolster the daughter's argument for custody. On April 12, 2021, the grandfather, acting *pro se*, filed a separate action in the probate and family court for grandparent visitation. Against the respondent's advice, on June 11, 2021, the daughter filed a *pro se* objection to the grandfather's petition. In the objection, she raised concerns about the grandfather's influence on the minor children. On July 15, 2021, the respondent represented the daughter at a hearing on the petition for grandparent visitation. Following the hearing, the respondent recognized there was a conflict of interest. On August 17, 2021, the respondent withdrew his appearance from the guardianship and visitation proceedings due to the conflict.

The daughter and grandfather subsequently retained successor counsel. Custody was returned to the daughter in the guardianship proceeding and the parties agreed upon a visitation schedule for the grandfather, which was made a part of the judgment in the visitation case. There was no ultimate harm to either client.

By representing the daughter where the representation was materially limited by the respondent's obligations to the grandfather, and without obtaining informed consent in writing or advising the daughter to seek independent counsel, the respondent violated Mass. R. Prof. C. 1.7(a) and (b).

The respondent was admitted to practice in Massachusetts in 1998 and has no prior discipline. The respondent received an admonition for the misconduct.

# ADMONITION NO. 22-25

## CLASSIFICATIONS:

No Written Fee Agreement [Mass. R. Prof. C. 1.5(b)(1)]
Conflict of Interest [Mass. R. Prof. C. 1.7(b)(2), as in effect prior to July 1, 2015]
S.J.C. Rule 4:01 § 10.

## SUMMARY:

The respondent represented both the seller and buyer in connection with the sale of ten (10) vacant real estate parcels that closed on February 27, 2013. The respondent obtained informed consent from both parties as to the potential conflict of interest. He failed, however, to disclose in writing to both parties the scope of the representation and the basis or rate of the fee and expenses. The fee exceeded $500.00. The respondent's conduct violated Mass. R. Prof. C. 1.5(b)(1).

In a separate matter, the respondent represented both the mortgagor and mortgagee in connection with the execution of a mortgage deed on March 7, 2014. The respondent reasonably believed that in the circumstances he could provide competent and diligent representation to both parties, but he failed to consult and explain to both parties the implications of the dual representation, as well as the advantages and risks involved, and obtain their informed consent. The respondent's conduct did not result in harm to the mortgagor or mortgagees. The respondent's conduct violated Mass. R. Prof. C. 1.7(b)(2), as in effect prior to July 1, 2015.

Finally, in 2021, the seller in the 2013 real estate transaction described above filed a request for investigation of the respondent with the Office of Bar Counsel. The seller complained that one of the real estate parcels was mistakenly conveyed to the buyer. The respondent contacted both the seller and buyer and attempted to rectify the matter. In doing so, the respondent proffered a settlement that was conditioned on the seller withdrawing his disciplinary complaint against the respondent. The matter was ultimately resolved without requiring the withdrawal of the disciplinary complaint. By attempting to make the withdrawal of the disciplinary complaint a condition of the settlement, the respondent violated S.J.C. Rule 4:01 § 10.

The respondent was admitted to the Massachusetts bar on November 19, 1968 and has no prior discipline. He received an admonition for his misconduct.

# ADMONITION NO. 22-26

## CLASSIFICATION:

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

## SUMMARY:

In February 2021, the client retained the respondent to represent them in connection with the probate of their father's estate. The respondent and client agreed that the case would be billed on an hourly basis, but that no retainer was required. The respondent failed to communicate in writing the scope of the representation and the basis or rate of the fee and expenses for which the client was responsible before or within a reasonable time after commencing the representation. The respondent timely contacted counsel to the proposed personal representative of the estate, and filed the client's objections to the appointment of that personal representative. After a full hearing on the client's objections, the objections were denied and the personal representative for the estate was appointed. After the hearing, the attorney/client relationship deteriorated in large part because the scope of the representation and the rate of the fee had not been communicated to the client in writing, and the representation was terminated.

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

The respondent was admitted to the bar in 1996. The respondent has no previous discipline. The respondent received an admonition for this misconduct.

# ADMONITION NO. 22-27

## CLASSIFICATION:

Improper Communication with Represented Person [Mass. R. Prof. C. 4.2]

## SUMMARY:

On October 30, 2020, the maternal grandmother of a minor child ("the client") retained the respondent with respect to care and protection proceedings in juvenile court. The client hoped to obtain custody of the child.

Prior to the commencement of the action, the Department of Children and Families ("DCF") had taken the child into custody. The child, mother, and father each had separate court-appointed counsel. An initial placement hearing on temporary custody was scheduled for November 2, 2020.

Sometime prior to October 31, 2020, the client informed the respondent that the child's parents were agreeable to the client obtaining legal custody. Based on that representation, on October 31, 2020, the respondent emailed to the client partially prepared waiver and consent forms in support of a petition for client's guardianship of the child for the client to present to the mother and father for completion and signature. The respondent was aware that the parents each had legal counsel. The respondent did not, however, seek counsel's authorization to, through the client, present the guardianship forms to the parents to be completed and signed in front of a notary, or otherwise notify counsel of the communications. While represented parties may communicate with each other, attorneys may not make a communication through the acts of another, including delivering messages, advice, or information, or eliciting information. See ABA Formal Opinion 11-461 (2011).

On November 1, 2020, the client obtained the notarized signatures and assents from each parent. On the same date, the respondent electronically served the Petition for Guardianship of a Minor and the notarized assents, upon the child's counsel and a DCF case manager assigned to the child, but not on the parents' attorneys.

At the hearing in the Care and Protection matter on November 2, 2020, the respondent, on behalf of the client, filed an appearance and the guardianship documents, including the petition and notarized assents. As the client was not a party in the matter, the court did not allow the respondent to participate in the care and protection proceedings and the hearing was continued. Later that month, the client moved to dismiss the guardianship petition; however, she was ultimately awarded custody in the Care and Protection matter.

By communicating indirectly without authorization about the subject matter of the representation with persons whom the respondent knew had legal counsel, the respondent violated Mass. R. Prof. C. 4.2.

The respondent was admitted to practice in 2010 and has no prior discipline. In this matter, the respondent received an admonition and will attend a continuing legal education class designated by bar counsel.

# ADMONITION NO. 22-28

## CLASSIFICATIONS:

Trust Account Commingling [Mass. R. Prof. C. 1.15(b)(2)]
Record-Keeping Violation [Mass. R. Prof. C. 1.15(f)(1)(D)]
Record-Keeping Violation [Mass. R. Prof. C. 1.15(f)(1)(E)]

## SUMMARY:

Between October 2020 and March 2021, the respondent did not comply fully with the recordkeeping requirements of Mass. R. Prof. C. 1.15. Specifically, the respondent neglected to use client ledgers in his reconciliations and thus was only performing two-way reconciliations of his IOLTA account. He also did not maintain a ledger for bank fees and charges. Additionally, over time, the respondent accumulated earned fees totaling more than $40,000 in the account.

The respondent therefore violated the Massachusetts Rules of Professional Conduct in the following respects. By failing to withdraw earned fees from the IOLTA account in excess of the permitted minimal sum for bank fees, the respondent violated Mass. R. Prof. C. 1.15(b)(2). By failing to maintain a bank fees and charges ledger, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(D). By failing to prepare and retain three-way reconciliation reports, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(E).

At the conclusion of bar counsel's investigation, the respondent agreed to withdraw the earned fees from the IOLTA account and close the account. He also opened a new IOLTA account and maintained records that were fully compliant with Mass. R. Prof. C. 1.15.

The respondent has been a member of the Massachusetts bar since 1975 and has received no prior discipline. He accordingly received an admonition for his misconduct.

# ADMONITION NO. 22-29

## CLASSIFICATION:

Advancing Frivolous Claim or Defense [Mass. R. Prof. C. 3.1]

## SUMMARY:

The respondent represented a municipal employee in a federal employment discrimination suit against a Town and multiple Town officials. Among the named defendants was an individual Town Meeting member ("TMM"), one of over 200 members of the Town Meeting. The complaint alleged that, after the plaintiff's discrimination allegations had become a matter of public debate, TMM made and distributed comments critical of the plaintiff to Town Meeting members and others, in violation of certain civil rights statutes. TMM filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and also a Motion for Sanctions pursuant to Fed. R. Civ. P. 11.

The motions were referred to a Magistrate Judge (the "Magistrate"), who found that the complaint did not allege any actionable harm or civil rights violation that the plaintiff suffered as a result of TMM's actions. The Magistrate recommended that the claims against TMM be dismissed with prejudice. The District Court adopted the Magistrate's recommendation, except it gave the respondent leave to replead the claims against TMM in order to cure the defects the Magistrate had identified. No action was taken on TMM's Motion for Sanctions.

The respondent subsequently filed an amended complaint that asserted the same statutory violations by TMM, but alleged additional factual detail about TMM's critical statements. TMM filed another Motion to Dismiss and another Motion for Sanctions. The Magistrate recommended allowing both motions. The Magistrate found that the amendments to the allegations against TMM were inconsequential and insufficient to state a claim. The Magistrate also found that no reasonable attorney would have believed that these minimal changes would have cured the defects that had previously been identified. The Magistrate recommended sanctions against the respondent pursuant to Fed. R. Civ. P. 11. The District Court adopted the recommendation and ordered the respondent to pay attorneys' fees. The respondent complied with this order.

The First Circuit Court of Appeals affirmed the sanctions and the dismissal. The First Circuit found that by filing the amended complaint, the respondent had continued to allege claims against TMM without an adequate basis in fact or law, despite the Magistrate's warning.

By contrast, the plaintiff's claims against Town and others were not dismissed. The respondent ultimately secured for his client a settlement payment from the Town. After the settlement, the Town reimbursed TMM for the attorneys' fees he had incurred, minus the sanction paid by the respondent.

By refiling claims against TMM in the amended complaint without an adequate basis in fact or law, despite the warning from the Magistrate, the respondent violated Mass. R. Prof. C. 3.1.

The respondent was admitted in 1998 and has no prior discipline. He received an admonition for his misconduct.