Public Reprimand No. 2008-19

MICHAEL P. MURRAY

Order (public reprimand) entered by the Board August 27, 2008.

MEMORANDUM OF DECISION

At the request of bar counsel, the Board of Bar Overseers (board) has filed an information concerning the conduct of the respondent Michael P. Murray (respondent). Bar counsel seeks a review of the board's vote that the respondent receive a public reprimand for the violations of disciplinary rules that the board concluded the respondent had committed; bar counsel argues that the violations warrant a suspension from the practice of law for a period of six months and one day. The respondent opposes bar counsel's position, arguing that a public reprimand is the appropriate sanction.

1. Background
    a. Prior proceedings. In December, 2005, bar counsel filed a petition for discipline against the respondent, charging, inter alia, that the respondent had improperly held himself out as an expert in business litigation involving closely held corporations; charged and collected a clearly excessive or illegal fee; sought publicity without client consultation or consent and failed to communicate with his client; and failed to obey his clients' decision to dismiss and thereby settle the lawsuits that the respondent had commenced on their behalf. After an evidentiary hearing, a hearing committee of the board upheld the charges of two separate violations of Mass. R. Prof. C. 1.4(1) and (b), 426 Mass. 1314 (1998) (failure to communicate with clients, and to keep clients reasonably informed); and three violations of Mass. R. Prof. C. 1.5 (a), as amended, 432 Mass. 1301 (2000) (entering an agreement for, charging, or collecting an illegal or clearly excessive fee), with a connected violation of Mass. R. Prof. C. 1.8 (a), 426 Mass. 1338 (1998) (rules for engaging in business transaction with client).[1] The hearing committee found that the other violations charged had not been proved, including the claim that the respondent had disobeyed his clients' decision to dismiss their lawsuits, conduct that was alleged to be in violation of Mass. R. Prof. C. 1.2 (a), 426 Mass. 1310 (1998) (lawyer shall seek lawful objectives of client), and 3.2, 426 Mass. 1382 (1998) (duty to expedite litigation). As a sanction, the hearing committee recommended that the respondent receive a public reprimand conditioned on (a) taking and passing the multistate professional responsibility examination (MPRE); (b) returning the $57,700 fee paid by one of his clients, with interest; and (3) paying the fee that client paid to the other lawyer that the client retained to assist in dealing with the ongoing litigation and the respondent. The committee's further recommendation was that if the respondent did not comply with these conditions within six months, he should receive a suspension of six months and one day. On appeal to the board, the board adopted the hearing committee's findings of fact, modified the committee's conclusions of law by finding misrepresentation in violation of Mass. R. Prof. 8..4 (c), 426 Mass. 1429 (1998) (conduct involving fraud, dishonesty or deceit), and then voted to conclude the matter by public reprimand

conditioned solely on the respondent's taking the MPRE twice a year until he passed it.

b. Facts. The following is a summary of the facts found by the hearing committee and the board.[2] The respondent was admitted to practice in June of 1991. In June of 2000, the respondent was a general practitioner who concentrated heavily in criminal defense work, but he had done some work in drafting incorporation papers, employment agreements, and shareholder agreements for small business clients.

In June, 2000, the respondent met with James Rowse, Jr. and Robert Ahearn, who were trustees of separate family trusts that were funded with shares of Veryfine Products, Inc. (Veryfine), a closely held corporation that Rowse's family had founded. Rowse had worked for Veryfine until his retirement in 1988. Ahearn was a lawyer, but since some time in the 1980's, he had ceased to practice law and had become Rowse's trusted investment advisor. Rowse knew and had worked with the respondent, because the respondent had represented members of Rowse's family and Rowse himself in three separate legal matters. Rowse and Ahearn told the respondent that the Veryfine stock was not paying dividends, and they claimed that the company was being mismanaged by Rowse's brother, who had taken over running the company at some point after Rowse retired; Rowse suspected criminal activity at Veryfine. They wanted to take legal action against Veryfine in order to force the company either to pay dividends or to repurchase the shares of Veryfine stock that were held by the two trusts. At the meeting, the respondent told Rowse and Ahearn he could handle the proposed litigation about Veryfine, although it would take a lot of work and he would need to conduct research and hire an expert. In response to an inquiry from Rowse or Ahearn about experience with corporate litigation, the respondent pushed his business card across the table to them, and said, "this is my business." The business card had the respondent's name printed on it and the words "Commercial and Intellectual Property Law"' printed underneath the name. Soon after the meeting, Rowse and Ahearn decided to retain the respondent. They understood the litigation involved would be complex, but they were primarily interested in obtaining a prompt settlement.

At a subsequent meeting, the respondent discussed fees with Rowse and Ahearn, who told him that Rowse, who would be funding the matter, lived on fixed assets and could not afford to pay hourly fees; Rowse did not disclose to the respondent that he owned over $2 million in investment assets. Some time thereafter, the respondent sent Rowse and Ahearn identical contingent fee agreements. The agreements provided for a one-third contingent fee, and also provided that if the clients discharged him without cause, he was to be paid $600 per hour for all past services. At that time, the respondent had never been paid more than $250 per hour for any legal services. Although Ahearn sought to eliminate or modify the penalty-fee-on-termination clause, the respondent did not change it, and both Rowse and Ahearn freely signed the fee agreements with the clause included.

On September 1, 2000, the respondent filed two separate but identical lawsuits, one on behalf of each family trust, in Middlesex Superior Court. The complaints alleged corporate wrongdoing and fraud, including claims under the RICO statute, 18 U.S.C. § 1961 et seq. The complaints represented the respondent's first litigation of this type. The respondent did not discuss the RICO claims with his clients before filing the complaints.

An article about the lawsuits appeared in a Worcester newspaper soon after the suits were filed, reporting allegations in the complaint against Rowse's brother and including quotes by the respondent. Following publication of the article, Ahearn, on behalf of Rowse, told the respondent not to contact the press again. However, at a later time — in January, 2002 — the respondent caused another article about the

litigation to be published in the newspaper, without the knowledge or consent of his clients.

The lawsuit defendants filed counterclaims against both Rowse and Ahearn individually in December of 2001; these included a claim for malicious prosecution and one for defamation through the media. The respondent did not inform his clients that the counterclaims against them had been filed, although he and they had discussed earlier the possibility that there might be counterclaims filed.

Between September, 2001, and February, 2002, the respondent was spending approximately 37 hours per month on the Veryfine litigation, a significant increase of the time he had been spending in the first few months of his work on the case. In February, 2002, the respondent learned that Rowse had received $8 million for the sale of his Veryfine stock in 1992. The respondent met soon thereafter with Rowse alone, and demanded that Rowse pay him $47,700, or he would cease working on the case. Rowse did pay him this sum, but without the knowledge of Ahearn. At the time the respondent had this meeting and made this demand of Rowse, he was aware that Rowse had been hospitalized for depression two months before, in December, 2001. One week after Rowse made the $47,700 payment, Rowse was again hospitalized for depression. In June, 2002, Rowse and Ahearn agreed to the respondent's demand to pay him an additional $5,000, and they did so again the following month, in response to the respondent's additional demand for such a sum. The respondent demanded more, but Rowse refused, citing the terms of the parties' original contingent fee agreement. At the time Ahearn agreed to make (through Rowse) these two $5,000 payments, he still did not know that Rowse had paid the respondent $47,700 several months earlier. Rowse was again hospitalized for depression in September, 2002.

By October, 2002, as a result of motion practice and further amendments, the original complaints in the two lawsuits each had only one remaining count, which was a shareholder derivative claim against Veryfine's management. With the cases in this posture, a mediation session was held in May, 2003. The lawsuit defendants offered to purchase the Veryfine stock held by the two trusts, but Rowse and Ahearn rejected the offer as too low. Rowse learned at the mediation, for the first time, that the defendants had filed counterclaims against him and Ahearn personally; he also learned that the only claims in the lawsuits were derivative claims on behalf of Veryfine itself, which would provide only indirect relief to the trusts. Concern about these facts, and Ahearn's concern about Rowse's mental health, led Ahearn to explore through a family intermediary the possibility of settling the lawsuits through dismissal and mutual releases; the intermediary reported that the defendants were interested in settlement, but wanted more than simple dismissals of all claims. Ahearn raised the idea of dismissal with the respondent, who wrote a letter that in effect equated dismissal with a discharge without cause, and stated that dismissal would entitle him to a retroactive fee of $438,915.70 for services through July 31, 2003, calculated at an hourly rate of $600. However, the letter did not state that the respondent would not dismiss the cases unless he was paid this fee.

Some weeks later, Rowse and Ahearn retained a new lawyer to advise them about the litigation and the respondent's demands. The attorney charged $235 per hour, a rate that he indicated fell within the mid-range that was typically charged by mid-sized firms for litigation in the Worcester area. The attorney advised Rowse and Ahearn that they alone, and not the respondent, had authority to dismiss the cases, and also that the provision in the contingent fee agreement requiring payment at $600 per hour upon termination was unenforceable as a penalty. There was more correspondence between Ahearn and the respondent and between the new attorney and the respondent, with the respondent repeating that dismissal would

be a discharge without cause and would trigger the requirement to pay him $438,915.70. Nevertheless, in October, 2003, the respondent appears to have pursued the dismissal with the defendants, and in November, 2003, the trustees and the defendants did agree to dismiss their respective claims and exchange releases. The court approved the settlement on December 16, 2003. The respondent thereafter sent a bill to Rowse and Ahearn for a total of $450,555.70, based on an hourly fee of $600. Rowse and Ahearn did not pay the bill, but filed complaints with bar counsel.

As has been stated, based on these findings, the board, agreeing with the hearing committee, concluded that the respondent had violated Mass. R. Prof. C. 1.4 (a) and (b), by seeking publicity about the lawsuits without his clients' knowledge or consent, and also by failing to inform his clients in a timely way about the counterclaims that had been filed against them; and Mass. R. Prof. C. 1.5 (a) by: including a provision in the contingent fee agreement that called for an excessive fee on termination; collecting an excessive fee of $57,700 in contravention of the terms of the contingent fee agreement; and demanding payment for all his work at $600 per hour following his clients' instruction to dismiss the lawsuits. The board, but not the committee, also found that the respondent violated Mass. R. Prof. C. 8.4 (c), by misrepresenting his expertise in handling litigation involving close corporations.

2. Discussion. In reviewing bar discipline matters, "the findings and recommendations of the board, though not binding on this court, are entitled to great weight." Matter of Hiss, 368 Mass. 447, 461 (1975). Accord, Matter of Lupo, 447 Mass. 345, 356 (2006). "Nonetheless, [the court] must decide each case 'on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances.'" Matter of Griffith. 440 Mass. 500, 507 (2003), quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984). I must weigh whether a sanction I might consider in this matter is "markedly disparate from judgments in comparable cases." See Matter of Lupo, supra, 447 Mass, at 359; Matter of Finn, 433 Mass. 418, 422- 423 (2001); Matter of Palmer, 413 Mass. 33, 37-38 (1992); Matter of Alter, 389 Mass. 153, 156(1983).

The respondent contends that the public reprimand voted by the board is the appropriate level of discipline in this case. He points out that where an excessive fee has been charged, this court has often imposed a public censure or public reprimand. See, e.g., Matter of Fordham, 423 Mass. 481, 495 (1996), cert. denied, 519 U.S. 1149 (1997); Matter of Palmer, supra, 413 Mass. at 40; Matter of Kerlinsky, 406 Mass. 67, 76 (1989), cert. denied, 498 U.S. 1027 (1991). His position is that while the board found he had committed additional violations of the Rules of Professional Conduct beyond charging and collecting an illegal or excessive fee (see Mass. R. Prof. C. 1.5 [a]), the excessive fee was the "gravamen" of the matter, and the other violations do not warrant greater discipline than public reprimand. Bar counsel, on the other hand, argues that the respondent's misconduct calls for a suspension of six months and one day. Bar counsel distinguishes Matter of Fordham, supra; Matter of Palmer, supra; Matter of Kerlinsky, supra; as well as certain excessive fee disciplinary cases in which the board had imposed a public reprimand[3] on the grounds that in these cases, excessive fees were charged but either not collected or refunded. She also argues that because in this case the hearing committee and board found three separate violations of Mass. R. Prof. C. 1.5 (a), as well as other disciplinary rule violations, the aggregate amount of misconduct requires suspension.

I agree with both parties as well as the board and hearing committee that the respondent's violation of Mass. R. Prof. C. 1.5 (a) constitutes the central and most serious misconduct at issue in this case. Further, I accept the board's and the hearing committee's determination that the respondent committed three separate violations of this rule. First, the provision in the contingent fee agreements providing that the

respondent would be entitled to collect an hourly fee of $600 for all past services if terminated without cause itself represents a violation of rule 1.5 (a). The fee-on-termination or discharge penalty clause by its terms would come into effect without any showing of bad faith on the client's part in discharging the attorney. Thus, even with no bad faith at issue, the clause's requirement that the clients pay the sizeable fee of $600 per hour for past services could mean that the clients would be effectively forced either to keep a lawyer in whom they had no longer had confidence or to pursue litigation which they no longer believed had value or pay the lawyer near $500,000 to drop it. As the board (and hearing committee) observed, the provision constitutes a severe and unfair burden on the client's unqualified right to choose and change his counsel. See Malonis v. Harrington, 442 Mass. 692, 700-701 (2004); Salem Realty Co. v. Matera, 10 Mass. App. Ct. 571, 575 (1980), S.C. 384 Mass. 803(1981). See also Matter of the Discipline of an Attorney, 451 Mass. 131, 143 (2008). Moreover, the $600 hourly fee included in the penalty discharge clause was itself excessive. It was far greater than any hourly fee the respondent had charged any client, and - according to the evidence in the record - more than two times higher than the median fee charged for litigation services by attorneys practicing in the Worcester area, the respondent's legal community. That the clients signed the contingent fee agreements with the $600 hourly fee provision is immaterial to the question whether it was clearly excessive. See Matter of Fordham, supra, 423 Mass, at 493.

Second, the respondent actually collected $57,700 from his clients in violation of the plain terms of the contingent fee agreement. As the board stated, the fact that the respondent might have been justifiably angry about his clients' earlier, and perhaps disingenuous, contention that Rowse was living on limited means and was unable to pay an hourly fee did not permit the respondent to disregard the clear terms of the contingent fee agreements and demand payments for which the agreements did not provide. Furthermore, at the time the respondent made his first such demand on Rowse alone for a payment of $47,700, Rowse, as the respondent knew, was suffering from depression, and therefore was in a vulnerable mental state. Finally, the respondent clearly charged an illegal or excessive fee when he billed his clients for approximately $450,000 at the time of the lawsuits' dismissal.

These distinct violations of Mass. R. Prof. C. 1.5 (a) are serious, but they are all part of one undertaking with one set of clients. Moreover, the board (and the hearing committee) noted that while, as in any case involving an excessive fee, the respondent was seeking money, there was no evidence that the respondent was motivated by "predatory self-interest" (the board's phrase) that was evident in cases such as Matter of Pike, 408 Mass. 740 (1990), or Matter of Wise, 433 Mass. 80 (2000). It does appear that in cases involving clearly excessive fees, public reprimand is generally the discipline imposed. See Matter of Fordham, supra, 423 Mass, at 495, citing ABA Standards for Imposing Lawyer Sanctions § 7.3 (1992); Matter of Palmer, supra; Matter of Kerlinsky, supra. See also cases cited in note 1, supra. It is true that there are some aggravating factors here: the respondent's misrepresentation concerning the level of his experience in handling corporate litigation, in violation of Mass. R. Prof. C. 8.4 (c); his seeking publicity about the Veryfine litigation against his clients' instruction and without their knowledge, and his failure to inform them of the counterclaims against them, both in violation of Mass. R. Prof. C. 1.4 (a) and (b); and the fact that one of his clients, Rowse, was in a vulnerable state of health. Nevertheless, the board found - and the evidentiary record supports - that the respondent's misrepresentation about his level of experience was not egregious (hardly more than puffery, in the board's view), did not itself induce reliance by the clients - one of whom (Rowse) had been represented by the respondent before, and the other of whom (Ahearn) was a lawyer himself- and caused no harm. And I agree with the board that the respondent's seeking publicity about the litigation and his failure timely to inform his clients of the counterclaims are not sufficiently serious to shift the balance towards suspension. Finally, the emotional vulnerability of Rowse must be considered in context. Although the respondent approached Rowse alone to demand

the payment of $47,700 in fees, as the hearing committee observed, Rowse, "neither isolated nor entirely dependent on the [r]espondent, enjoyed the advice of a long-time friend and advisor [Ahearn] who himself had practiced law for a number of years." In Matter of Palmer, supra, and Matter of Kerlinsky, supra, the respective respondent attorneys had also engaged in other misconduct beyond the charging of clearly excessive fees, misconduct that in my view was more serious than in this case.[4] The cases involving excessive fees in which this court has imposed suspensions have included substantially more serious misconduct beyond the issue of fees. See, e.g., Matter of Tobin (Robert H.), 417 Mass. 81, 85-88, 90-91 (1994) (attorney suspended for eighteen months for intentionally inducing client to retain him for unnecessary services in settling an estate in order to collect an unwarranted and excessive fee, making false and fraudulent representations to the Probate Court, his client, and bar counsel, and having a prior disciplinary history that included a prior private censure for client neglect)[5]; Matter of Tobin (Albert G.), 417 Mass. 92, 99-101 (1994) (attorney suspended for eighteen months for disciplinary violations in three separate matters: trying to collect unwarranted and excessive fee charged by his law firm in one matter, and making fraudulent representations to Probate Court, client and bar counsel in process; conducting litigation over ten years in harassing, vexatious, manner in the second and third matters; and representing client on appeal when he should have known he was not competent to do so in the third). See also Matter of Woodhouse, No. BD-2007-046 (2007) (assented-to four month suspension imposed where attorney was retained to pursue wrongful termination case, executed a contingent fee agreement for 20% of recovery, but failed to file timely claim on behalf of client and then charged excessive fee for legal services having no value).[6]

The board rejected the hearing committee's recommendation that the respondent be required to repay his client Rowse the $57,700 that he had obtained from Rowse in violation of the contingent fee agreement, stating, "The board is neither a court that awards damages for breach of contract nor an arbitration panel that makes fee awards." I agree that the board is neither of those entities, but when an attorney collects an unwarranted and excessive fee in plain violation of his fee agreement with his clients, an order of repayment represents neither damages nor a fee award; it is restitution.[7] See Matter of Kerlinsky, supra, 406 Mass. at 77. See also Matter of Lupo, supra, 447 Mass. at 361; Matter of Palmer, supra, 413 Mass. at 41. I conclude that the appropriate discipline to impose in this case is a public reprimand, accompanied by the requirements that (1) the respondent take the MPRE within the next six months and, if he does not pass the examination, that he continue to take it twice a year until he does pass it; and (2) the respondent repay his client James Rowse, Jr., $57,700, within the next three months.

3. Conclusion. For the foregoing reasons, an order shall enter as follows:
    1. The respondent Michael P. Murray is to be disciplined by public reprimand administered by the Board of Bar Overseers;
    2. The respondent is to take the multistate professional responsibility examination within six months of the date of this order, and, if he fails to pass such examination, he is to take the examination at least twice each year thereafter until he does pass it; and
    3. Within three months of the date of this order, the respondent is to pay to his client, James Rowse, Jr., the sum of $57,700 with statutory interest.

1 The violation of Mass. R. Prof. C. 1.8 (a) was not included as a charge in bar counsel's petition for discipline. The hearing committee and the board mentioned rule 1.8(a) only as part of their consideration of the claim that the respondent had charged and collected an excessive fee in violation of Mass. R. Prof. C. 1.5 (a) - and then only in response to an argument by the respondent that the clients had agreed to amend the original contingent fee

agreement, an argument that the hearing committee and the board both rejected. I do not consider rule 1.8 (a) further.

[2] Neither party challenges the factual findings by the board and hearing committee.

[3] Bar counsel cites Matter of Steele, 22 Mass. Att'y Disc. R. 742 (2006); Matter of Saia, 19 Mass. Att'y Disc. R. 380 (2003); and Matter of Kliger, 18 Mass. Att'y Disc. R. 350 (2002).

[4] Thus, in the Palmer case, in addition to charging a clearly excessive fee, the respondent filed a probate account containing misrepresentations and inaccuracies, mishandled other litigation, and had a prior disciplinary history. Matter of Palmer, 413 Mass. 33, 39 (1992). The respondent in Kerlinsky charged his client and collected a contingent fee of 50% of a settlement when the contingent fee agreement limited the recovery to 33 1/3%, but also (a) improperly retained another 15% of the settlement as an expense, (b) refused to turn over funds he had retained to pay medical bills of his client, (c) refused to turn over even the undisputed portion of the settlement to his client, and (d) through his unreasonable actions, prevented his client's litigation from being resolved for more than twenty-four years. Matter of Kerlinsky, 406 Mass. 67, 76-77 (1989), cert. denied, 498 U.S. 1027 (1991).

[5] The respondent in this case has no history of prior discipline.

[6] As noted previously, bar counsel seeks to distinguish cases such as Matter of Fordham, 423 Mass. 481, 495 (1996), cert. denied, 519 U.S. 1149 (1997); Matter of Palmer, supra; and Matter of Kerlinsky, supra, with the argument that in those cases, the attorneys either did not collect or refunded the excessive fees. The argument is somewhat misleading. It is true that in Fordham, the attorney did not collect the fee, but he did insist that his client sign a promissory note in favor of the attorney for the amount of the fee. Matter of Fordham, supra, 423 Mass, at 484. And in Palmer and Kerlinsky, the attorneys only refunded the fees because this court ordered them to do so. See Matter of Palmer, supra, 413 Mass. at 41; Matter of Kerlinsky, supra, 406 Mass, at 77.

[7] The hearing committee recommended that the respondent also pay his client Rowse the amount of fees Rowse had paid to the attorney whom Rowse and Ahearn later retained to help them with the ongoing litigation and in dealing with the respondent. Fees a client pays to a subsequent lawyer because of dissatisfaction with his original counsel - even when the dissatisfaction is warranted - are very different from fees that the client pays in response to a demand by the lawyer that was made in violation of the disciplinary rules. The respondent in this case should not be required to pay Rowse the amount of the subsequent attorney's fees as a matter of restitution.