IN RE: RICHARD J. REILLY, JR.

NO. BD-2018-070

S.J.C. Order of Indefinite Suspension entered by Justice Budd on January 31, 2019.[1]

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[1] The complete order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

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

BAR COUNSEL,	)
Petitioner,	)
v.	)
RICHARD J. REILLY, JR., ESQ.,	)
Respondent.	)

BOARD MEMORANDUM

This case presents two separate allegations of misconduct arising out of the same litigation. The respondent represented several plaintiffs in a lawsuit against the developer of a time share community on Cape Cod. During the course of that case, he began representing another set of plaintiffs who owned time share units at another development. The defendant was the same in both cases. Without informing the clients in the first case, he settled the second case and, as part of the settlement, agreed to dismiss the first case and not represent the first set of plaintiffs in the future – a flagrant conflict of interest. Moreover, he refused to refund to the first group of plaintiffs expense retainers that they had paid him at the outset of the engagement, having spent less than $1,000 of the approximately $130,000 he had collected.

A hearing committee concluded that the respondent violated numerous Rules of Professional Conduct and recommended a two-year suspension with reinstatement contingent on full restitution of the expense retainers. Bar counsel appeals, seeking a three-year suspension. Respondent does not appeal. Concluding that a term suspension is inconsistent with sanctions in

analogous cases, we recommend that the Supreme Judicial Court impose an indefinite suspension.

The Hearing Committee's Findings of Fact

We adopt the hearing committee's Findings of Fact, as they are not erroneous. BBO Rules, Sec. 3.53.

In 2009, the respondent, Richard J. Reilly, Jr., met with owners of time share units at a development known as The Breakers, located in Dennisport, Massachusetts. The owners complained about construction delays, failure to complete the entire development, failure to record the Master Deed, and failure to install appliances (including a full kitchen and a jacuzzi as advertised in the marketing materials). Although the promotional materials had promised a kitchen in each unit, the developer apparently was unable to obtain the necessary permits from the fire department. Two of the owners were married couples, the Boltons and the Lombardis. The Lombardis testified that they had never used their unit; it was not ready for four years after they purchased it.

Prior to retaining the respondent, the Boltons exchanged emails with him about his fees. He wrote: "My fee is a [$]1,000 retainer amount, and 20% of whatever funds I collect on your behalf (which includes the $1,000 initial payment)." He further explained that the contingency percentage would increase if the case went to trial or appeal and that the $1,000 retainer would be included in any contingent fee but that he would also seek to have his fees reimbursed by the defendant as allowed by statute.

On May 21, 2009 (Bolton) and July 21, 2009 (Lombardi), the clients signed engagement letters with Reilly. Both clients (Bolton and Lombardi) had "virtually identical" fee agreements, which were labelled "Compensation Agreement." The agreements called for a 20% contingent

fee, increased to 30% if the case went to trial or 40% if it went to appeal. Each agreement provided for the payment of $1,000 "for expenses as needed, to secure records and documents, to pay the costs of title examinations and reports, fees for expert witnesses, and the costs of service of notice of suit and filing of Petition." Further, "Any expense fund balance shall apply on [sic] law firm's fees; however, such balances so applied, unless hereinafter otherwise set forth, shall be considered in determining the percentages hereinafter referred to." Finally, "Except as may be heretofore set forth or as provided by law for the administration of assets other than this lawsuit, said attorneys shall receive no further compensation for services rendered under this Agreement if there is no recovery of money and/or property." The hearing committee found that the engagement agreements were contingent fee agreements within the meaning of Mass. R. Prof. C. 1.5.

At the hearing, the respondent testified that he explained to his clients that the $1,000 payment was a "flat fee" for legal services even if he incurred less than that in expenses and reached no settlement. The hearing committee did not credit this testimony. We defer to its credibility findings, as the committee members had the sole opportunity to observe the witnesses in person. B.B.O. Rules, §3.53; Matter of Diviacchi, 475 Mass. 1013, 1019, 32 Mass. Att'y Disc. R. 268 (2016) (hearing committee is sole judge of credibility and arguments hinging on such determinations generally fall outside scope of review), *citing* Matter of McBride, 449 Mass. 154, 161, 23 Mass. Att'y Disc. R. 444, 453 (2007) (hearing committee is sole judge of credibility and arguments hinging on such determinations generally fall outside proper scope of review). The credibility finding is supported by the documents themselves: the fee agreements did not refer to a flat fee or a retainer (refundable or otherwise) for legal fees. They expressed a contingent fee arrangement with a $1,000 advance against expenses.

On July 21, 2011, two years after being hired, the respondent filed suit in Barnstable Superior Court against The Breakers Resort, LLC, the developer of the Breakers. He represented approximately 138 plaintiffs, including the Boltons and Lombardis. At the time he filed suit, Attorney Reilly had received at least $130,000 from his clients on the same terms set forth in the Bolton and Lombardi agreements.[1] Despite receiving this large sum, the respondent admitted that total expenses in the litigation were under $1,000, including a single filing fee of $275. Without opposition, the court certified the case as a class action one year after it was filed. The plaintiffs sought monetary damages, rescission of their purchase and sale and financing agreements, costs, attorneys' fees, and treble damages.

The Breakers defendant did not answer. The court issued a default and ordered the respondent to file a motion for assessment of damages and default judgment or a request for default judgment. Inexplicably, the respondent filed nothing, so the court entered a judgment of dismissal against the plaintiffs. After the respondent successfully moved to vacate that judgment, the court gave him a second chance to file a motion for judgment and damages. Again, he failed to do so, leading to a second judgment of dismissal.

In November, 2009 (after he had signed engagement letters with the Breakers plaintiffs but before he filed suit in that case), Attorney Reilly sued the developer of the other time share community, the Soundings, also located in Dennisport. He represented thirty-three plaintiffs in the case against Soundings and Resort Fundings, LLC in Barnstable Superior Court. All of the

[1] The hearing committee found, and we agree, that the number of clients (approximately 138) and the material similarity of their fee agreements was established by the pleadings. These facts were asserted in paragraph 11 of the Petition for Discipline. The respondent purported to deny the allegation in his Answer, but he did not deny that the terms of the agreements were the same. Thus, the fact was established. B.B.O. Rules, § 3.15(d) ("[t]he answer shall ... state fully and completely the nature of the defense. The answer shall admit or deny specifically and in reasonable detail, each material allegation of the petition and state clearly and concisely the facts and matters relied upon. Averments in the petition are admitted when not denied in the answer in accordance with this section").

plaintiffs had the same engagement agreement as the Breakers clients, and they each paid the respondent $1,000 for expenses. The case was inactive for almost two years. The defendant having failed to answer, the clerk issued a default order on July 18, 2011.

On November 29, 2012, the parties in the Soundings case reached a settlement.[2] On December 24, 2012, the parties filed a stipulation of dismissal with prejudice. The case was settled for $161,675, to be shared among seven named plaintiffs. Of that amount, Reilly received a twenty percent (20%) contingent fee, approximately $32,335.

Although only the Soundings plaintiffs received compensation, the settlement affected the rights of the Breakers plaintiffs as well. The Addendum to the settlement agreement recited that an "express condition" of settlement was that no additional financial obligations be incurred to the Breakers plaintiffs. The Addendum also required that the Breakers case be dismissed without prejudice and that plaintiffs' counsel (Attorney Reilly) agree to not re-file it and not represent any of the owners in future litigation.[3] The Addendum indicated that the Breakers owners would be given the opportunity to execute a deed for nominal or no consideration to transfer title back to the developer in exchange for relief from any past, present or future financial obligations (in effect, a walk-away agreement). The Breakers plaintiffs further agreed that those who retained ownership of their units would accept the incomplete kitchens in their present condition. Other Breakers plaintiffs were given the opportunity to convert their time-share membership to another company.

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[2] The settlement agreement was not offered into evidence at trial, but the hearing committee was provided with a copy of an undated document entitled, "Addendum to Settlement Agreement by and between Plaintiffs Bastarche et al and Soundings Seaside Resort, LLC" (hereinafter, "Addendum"), which references a settlement agreement dated November 29, 2012.

[3] The respondent signed the Soundings settlement both in his capacity as counsel for the Soundings plaintiffs and in his individual capacity, thereby binding himself personally to the commitment to not represent Breakers plaintiffs in the future.

The hearing committee found that the respondent did not inform the Breakers plaintiffs of the settlement. He did not inform them or seek their consent before dismissing their lawsuit. He did not tell them that he had agreed to no longer represent them. Although the respondent testified that he showed the Addendum to Mrs. Bolton, the hearing committee found her denial of this assertion to be credible. Her denial is supported by her hearing testimony that she saw the Addendum for the first time after she filed her complaint with bar counsel. In fact, she did not know about the dismissal until April, 2014, when she visited the resort and was informed by the manager that the case had been dismissed. Mr. Lombardi did not learn of the dismissal until January, 2017, when he inspected the file at the Superior Court.

The respondent said that he sent an explanatory email about the settlement to the Breakers clients, but there are no recipients listed on the email, and its purported date – October 9, 2012 – was more than six weeks before the settlement was signed – November 29, 2012. The hearing committee properly found that the lack of addresses on the email shows that it was not sent, or – worse – fabricated. The email supports the hearing committee's findings that the respondent did not inform his Breakers clients that he was settling the Soundings case at their expense and his testimony to the contrary was not credible. This finding is further supported by the fact that Reilly received a substantial fee as part of the settlement and had every incentive to not jeopardize the agreement by informing the Breakers owners, who mostly likely would have objected to the outcome.

When confronted by his clients about the apparent dismissal of their case, the respondent lied. In an email to Mrs. Bolton on May 15, 2014, he wrote that the dismissal was without prejudice and, in fact, he planned to file a new lawsuit the following week. Of course, in settling the other case, he had agreed to do no such thing. The hearing committee found that he had no

intention of filing another lawsuit and the statement to his client was knowingly false. In a similar vein, four years after the dismissal, the respondent wrote to Mr. Lombardi that he planned to file a federal lawsuit. The committee found that this statement was deceptive.

Having sold out their interests to settle the other case, the respondent had the temerity to keep the retainers paid to him by the Breakers plaintiffs. At trial, he admitted that the money was not payment for a contingent fee, since the clients received no compensation from the defendants. Instead, he characterized the retainers as advances against hourly legal fees. But, the engagement letters do not provide for an hourly fee, and the respondent produced no records to show that he had earned any hourly fees. The hearing committee's rejection of this testimony finds ample support in the record.[4]

Discussion

We affirm the hearing committee's legal conclusions. By a preponderance of the evidence, bar counsel proved that the respondent violated Mass. R. Prof. C. 1.7(a) and 1.7(b), which govern conduct prior to July 1, 2015.[5] Rule 1.7(a) proscribes representation where the representation will be directly adverse to another client unless the lawyer reasonably believes that the conduct will not adversely affect the relationship with the other client and each client consents after consultation. Rule 1.7(b) applies where the representation will be "materially limited" by responsibilities to another client, a third person, or the lawyer's personal interests,

[4] The respondent did not bill his time, send invoices to his clients or notify them when he withdrew "earned fees." He produced no records showing that he transferred funds from his IOLTA account to his operating account as he earned fees on the case. All of these facts further support the committee's finding that Reilly was not entitled to an hourly fee and that his testimony to the contrary was not credible. The hearing committee found that the respondent fabricated two purported invoices that he presented at trial. Mrs. Bolton emphatically testified that she neither requested nor received an invoice. The respondent further testified that he earned an hourly fee because he continued to represent Breakers plaintiffs after the Soundings settlement. He claimed that he resolved over 100 claims. There was no evidence (other than Reilly's testimony) to support this position, and if he did so, he would have been in violation of the Soundings settlement, which prohibited him from involvement in the case.

[5] Bar counsel also charged violations of Rule 1.7(a)(1) and 1.7(a)(2), which apply on and after July 1, 2015, but there was no evidence of violations after that date, so our analysis is limited to the prior version of the rules.

unless the lawyer reasonably believes that the relationship will not be adversely affected and the client consents after consultation.

Although a conflict may not have been present at the outset of the litigation, it clearly existed at the time of the Soundings settlement. In fact, we are hard-pressed to think of an example of a clearer conflict: settling one case for monetary relief (and a fee), where a principal condition was dismissal of the other case (which, despite his abandonment, could have imminently been reduced to judgment) and agreeing to not represent the other clients. He put his own fee ahead of his clients. Making matters worse, the respondent did not inform the Breakers clients of what he was doing. To the extent that they could have retained other counsel and brought another lawsuit within the limitations period, his silence foreclosed that possibility.[6]

The respondent did not discuss the conflict with his clients, nor did they consent. Lombardi testified that he first heard about the concept of conflict-of-interest after he filed a complaint with bar counsel. Further, the respondent did not "reasonably believe" that he could represent both sets of plaintiffs despite the conflict. Indeed, the hearing committee observed that the respondent refused even to acknowledge the existence of a conflict in his trial testimony. It is therefore apodictic that he did not consider whether he could handle both cases despite the conflict, and therefore had no "reasonable belief" about the matter at all. Further, any such belief would have been unreasonable as a matter of law; his agreement not to pursue the Breakers matter as consideration for settling the Soundings matter is decisive in that regard.

We affirm the committee's conclusion that bar counsel proved violations of Rules 1.2(a) (seek lawful objectives of the client); 1.4(a) (keep client reasonably informed); 1.4(b) (explain

[6] Respondent did not make this argument at trial, and there was no evidence that the Breakers plaintiffs could have brought a new case. For all intents and purposes, their one shot at compensation was the case where they were represented by the respondent.

matter to client to extent reasonably necessary to permit client to make informed decisions); and 3.4(c) (do not knowingly disobey obligations under rules of tribunal). As described above, the respondent kept his Breakers clients in the dark about the Soundings settlement; moreover, the settlement did not protect their interests. He violated his obligations to the tribunal by agreeing to dismiss the Breakers case (a class action) without court approval. Mass. R. Civ. Pro. 23(c). He failed to communicate with his clients for several years.

We affirm the committee's decision that the respondent violated Rule 1.1 (competence) and 1.3 (act with reasonable diligence and promptness). It goes without saying that a competent lawyer would not agree to bargain away for nothing – with no authority to do so – the right of his clients to receive compensation for damages. He did so even though the court had invited him to move for a judgment and assessment of damages. Throwing fuel on the fire, he never told his clients that he had agreed to not represent them in the future and to not re-file the lawsuit on their behalf. He completely undermined the trust that clients place in their counsel.

We next address the respondent's "fee" in the Breakers case. Pursuant to their retainer agreements, every Breakers client agreed to pay the respondent a $1,000 expense retainer, totaling approximately $130,000. The respondent spent less than $1,000 in total on expenses, yet he did not refund the money at the conclusion of the case. Bar counsel charged that this conduct violated Mass. R. Prof. C. 1.16(d), 8.4(c), and 8.4(h); the hearing committee agreed, and so do we.

The agreements made no reference to a flat fee, retainer, or an hourly rate. Nothing in the agreements authorized the respondent to treat the $1,000 as a flat fee or to apply it against hourly fees. The money was clearly for expenses. The respondent was entitled to a fee only if his clients recovered damages by settlement or trial, a condition that by his own admission was not

fulfilled. The respondent's assertion that he agreed with his clients to a different arrangement – that the $1,000 was a flat fee, not an expense retainer – runs head first into the parol evidence rule. *See, e.g.*, Siebe, Inc. v. Louis M. Gerson, Inc., 74 Mass. App. Ct. 544, 550 (2009) (absent ambiguity, parol evidence inadmissible to contradict or modify terms of a contract).

Even if the fee agreements were ambiguous, they still could not be interpreted as anything other than a contingent fee agreement. The hearing committee correctly recognized that any ambiguity in the fee agreements must be construed against the drafter, Reilly. "As a general proposition, the meaning of a written document, if placed in doubt, is construed against the party that wrote it . . . and the principle surely counts double when the drafter is a lawyer writing on his or her own account to a client." Beatty v. NP Corp., 31 Mass. App. Ct. 606, 612 (1991). This is because, "[i] n setting fees, lawyers 'are fiduciaries who owe their clients greater duties than are owed under the general law of contracts.'" Id., citing Restatement (Third) of the Law Governing Lawyers § 46, comment b (Tent. Draft No. 4, 1991). See Matter of Kerlinsky, 406 Mass. 67, 72, 6 Mass. Att'y Disc. R. 172, 178 (1989) (fee agreement construed against drafter, who "had the obligation of seeing that all its parts were completed with clarity"); Benalcazar v. Goldsmith, 400 Mass. 111, 114 (1987) (principle that ambiguous document is to be construed against drafter "is particularly applicable where an attorney drafts a contingent fee contract which he knows will be signed by a person without legal training"); Garnick & Scudder, P.C. v. Dolinsky, 45 Mass. App. Ct. 925, 926 (1998) ("the burden of spelling out the fee agreement lies upon [the attorney]"). The respondent cannot simultaneously draft an ambiguous contract and rely on parol evidence to change its terms. Equally important, the committee did not credit the respondent's parol testimony about his contract with the clients.

Based on the above, we agree with the hearing committee that the respondent intentionally misused the expense retainers in violation of Rule 1.16(d). He deprived the clients of their retainer. He has not made restitution.

Mitigation and Aggravation

The respondent presented no facts to support mitigation of the sanction.

The hearing committee found several aggravating factors, and we affirm. The respondent violated numerous rules, and his misconduct impacted many clients. Matter of Saab, 406 Mass. 315, 326-327, 6 Mass. Att'y Disc. R. 278, 289-290 (1989). The conduct harmed his clients, because he did not return their expense retainers and he agreed to dismiss their case when judgment and damages were imminent. Matter of Moran, 479 Mass. 1016, 1023, 34 Mass. Att'y Disc. R. ___ (2018). The hearing committee found that the respondent was motivated by greed and self-interest when he settled the Soundings case and received a fee while agreeing to dismiss the Breakers case. Although there was no direct evidence of the respondent's state of mind, the hearing committee found – and we have been presented with no evidence to the contrary – that he did so for a fee. Added to this fact is the respondent's refusal to pay back the expense retainers. Seeking pecuniary gain in the course of a rule violation has been found to be aggravating. Matter of Lupo, 447 Mass. 345, 354, 22 Mass. Att'y Disc. R. 517, 532-533 (2006); Matter of Pike, 408 Mass. 740, 745, 6 Mass. Att'y Disc. R. 256, 261 (1990); ABA Standards for Imposing Lawyer Sanctions, § 9.22(b).

Next, we address several aggravating factors arising from the respondent's testimony at the hearing. The committee found that he displayed evasion and a lack of candor, Matter of Hoicka, 442 Mass. 1004, 1006, 20 Mass. Att'y Disc. R. 239, 243 (2004), as well as a "profound inability to comprehend his professional obligations to his clients, or to appreciate and

acknowledge the wrongfulness of his conduct and its effects. He refused to recognize the principles of conflict of interest, insisting that there can be no conflict of interest if all of the clients are pursuing the same party since, 'it's a common defendant, so we're all in the same position.'" (Hearing Report, ¶ 85). Matter of Moran, 479 Mass. 1016, 1023, 34 Mass. Att'y Disc. R. __ (2018) (collecting cases); Matter of Cobb, 445 Mass. 452, 480, 21 Mass. Att'y Disc. R. 93, 125-126 (2005); Matter of Clooney, 403 Mass. 654, 657, 5 Mass. Att'y Disc. R. 59, 67-68 (1988); ABA Standards for Imposing Lawyer Sanctions, § 9.22(g).

In some circumstances, we hesitate to penalize a respondent for putting on a defense. A hearing committee's refusal to credit certain testimony does not automatically translate into a lack of candor, a failure to understand one's ethical duties, or the concomitant failure to acknowledge the wrongfulness of one's conduct. However, the record in this case reveals something very different: a lawyer who disdains the Rules of Professional Conduct. As described in the hearing report, he was defensive and evasive. The committee described his testimony as "breathtakingly disingenuous." (Hearing Report, ¶ 84). He lied with ease and audaciously proffered fabricated invoices. (Id).

We also affirm the hearing committee's decision to find in aggravation a rule violation not charged by bar counsel. Matter of Orfanello, 411 Mass. 551, 556, 7 Mass. Att'y Disc. R. 220, 226 (1992) (uncharged misconduct may be considered in aggravation). Although not charged, Rule 5.6 was violated. The rule in effect in 2012 and 2013 (the time of the settlement) prohibited a lawyer from entering into a settlement agreement that would restrict his right to practice as part of the settlement or controversy. Reilly's undertaking to not re-file the Breakers lawsuit and to not represent any of the clients in the future was a violation of the rule.

Recommended Sanction

The respondent does not appeal the hearing committee's recommendation of a two-year suspension. Bar counsel's appeal argues for a three-year suspension. Concluding that neither alternative is consistent with precedent, we recommend an indefinite suspension.

We start with the conflict of interest. Egregious conflicts – such as in this case – are sanctioned by significant term suspensions. In Matter of Traficonte, 22 Mass. Att'y Disc. R. 747 (2006), the lawyer settled a proposed class action and accepted a substantial fee payment from the putative defendant, without his clients' knowledge or consent. He did not disclose to his clients that he would be receiving fees, and he did not disclose to one client, with whom he corresponded, that he had agreed not to serve as counsel for anyone who wanted to proceed with a lawsuit. He made deceptive statements to his clients, and he caused them harm. He was suspended for one year, with a recommendation that as a condition for reinstatement, he prove that he had contributed his net fee to charity. *See also* Matter of Muse, 12 Mass. Att'y Disc. R. 335, 343-344 (1996) (three-year suspension for representing conservator and her incapacitated, wealthy client).

A term suspension is also appropriate for the respondent's intentional misuse of expense retainers. At the time of the events in this case, Rule 1.15(b)(1) of the Massachusetts Rules of Professional Conduct required that money advanced for legal fees be held in a client trust account and belongs to the client until earned.[7] In Matter of Sharif, 459 Mass. 588, 27 Mass. Att'y Disc. R. 809 (2011), the Supreme Judicial Court distinguished the misuse with deprivation or intent to deprive of "traditional" client funds (such as trust funds,

[7] Pursuant to amendments in 2015 (not applicable here), the same holds true for money advanced for expenses. At the time of the events in this case, the rule did not require that expense money be held in a trust account until it was used to pay expenses. The amendment to the rule does not change our analysis.

settlement proceeds, or money held in escrow) from unearned advances for legal fees or expenses. While misuse of the former would implicate the presumptive sanction of disbarment or indefinite suspension, Matter of Schoepfer, 426 Mass. 183, 187-188, 13 Mass. Att'y Disc. R. 679, 685 (1997), cases involving advances could range from disbarment down to a term suspension, depending on the facts of the case. Id. at 566. The principal justification for the distinction is not that misuse of advances is any less dishonorable, but there is a potential for confusion, misunderstanding, or ambiguity with handling advances.[8] Sharif, *supra*, 459 Mass. at 567-570, 27 Mass. Att'y Disc. R. at 820-823.

The potential for confusion is not present in this case. Reilly's representation of the Breakers plaintiffs was concluded. There was no possibility of future costs. He clearly knew that he was not entitled to keep the money advanced for expenses.

We have found no precise precedent for the respondent's serious and widespread misconduct, and extensive aggravating conduct. However, we "need not endeavor to find perfectly analogous cases, nor . . . concern ourselves with anything less than marked disparity in the sanctions imposed." Matter of Hurley, 418 Mass. 649, 655 (1994), cert. denied, 514 U.S. 1036 (1995). Moreover, disciplinary violations are not viewed in isolation. We are instructed to consider the, "cumulative effect of the several violations committed by the respondent." Matter of Zak, 476 Mass. 1034, 1039, 33 Mass. Att'y Disc. R. ___ (2017). At the end of the day, we confront an egregious conflict of interest and an exorbitant misuse of client funds without restitution. Each act of misconduct would call for at least a term suspension before we apply the

[8] The respondent in Sharif received a three-year suspension with the final year stayed. Bar counsel alleged (and proved) that she had misused funds that a client had advanced for legal fees and deprived the client of those funds; neglected client cases; and made several intentionally false statements to bar counsel. There were mitigating mental health issues.

myriad aggravating factors. Under these circumstances, we recommend that the Court impose an indefinite suspension.

Conclusion

For all of the foregoing reasons, we adopt and incorporate the hearing committee's findings of fact and conclusions of law but modify its proposed disposition. An Information shall be filed with the Supreme Judicial Court recommending that the respondent, Richard J. Reilly, Jr., Esq., be indefinitely suspended from the practice of law in Massachusetts.

Dated: October 15, 2018

Respectfully submitted

BOARD OF BAR OVERSEERS

By _____
Michael G. Tracy, Secretary pro tem