ADMONITION NO. 11-01

CLASSIFICATION:

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

SUMMARY:

In December 2007, the parents of a child with learning disabilities retained the respondent to help them obtain appropriate special educational services for their daughter. At the time, the parents gave the respondent a retainer and signed a fee agreement providing for an hourly rate.

In February 2008, the respondent met with school officials at a Team meeting about the child. Following the meeting, the school implemented a special education program for the child for the balance of the 2007-2008 academic year. Beginning in the spring of 2008, the respondent attempted to negotiate an Individual Education Program for the child and consulted with a number of special education professionals to that end.

Throughout the representation, the parents were not satisfied with their daughter's progress in school and wanted her transferred to another school. By early 2009, the respondent and the parents differed on overall strategy and in particular on whether they had sufficient evidence to prevail at a hearing before the Bureau of Special Education Appeals. As a result, the attorney-client relationship became strained and remained so.

The respondent billed the parents on a monthly basis. By fall 2008, there was a substantial unpaid balance. The respondent sent the parents letters on November 25, 2008 and February 26, 2009 asking them to remit a substantial payment on the unpaid balance of their bill. On January 8, 2009 and March 9, 2009, the parents sent the respondent payments substantially reducing, but not entirely satisfying, the outstanding balance on the respondent's bill.

A Team meeting was scheduled for June 19, 2009 at 9:00 a.m. for the respondent, the parents, and school officials to discuss the child. On June 17, 2009, the respondent sent a letter to the parents advising them that he would not be able to continue the representation, including attendance at the Team meeting, if they did not pay their balance in full. The parents did not learn about the correspondence until 4:00 p.m. on June 18, 2009. The parents tried to call the respondent but he was not in his office, and he did not return their call that afternoon or evening. The parents were forced to cancel the Team meeting. They have hired successor counsel.

The respondent's termination of representation without protecting his clients' interests by giving reasonable notice to his clients and allowing time to employ other counsel prior to the Team meeting on June 19, 2009, was in violation of Mass. R. Prof C. 1.16(d). The respondent received an admonition for his conduct, conditioned upon attendance at a CLE program designated by bar counsel.

ADMONITION NO. 11-02

CLASSIFICATIONS:

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

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

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

SUMMARY:

In December 2002, a woman and her son were injured in a freak accident while in the woman's car in the parking lot adjacent to the woman's apartment building. The asphalt under the car, which surrounded a municipal sewer and drain system cover, collapsed and created a sink hole into which the car fell causing injury to both occupants.

The woman hired the respondent in January 2003 to represent her and her son in a personal injury claim. Unbeknownst to the client or the respondent, the client's automobile insurance carrier filed suit in small claims court in July 2004 against the owner of the apartment building to recover payments made by the insurance carrier for repair of property damage to the client's car. The building owner filed a motion to dismiss based on lack of evidence that they owned or were responsible for maintaining the parking lot. The building owner claimed that the municipality had always maintained the parking lot. On September 23, 2004, the motion was granted, and the claim was dismissed.

On September 29, 2004, in response to a claim letter sent by the respondent, the third party administrator for the building owner denied the claim and informed the respondent that the building owner had won in small claims court by establishing that it was not responsible for maintaining the area where the accident occurred. Had the respondent obtained the small claims file he would have seen that the accident

occurred over a municipal sewer and drain system on property maintained by the municipality and that the municipality was a possible defendant. However, despite this, the respondent did not give notice to the municipality within two years of the accident as required by G.L. c. 258, § 4.

In October 2005, the respondent filed suit in district court against the building owner. The defendant filed a motion to dismiss in November 2005. The basis of the motion was that the plaintiffs, through their insurance carrier, were barred by *res judicata* from asserting that the building owner was liable for their injuries, based upon the small claims decision.

The respondent and a co-counsel opposed the motion. In September 2006, the court granted the defendant's motion to dismiss on the basis of *res judicata*. No appeal was filed. The respondent did not advise the client of the outcome of her case. The client tried unsuccessfully to reach the respondent to ascertain the status of her case. The client learned that her case had been dismissed when she contacted bar counsel in 2009. She has now retained a malpractice attorney to pursue a claim against the respondent, for which the respondent is insured.

The respondent's failure to investigate a potential claim against the municipality and to give notice to and sue the municipality was in violation of Mass. R. Prof. C. 1.1 and 1.3. The respondent's failure to adequately communicate with the client and apprise her of the outcome of her case was in violation of Mass. R. Prof. C. 1.4(a) and (b). The respondent received an admonition for his conduct, conditioned upon having the Law Office Management Assistance Program (LOMAP) inspect and audit his law office practices and procedures.

ADMONITION NO. 11-03

CLASSIFICATIONS:

Limiting Scope of Representation [Mass. R. Prof. C. 1.2(c)]

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

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

SUMMARY:

In the summer of 2006, a client consulted the respondent about the estate of his father, who had died intestate about a month earlier. The only asset for probate was a two-family house occupied by the father until his death. The house had been acquired originally by the client's grandmother, who had conveyed it to a trust of which she was the life trustee and beneficiary. Under the trust declaration, the father was named the successor trustee, and the house was to go to the father outright upon the grandmother's death. She had died in 1990, but the father had never transferred the property to his own name.

Shortly after the initial consultation, the client gave the respondent a quarterly real estate tax bill listing the trust as owner of the property and asked about any tax liability. The respondent informed the client, based on the tax bill alone, that some taxes were overdue but no tax foreclosure had been instituted. This was erroneous. The respondent failed to realize that the current tax bills did not list or indicate the existence of any prior arrearages, tax taking or foreclosure. In fact, the father had paid no real estate taxes for many years before his death, and there had been a tax taking in 1994. The city had started a tax foreclosure proceeding in 1997 but had not pursued it thereafter. The respondent failed to inform the client that he had conducted no inquiry into the tax matters beyond examining the bill and had not conducted and would not conduct such an inquiry.

The respondent also informed the client that the father's estate had to be probated and a new trustee of the grandmother's trust appointed in order to deed the house out of the trust. He asked the client for a $3,000 advance payment for the representation. The client made the payment in January 2007. The respondent did not verify the house title or inquire about the tax situation thereafter, advise the client to investigate the tax situation, or inform the client that he was limiting his work to the probate only. The client did not consent after consultation to the limited scope of the respondent's work.

The respondent filed a petition for administration and had the client appointed as estate administrator in April 2007. Between the spring of 2007 and the fall of 2008, the respondent took no action for the client. During that period, the client made repeated inquiries to the respondent about the status of the estate. The respondent failed to reply adequately to those inquiries. In October 2008, the respondent filed an estate inventory and a motion to have the client appointed as trustee of the grandmother's trust. He did not mark the motion for hearing and have it allowed until March 2009, after more inquiries and demands by the client.

The client and the respondent had not discussed the tax situation since 2006, prior to the engagement. Although the client had subsequently learned of the tax arrearage, he had made no current or past due payments. As of the spring of 2009, the client was trying to negotiate with the city and decided to keep the house in trust until the tax situation was resolved. The respondent rendered no services to the client thereafter and did not conclude the probate. The client eventually took a mortgage on the property and paid off the tax debt.

The respondent's failure to obtain the client's consent after consultation to the limitation of his representation violated Mass. R. Prof. C. 1.2(c). The respondent's lack of diligence in the matter violated Mass. R. Prof. C. 1.3. His failure to respond to the client's inquiries violated Mass. R. Prof. C. 1.4(a).

The respondent had no history of discipline, and he made a full fee refund to the client. He received an admonition for his misconduct.

ADMONITION NO. 11-04

CLASSIFICATIONS:

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

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

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

SUMMARY:

Prior to 2005, a lawyer practiced as an associate at a small law firm in which her father was a principal. In 2003, a husband and wife engaged the father to update their estate plans with the intended goal of avoiding probate. The father prepared new wills leaving all of the couple's assets to their nephew upon the last of the husband and wife to die. He also created a family trust to which he was to convey the couple's family home and bank accounts. The father failed to take steps to fund the new trust. The lawyer was not directly involved with the representation of the couple or the failure to properly fund the new family trust.

The wife died in May 2004. The nephew called the law firm, and was incorrectly advised that nothing needed to be done to probate his aunt's estate because all of the assets were in the family trust. This statement was incorrect because the family trust had not been funded. Although there were no adverse consequences for the aunt's estate, the firm missed an opportunity to fund the family trust prior to the husband's death.

The father ceased practicing law at the end of 2004. The lawyer and the remaining partner formed a new law firm.

In January 2007, the husband died. The nephew met with the lawyer to seek representation as the nominated executor of his uncle's estate, and as a co-trustee of the family trust. At or about the time of this meeting, the lawyer understood that the family trust had never been funded and that probate of the estate was required. The respondent

informed the nephew that his uncle's estate would have to be probated and agreed to represent him, but she did not inform the client that she would have a conflict of interest as to any claims the estate might have against her father or his former partner or firm and obtain his consent to the representation.

The lawyer represented the nephew in connection with the probate of his uncle's estate for about six months, before he retained new counsel to represent him. During this time, a niece initially sought to challenge the will that named the nephew as sole beneficiary of the uncle's estate. The lawyer presented the nephew with a bill for approximately $4,000 for her legal fees. These fees would not have been necessary if the lawyer's father had funded the living trust as he had been paid to do. After the nephew challenged the charges, the lawyer agreed to waive her entire legal fee.

The lawyer violated Mass. R. Prof. C. 1.7(b) and 1.16(a)(1) by representing a client in a matter in which her representation was materially limited by her responsibilities to her father and her former and present law firm when she did not seek the consent of the client after consultation. The lawyer violated Mass. R. Prof. C. 1.4(b) by failing to fully explain the matter to the client.

The lawyer, who was admitted to practice in 1999 and had no prior disciple, received an admonition for her conduct.

ADMONITION NO. 11-05

CLASSIFICATIONS:

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

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

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

SUMMARY:

The respondent was retained in May of 2005 to represent a client in a criminal matter arising out of a domestic assault and battery. The victim was the client's boyfriend. The respondent had limited experience in handling criminal matters and disclosed this to the client. The client rejected the respondent's offer to refer the client to another attorney and instead retained the respondent.

Prior to trial, the respondent failed to meet with three potential witnesses to other altercations between the victim and the client. He also failed to file a motion in limine to exclude from evidence graphic photographs of the victim's injuries and a 911 tape relating to the incident, and did not object to the introduction of this evidence at trial.

At the trial, the respondent failed to object to testimony concerning prior bad acts of his client and elicited additional testimony of his client's prior bad acts from the victim on cross-examination. The respondent also failed to object to testimony of a police officer regarding his opinion that the client was the "primary aggressor" in the physical confrontation.

At the conclusion of the trial, the client was found guilty of assault and battery and sentenced to one year of probation and referred to a batterer's program. Successor counsel filed a motion for a new trial on behalf of the client based upon ineffective assistance of counsel, which the court granted. The criminal charges against the client were dismissed after the victim failed to appear for the new trial.

The respondent's failure to engage in adequate pre-trial preparation and his conduct at trial in eliciting evidence of the client's prior bad acts and failing to object to harmful testimony and evidence was in violation of Mass. R. Prof. C. 1.1, 1.2(a) and 1.3.

The respondent was admitted to the Massachusetts bar on February 11, 1999 and has no prior discipline. The respondent received an admonition for this misconduct conditioned upon attendance at a CLE course designated by bar counsel.

ADMONITION NO. 11-06

CLASSIFICATION:

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

SUMMARY:

The respondents, a principal and an "of counsel" at a small firm, represented the client regarding trademark matters and failed to file certain pleadings before the statute of limitations expired.

In or about July 1985, the client had trademarked his business name ("the mark"). However, on April 27, 2004, another entity also registered the same mark as part of their trademark. The time limitation to file a petition to cancel with the trademark office is five years from the time a mark is registered.

In or about March 2008, the client engaged the services of the respondents to assist him with filing a petition to cancel the infringing mark as well as to assist with other intellectual property issues. The client repeatedly informed the respondents that he wanted them to file a petition to cancel on his behalf.

On April 22, 2009, the respondents met with the client to discuss the status of the petition to cancel as well as other issues. The respondents discussed with the client that the statute of limitations was soon expiring. The client left the meeting believing that the respondents would file the petition to cancel as soon as possible. On April 27, 2009, the statue of limitations expired and the respondents failed to file the petition to cancel. The client lost his opportunity to file the petition to cancel.

By email dated July 17, 2009, the respondents withdrew from representation and waived any outstanding fees due the firm. Ultimately, the client was not harmed because the other entity allowed its trademark to lapse.

The respondents' failure to file the petition to cancel before the running of the statute of limitations is in violation of Mass. R. Prof. C. 1.3.

The respondents received admonitions for their conduct conditioned upon their attendance at a CLE course designated by bar counsel.

ADMONITION NO. 11-07

CLASSIFICATION:

Failing to Act Diligently [Mass. R. Prof. C. 1.3]
Failing to Communicate Adequately with Client [Mass. R. Prof. C. 1.4]

SUMMARY:

In November 2009, the respondent was retained to assist his client in obtaining a Temporary Trainee ("H-3") visa. The client and respondent communicated for several months as the respondent assisted the client with drafting paperwork. After the client sent the final draft of the H-3 visa application to respondent, the communication ceased. The client eventually had to obtain a new attorney and pay an increased filing fee to expedite the H-3 visa application.

In early March 2010, the respondent took an extended period of time away from work to assist his parents who had been experiencing serious health issues. During his time away from work, the respondent did not provide for coverage and ceased communications with his client. The respondent made no attempt to communicate with the client in regards to the time the respondent was taking off or the status of the client's case. The respondent's voice mail box was answered as "full". After being notified of the complaint filed with bar counsel, the respondent reimbursed the client for his legal fee and for the additional filing fees the client had to pay to expedite his H-3 visa. No ultimate harm resulted.

The respondent's failure to act on behalf of his client with reasonable diligence was in violation of Mass. R. Prof. C. 1.3. The respondent's failure to adequately communicate with his client and to notify her of the status of her visa application was in violation of Mass. R. Prof. C. 1.4(a).

The respondent was admitted to practice on December 17, 1998 and has no prior discipline. However, the respondent was cautioned in January 2010 for failing to adequately communicate with his client in an immigration matter.

The respondent cooperated with bar counsel in setting up procedures for coverage in the future and his family health issues were resolved. The respondent received an Admonition conditioned upon taking a CLE program recommended by bar counsel.

ADMONITION NO. 11-08

In The Matter of An Attoney

See Memorandum of Decision

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No: BD-2011-024

IN RE: IN THE MATTER OF AN ATTORNEY

ORDER

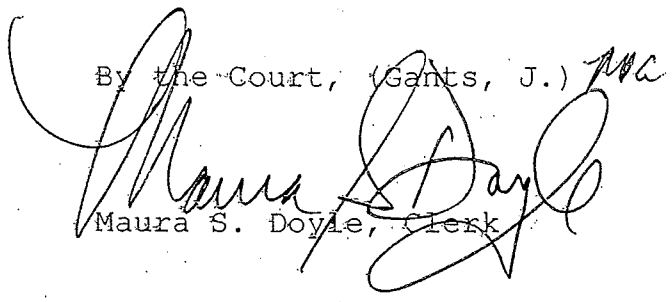
This matter came before the Court, Gants, J., on bar counsel's request that the Memorandum of Decision and Order Affirming Issuance of Admonition By Bar Counsel entered on May 19, 2011, should not be impounded.

Bar Counsel asserts as grounds for this request that the Memorandum of Decision and Order contains no identifying information and should be published according to the board's standard policy.

Upon consideration and pursuant to the Order of Impoundment entered on March 18, 2011, it is ORDERED that the record and proceedings In The Matter Of An Attorney remain impounded with the

exception of the Court's May 19, 2011 Memorandum of Decision and Order Affirming Issuance Of Admonition By Bar Counsel.

By the Court, (Gants, J.)



Maura S. Doyle, Clerk

Entered: May 31, 2011

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No: BD-2011-024

IN RE: IN THE MATTER OF AN ATTORNEY

ORDER AFFIRMING ISSUANCE OF ADMONITION BY BAR COUNSEL

This matter came before the Court, Gants, J., on an Information and Record of Proceedings with the Vote and Recommendation of the Board of Bar Overseers filed by Bar Counsel on March 15, 2011. A hearing was held on April 13, 2011, attended by assistant bar counsel and the lawyer.

Upon consideration thereof, and in accordance with the Memorandum of Decision of this date, it is ORDERED that the board's decision that an admonition be administered to the attorney be, and the same hereby is, affirmed.

By the Court, Gants, J.

Maura S. Doyle, Clerk

Entered: May 19, 2011

COMMONWEALTH OF MASSACHUSETTS

Suffolk, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-2011-024

RE: IN THE MATTER OF AN ATTORNEY

MEMORANDUM OF DECISION

After the Board of Bar Overseers (board) determined that the respondent should receive an admonition for engaging in a conflict of interest in violation of Mass. R. Prof. C. 1.7 (b), the board filed an information pursuant to S.J.C. Rule 4:01, § 8(6), on the written demand of bar counsel. Bar counsel presents two arguments. First, she contends that the respondent violated various rules of professional conduct by concealing material information from a judge at a proceeding under G. L. c. 152, § 15, to determine the fairness of a settlement agreement, and that this misconduct warrants a suspension of one year and one day, as recommended by the hearing committee. Second, she contends that the conflict of interest alone, when considered in light of the respondent's prior discipline twenty years ago (an admonition for signing her husband's name to a mortgage without advising the notary), warrants a public reprimand. I conclude that the subsidiary facts found by the board are supported by substantial evidence, and affirm the board's conclusion that admonition is the appropriate disposition.

1. Background. I summarize the facts as found by the hearing committee and the board. After an employee (husband) was injured at work when an electrical box exploded, the respondent represented the husband in the workers' compensation proceeding, and jointly represented the husband, his wife, and their child in a related tort action against the third parties who owned or maintained the property where the electrical box was located (third party action). The respondent negotiated a settlement of the third party action in the amount of $750,000 to settle all claims, but the parties could not agree as to the allocation of the settlement among the husband, wife, and child. Under G. L. c. 152, § 15, the third party settlement required the approval of the judge in the third party action, who must make a finding as to the "merits of the settlement" and the fairness of the allocation of amounts paid to the husband on his negligence claim and to his wife and child on their consortium claims.

At the § 15 hearing, the respondent, on behalf of the plaintiffs, proposed an allocation that apportioned sixteen per cent to the husband's negligence claim, seventy-nine per cent to the wife's consortium claim, and five per cent to the son's consortium claim, and argued to the judge that the allocation was appropriate in view of the defense of comparative negligence (which applied only to the husband's negligence claim) and the wife's substantial loss of consortium. The judge approved the

settlement with the proposed allocation. Under the settlement approved by the judge, the self-insured employer, which had a worker's compensation lien on the sum recovered by the husband from a third party, would receive only partial reimbursement of the approximately $320,000 it paid in workers' compensation benefits, and the husband would receive nothing.[1]

The respondent informed the judge at the hearing that the husband and wife had separated after the accident as a result of the husband's injuries suffered from the accident, and "what was an intact marriage is no longer a marriage." The respondent, however, did not inform the judge that the wife had moved to Virginia, that husband and wife had retained divorce counsel and were in the process of divorcing, that during the divorce negotiations the wife had agreed to divide their combined net third-party recovery equally, and that the husband therefore expected to received one-half of the wife's proceeds from the third party settlement.

A few months after the judge had approved the settlement agreement, the insurer learned of the divorce and separation agreement that divided equally the wife's net proceeds from the settlement, and filed a motion for relief from judgment, alleging

---

[1] The sum recovered by the employee from a third party "shall be for the benefit of the [workers' compensation] insurer, unless such sum is greater than that paid by it to the employee, in which event the excess shall be retained by or paid to the employee." G. L. c. 152, § 15.

fraud and newly discovered evidence. The respondent continued to represent the husband and wife at the hearing on this motion. On September 12, 2005, a judge (who was not the judge who had approved the settlement) vacated the approval of the settlement, finding that the husband and wife had intentionally committed a fraud on the insurer and the court by representing that the wife would receive seventy-nine per cent of the proceeds when they had privately agreed to an equal distribution. The judge attached the husband's assets, but not the wife's.

After this ruling, the husband retained new counsel, but the respondent continued to represent the wife. On October 16, 2005, one day before the new hearing on the approval of the settlement, the respondent filed an emergency motion to continue the hearing, contending that she had written the wife to notify her of the respondent's potential conflict in continuing to represent her but had yet to learn whether the wife wished to waive the conflict or retain new counsel. The motion hearing was continued.

On February 27, 2007, new counsel filed an appearance on behalf of the wife, and on March 21, 2007, the respondent filed a motion to withdraw as counsel. By July, 2007, the parties reached a global settlement which was approved by the original motion judge and which included an allocation identical to the one earlier approved.

After bar counsel filed a petition for discipline against the respondent, the hearing committee concluded that the respondent made misrepresentations to the motion judge, failed to take remedial action after the husband made misrepresentations to the motion judge, and engaged in conflicts of interest by continuing to represent both the husband and the wife at the hearing on the motion for relief from judgment, and by continuing to represent the wife after the judge found that the settlement approval was obtained through fraud. The hearing committee recommended the respondent be suspended for one year and one day.

The board accepted the hearing committee's factual findings but not its legal conclusions. The board concluded that the charges of misrepresentation had not been proven, because the allocation of the proceeds from the third-party settlement set forth in the separation agreement was not material to the judge's approval of the third-party settlement.[2] The board also concluded that the respondent had engaged in a conflict of interest, for which the appropriate disposition was an admonition.

---

[2] Because the separation agreement was neither signed by the husband nor approved by a judge of the Probate and Family Court until after the original G. L. c. 152, § 15, hearing, the Board of Bar Overseers (board) concluded that no enforceable separation agreement existed at the time of the hearing about which either spouse could have testified. I do not address this evidentiary issue because I agree with the board's conclusion that such an agreement, even if fully executed, is immaterial to a judge's fair allocation determination under § 15.

2. Discussion. I address first bar counsel's claim that the respondent concealed material facts from the judge at the § 15 hearing. A lawyer may not knowingly withhold a material fact from a court when disclosure is necessary to avoid assisting in fraud by a client. Mass. R. Prof. C. 3.3 (a) (2). "In the context of rule 3.3 (a) (1), a fact is material if, viewed objectively, it directly or circumstantially had a reasonable and natural tendency to influence a judge's determination." Matter of Angwafo, 453 Mass 28, 35 (2009).

At a § 15 hearing, the judge must determine the "merits of the settlement" and the "fair allocation of amounts" payable to the employee, and to the employee's spouse and children on a consortium claim. G. L. c. 152, § 15, amended by St. 1991, c. 398, § 39. "The cases have uniformly held that . . . an insurer's right to full reimbursement of benefits it has paid to the injured employee under G. L. c. 152 . . . may not be compromised, abridged, or equitably allocated to others so as to deprive the insurer of its lien." Hultin v. Francis Harvey & Sons, Inc., 40 Mass. App. Ct. 692, 694-95 (1996); see Walsh v. Telesector Resources Grour, Inc., 40 Mass. App. Ct. 227, 232 (1996) (judge not required to accept allocation "made for the primary, if not exclusive, purpose of depriving the insurer of its right to reimbursement and a possible offset"). Where a third-party tort settlement includes compensation for a spouse's

or a child's loss of consortium, a judge must consider and weigh the relative merits of the employee's negligence claim and the spouse's and children's consortium claims in deciding whether or not the recommended allocation is fair. Hultin v. Francis Harvey & Sons, Inc., supra at 698. In deciding whether a settlement allocation is fair, a judge may consider the probability that a plaintiff would have prevailed at trial, the magnitude of damages suffered by each plaintiff, and the allocation that an impartial jury likely would have established through their verdict. See, e.g., id. at 698-99; Walsh v. Telesector Res. Grp., supra at 230. In the instant case, a judge may also consider the probability that the husband would have been found comparatively negligent had the case been tried, and the percentage responsibility a reasonable jury likely would have attributed to the husband.

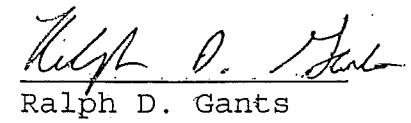
The ultimate disposition of the proceeds of settlement, whether by agreement or by gift, is not a factor in determining the fairness of the settlement allocation. Where a husband and wife continue to be married, a judge may not inquire into whether one spouse may use the proceeds for the benefit of the other in determining whether the allocation is fair, and the inquiry is no more appropriate where the spouses are separated and contemplating divorce. Therefore, I conclude that the allocation of settlement proceeds in a separation agreement is not material to a judge's determination of the fairness of the allocation of a

civil settlement under § 15. Because it is not material, the respondent had no duty to furnish the judge with information regarding the separation agreement, and violated no disciplinary rule by failing to volunteer such information. Therefore, I affirm the board's decision that the respondent did not violate rule 3.3 (a) (2) or rule 3.3 (b).

Bar counsel additionally argues that a public reprimand is the appropriate sanction for the conflict of interest, because the conflict caused harm or potential harm, and was aggravated by prior discipline. The board determined that an admonition was the appropriate sanction, noting that "the conflict did not arise out of self-interest, it was not pursued through misrepresentation, and it did not cause harm." The board also concluded that its admonition of the respondent twenty years ago did not require an escalation of the sanction to public reprimand. I conclude that the board's conclusion is supported by substantial evidence. See Matter of Murray, 455 Mass. 872, 879 (2010), quoting 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"). Where, as here, the respondent did not knowingly and purposefully engage in a conflict of interest, did not act out of self-interest, and ultimately withdrew from the representation, albeit belatedly, I

agree with the board that an admonition is appropriate discipline. See In re Discipline of an Attorney, 449 Mass. 1001, 1002 (2007) (admonition appropriate where attorney's actions not motivated by self-interest); Matter of the Discipline of Two Attorneys, 421 Mass. 619, 629-30 (1996) (admonition appropriate where attorneys made wrong choice in effort to act ethically).

Conclusion. For the reasons stated above, I affirm the board's decision that the respondent receive an admonition for engaging in a conflict of interest in violation of Mass. R. Prof. C. 1.7 (b).



Ralph D. Gants
Associate Justice

Entered: May 19, 2011

ADMONITION NO. 11-09

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 December 2005, a client of the respondent was injured when the car she was driving was struck by another vehicle. The client and the respondent had an ongoing professional relationship, and in January 2006, the respondent agreed to represent the client in her claim against the other driver. During the three-year period following the accident, the client received medical treatment for her injuries, her condition worsened, and she did not reach a medical end result.

On multiple occasions in the late summer and fall of 2008, the client tried to reach the respondent to ascertain the status of her case. The respondent did not respond to her inquiries. In December 2008, shortly before the statute of limitations would expire, the respondent filed suit. The respondent did not inform the client that he had filed suit, nor did he send her a copy of the complaint. In late 2008 and early 2009, the client again tried on multiple occasions to reach the respondent to ascertain the status of her case, but was unsuccessful in her efforts to speak to him.

In March or April 2009, the client finally spoke to the respondent, and he informed her that he was pursuing her case and that he would contact her in a month. He did not, however, and also did not inform the client that, in May 2009, the defendant served a request for production of documents and interrogatories on the respondent and, in July 2009, the defendant served a final request for answers to interrogatories on the respondent. A month later, the court allowed the defendant's motion to compel production of documents pursuant to Rule 37(d). The respondent did not respond to the court's order compelling production of documents.

In October 2009, the court dismissed the case because of the respondent's failure to answer interrogatories in accordance with Mass. R. Civ. P. 33(a)(4). The respondent did not advise the client that her case had been dismissed. Throughout the fall of 2009, the client again tried on multiple occasions to reach the respondent to ascertain the status of her case, but was unsuccessful.

In November 2009, after the client filed a complaint with the Office of Bar Counsel, the respondent sent the client the interrogatories, and she submitted her answers to the respondent. In January 2010, the respondent filed a motion to vacate the dismissal, and the court allowed it after a hearing in February 2010.

In mitigation, from July 2008, the respondent suffered from a number of health problems that required ongoing treatments and hospitalizations through October 2009. By late 2009, the respondent had recovered sufficiently to resume work on the client's matter. Discovery has proceeded since the suit was reinstated.

In aggravation, the respondent received an admonition on August 7, 2006 for failing to act diligently and failing to communicate adequately with a client. *Admonition No. 06-27*, 22 Mass. Att'y Disc. R. 907.

The respondent's failure to respond to discovery requests or a motion to compel or to oppose a motion to dismiss was in violation of Mass. R. Prof. C. 1.3. The respondent's failure to adequately communicate with the client and keep her apprised of the status of her case throughout the representation was in violation of Mass. R. Prof. C. 1.4(a) and (b). The respondent received an admonition for his conduct, conditioned upon having the Law Office Management Assistance Program (LOMAP) inspect and audit his law office practices and procedures.

ADMONITION NO. 11-10

CLASSIFICATIONS:

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

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

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

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

SUMMARY:

In December 1999, a lawyer filed in superior court a verified complaint alleging that the plaintiff ("the client") had been terminated after reporting defects in a company product to his supervisors and others. In September 2004, the lawyer who filed the complaint withdrew from his representation of the client, and the respondent filed an appearance for the client in late November 2004.

In October 2006, the respondent and the attorney for the company waived a jury trial, and the case proceeded to trial before a judge on May 16, 2007. In December 2007, the court entered findings of fact, rulings of law, and an order for judgment in favor of the defendant-company and dismissed the complaint. The respondent filed a timely notice of appeal for the client in January 2008.

The client unsuccessfully sought new counsel to represent him on appeal. The client then asked the respondent prepare and file a brief on appeal on his behalf, and the respondent agreed to do so.

The appeal was entered in the Appeals Court in November 2008, and the client's brief was due on or before January 4, 2009. The respondent had difficulty identifying issues to support an appeal and sought an extension on December 19, 2008. After December 19, 2008, the respondent was unable to find a basis for the appeal. Between February 4 and March 6, 2009, the respondent filed five additional motions to extend the time for filing a brief and appendix, all of which the Appeals Court allowed.

On March 13, 2009, the respondent filed a seventh motion to extend the appeal date. The court denied this motion without prejudice. On March 23, 2009, the company filed a motion to dismiss the appeal, which the court granted on April 7, 2009. The respondent did not inform the client that his appeal had been dismissed until the summer of 2009. At that point, the respondent told the client that he would file a motion to reinstate the appeal as soon as he finished the brief. The respondent finally completed the brief and filed the motion on March 19, 2010. The motion was denied.

The respondent's failure to file an appeal brief for his client in a timely manner violated Mass. R. Prof. C. 1.1, 1.2(a) and 1.3. The respondent's failure timely to inform the client that the appeal had been dismissed violated Mass. R. Prof. C. 1.4(a) and (b).

The respondent received an admonition for his conduct in this matter, subject to the condition that he attend a continuing legal education course designated by bar counsel.

ADMONITION NO. 11-11

CLASSIFICATIONS:

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

Failure to Account on Request or on Final Disbursement [Mass. R. Prof. C. 1.15(d)(1)]

SUMMARY:

In April of 2008, the client retained the respondent to represent him in a complaint for modification of a divorce separation agreement. In April 2008, the client signed an hourly fee agreement. In or about this same time, the client paid the respondent a $5,000 retainer. The respondent deposited the funds to her IOLTA account.

Between May 2008 and February 2009, the respondent and opposing counsel negotiated the modification agreement. By March of 2009, the respondent and opposing counsel finalized the agreement. On April 22, 2009, opposing counsel forwarded to the respondent three original executed agreements and stated in the letter that one agreement was for her file, one for her client and one to be filed with the court. Opposing counsel also stated in the letter that she assumed the respondent would prepare the joint petition for modification for filing as well. The respondent took no further action on the matter and did not file the original agreement with the court.

In December 2009, the client terminated the respondent's services and requested a full accounting of his retainer. The respondent did not respond, provide an accounting or return the client's file.

By letter dated March 2, 2010, opposing counsel requested an update on the status of the case. The respondent did not respond. Rather, the respondent returned the file to the client and directed the client to deal directly with opposing counsel.

By failing to prepare and file the joint petition for modification and to file the original agreement with the court, the respondent failed to act with reasonable diligence and promptness in violation of Mass. R. Prof. C. 1.3. By failing to provide an accounting upon request, the respondent violated Mass. R. Prof. C. 1.15(d)(1).

Although the respondent did not file the agreement with the court, there was no harm to the client because the terms of the agreement had been carried out by the parties. After the receipt of the complaint filed with bar counsel, the respondent provided a full accounting for the retainer. In mitigation, during the relevant time period, the respondent was the primary caregiver for her elderly mother, who subsequently died.

The respondent has been a member of the bar since 1977 and has no disciplinary history. The respondent received an admonition for the above misconduct conditioned on attendance at a CLE program designated by bar counsel.

ADMONITION NO. 11-12

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

BAR COUNSEL, Petitioner, vs. JOHN SMITH, ESQ.,[1] Respondent	)

BOARD MEMORANDUM

Bar counsel appeals from a hearing committee's conclusions of law and recommendation that the respondent receive an admonition. The committee based its recommendation on findings that the respondent engaged in the unauthorized practice of law after learning that he had been administratively suspended for failing to comply with his registration obligations, and that he had failed to provide the board with accurate registration information. Oral argument was held before the full board on May 9, 2011.

We adopt the hearing committee's findings and conclusions, except as expressly modified below, and we adopt its recommendation that the respondent receive an admonition.

[1] Because we have decided not to impose public discipline against the respondent, we have used a pseudonym. See S.J.C. Rule 4:01, § 20(3)(d); Board Rule Section 3.22(c)(4).

1. **Findings of fact, conclusions of law, and matters in mitigation and aggravation.**

Unbeknownst to the respondent, on September 1, 2006, he was administratively suspended from the practice of law. The suspension resulted from the respondent's failure to send his annual registration statement and fees to this board. At the time of the suspension, it was the customary practice for the respondent's employer, a large Boston firm, to pay its associates' registration fees after the associates had submitted their registration statements to the firm.

Unaware of the suspension, the respondent did not seek reinstatement within thirty days, and he thereafter did not comply with his obligations of withdrawal, notice, and compliance under S.J.C. Rule 4:01, § 17(1), (5), and (6).

From the date of the administrative suspension in 2006 through around February 2009, the respondent continued to practice law at the Boston firm. By March 2009, the respondent had received notice that his employment was being terminated as part of a work force reduction, and during that month he conducted a job search using an office at the firm. He was not then practicing law.

Sometime around March 27, 2009, the respondent first learned of his suspension. Around that same day, he wrote to the board's registration department requesting information concerning reinstatement. His letter enclosed checks towards the arrears on his registration fees.

The board received the respondent's letter on April 9, 2009. By that day, the respondent had accepted employment and begun work as in-house corporate counsel. The respondent did not advise his new employer of his administrative suspension.

The board returned the checks because they were less than the total owed, and it also enclosed a packet of materials for the respondent to prepare and return in support of his request for reinstatement which, the packet advised, had to be acted on by the Court. The completed packet arrived at the board on May 6, 2009. On May 12, 2009, the board

notified the respondent that the Court had granted his reinstatement.

The committee found in substance that the respondent had failed to provide the board with his correct office address, and that the respondent was sent admonitory mailings about his registration obligations to his home address that either he did not accept or did not see.

Specifically, the committee found as follows.

The respondent's initial registration statement, filed during 2003, gave his father's address in State B both as his own home address and as his office address.[2] In August 2004, the respondent moved to Boston, and that September he began work for the Boston firm, where he remained until March 2009. Meanwhile, in June 2005, the respondent notified the board of his changed home address, but not his new office address. Until May 2009, he did not advise the board of his Boston office address and the board continued to list his State B address as the respondent's office address.

Since 2005, the respondent was aware that his father was throwing away mail sent to him in State B. Further, the respondent did not pick up his home mail, or open it, on a daily basis.

The board billed the respondent annually. From November 2005 to June 2006, the board mailed the respondent four notices that informed him of the deadline for the annual registration and fees due in 2006. All were sent by first-class mail and none were returned. Three were mailed to the State B address; one went to the respondent's Boston home address.

In July 2006, the board sent the respondent two packets of materials, each of which included notice of his upcoming administrative suspension. The board sent one of the packets to the respondent's home in Boston by first-class mail; it was not returned. The other went to the State B address by certified mail, return receipt requested. After

---

[2] During 2003 and 2004, the respondent clerked for a federal judge sitting in Maine.

two notices, the Post Office returned this item to the board as unclaimed.

On September 6, 2006, the board mailed to the respondent a packet that included notice of his suspension, materials for obtaining reinstatement, and notice that if he was not reinstated within thirty days of the administrative suspension, then he was obligated by S.J.C. Rule 4:01, § 17, to notify clients, withdraw from all matters, and file an affidavit attesting to his compliance. These materials went by certified mail, return receipt requested, to the respondent's Boston home address. He did not claim the letter after two notices from the Post Office, and it was returned as unclaimed.

The materials the respondent sent to the board in May 2009 in support of his reinstatement included a registration statement that incorrectly named the Boston law firm as his employer, and gave his Boston address as both his home and his office. During a recorded statement before bar counsel in April 2010, the respondent disclosed his corporate employer for the first time.

The respondent's practice focused on corporate and transactional law and, not being a litigator, he did not have occasion to produce a current bar card for admission to court.

Based on these findings, the committee made the following findings:

(1) By failing to provide the board with current address information, the respondent violated S.J.C. Rule 4:02, § (1) (annual registration obligations).

(2) The respondent's failure to file a timely affidavit of compliance concerning his suspension did not violate either S.J.C. Rule 4:01, § 17 (5) and (6) (compliance obligations on suspension), or Mass. Rule Prof. C. 8.4(d) (conduct prejudicial to the administration of justice) because he was unaware of his suspension.

(3) The respondent engaged in the unauthorized practice of law in violation of Mass. Rule Prof. C. 5.5(a) from March 27, 2009, the date he learned of his administrative suspension, until his reinstatement on May 12, 2009.

In mitigation, the committee found that the respondent was inexperienced at the

time of his misconduct; that he believed his employer was paying his registration fees and when he discovered his suspension he took prompt action to learn why it had occurred; that at the hearing, the respondent accepted full responsibility for his misconduct and credibly expressed remorse; that there was no evidence of a selfish or dishonest motive; and that while there was no evidence of a failure to cooperate, there was evidence that the respondent contacted the board promptly, cooperated with the board to obtain reinstatement, and believed that he had resolved his problem when he wrote to the board in late March or early April 2009 enclosing payment towards his fee arrears.

2. Discussion.

On appeal, bar counsel argues that the committee erred by declining to find unauthorized practice and violation of compliance obligations following suspension and by recommending and admonition in reliance on factors that constitute "typical" mitigation.

The respondent's continued practice during the suspension, even unaccompanied by actual knowledge of the suspension, violated Mass. R. Prof. C. 5.5(a). That rule does not state that either intent or knowledge is an element of unauthorized practice. In a recent opinion addressing the closely related issue of an attorney's assistance in the unauthorized practice of law, the Court reasoned as follows:

> [N]o cases support the addition of a requirement that the attorney know that the practice is unauthorized. ...
>
> At best, the respondent's defense is that, because he was not aware that Porter's activities, as permitted and arranged by the respondent, amounted to the unauthorized practice of law, he cannot be held liable for assisting in that practice. This is not a sufficient defense. Matter of the Discipline of an Attorney, 392 Mass. 827, 835 (1984) ("There have been, and will be, few cases of unethical conduct where we consider it relevant that an offending attorney was not aware of the disciplinary rules or their true import.").

Matter of Hrones, 457 Mass. 844, 854-855 (2010). Here, the respondent knew all of the relevant facts short of his actual suspension, i.e., that he was practicing in Massachusetts over a period of years and (despite his belief that his employer was paying his registration

fees) that he had neither caused the required annual registration statements to be filed nor taken the steps required to cause his employer to pay his annual registration fee. He may be held to the disciplinary implications of those facts under S.J.C. Rule 4:01, § (3) ("A violation of this Chapter Four by a lawyer ... shall constitute misconduct and shall be grounds for appropriate discipline"). Inevitability, those implications include administrative suspension. S.J.C. Rules 4:02, § (3); 4:03, §§ (2), (3) (mandatory administrative suspension for failure to file annual registration statement and for failure to pay annual registration fee). Under Hrones, the respondent's apparent ignorance of the ethical import of the facts is no defense to the charge of unauthorized practice. Accordingly, we modify the hearing committee's conclusions to include the finding that the respondent engaged in the unauthorized practice of law starting with his administrative suspension in 2006 until his reinstatement in May 2009.[3] We leave undisturbed, as we must, the committee's credibility finding that the respondent first learned of his suspension around late March 2009. See S.J.C. Rule 4:01, § 8(5); Matter of Saab, 406 Mass. 315, 328, 6 Mass. Att'y Disc. R. 278, 291-292 (1989).

Our modifications to the committee's findings do not require that we reject its recommendation. The respondent's most serious violation was his unauthorized practice once he knew of his administrative suspension. Typically, we would be inclined to impose at least a public reprimand for unauthorized practice aggravated by the respondent's knowledge of his administrative suspension.[4] Cf. Matter of Cavanaugh, 26 Mass. Att'y Disc. R. ---, Pub.

---

[3] For similar reasons, we modify the committee's conclusions to include a finding that the respondent violated S.J.C. Rules 4:01, § 17(5) and (6) by failing to meet his compliance obligations after his administrative suspension, including the obligation to file an affidavit and to cease practice if not timely reinstated. Also, because attorney registration concerns the administration of justice, we modify the committee's conclusions to include a finding that the respondent's conduct violated Mass. R. Prof. C. 8.4(d). See Matter of O'Connor, 25 Mass. Att'y Disc. R. 453, 457 (2009).

[4] Our conclusion that Rule 5.5 can be violated by unauthorized practice unaccompanied by the lawyer's awareness that it was unauthorized compels the conclusion that knowing unauthorized practice is an aggravated violation. Cf. ABA Standards for the Imposition of Lawyer Sanctions, §§ 3, 7.1-7.4 (1992) (attorney's state of mind pertinent to the severity of the sanction, including sanctions for violation of duties owed to the legal profession). Still, as this case and the admonition cases discussed in note four, infra,

Rep. No. 2010-31 (October 28, 2010); Matter of Payton, 26 Mass. Att'y Disc. R. ---, Pub. Rep. No. 2010-30 (September 23, 2010); Matter of Gillespie, 26 Mass. Att'y Disc. R. ---, Pub. Rep. No. 2009-28 (January 8, 2010) (each case: public reprimand imposed by consent for unintentional unauthorized practice where aggravating factors were present).

Here, however, the committee made no findings in aggravation beyond the respondent's knowledge of his suspension, while finding numerous matters in mitigation. The committee reasoned that those mitigating factors, and the absence of additional aggravating factors similar to those in Cavanaugh (knowing non-cooperation with bar counsel), Payton (prior discipline), and Gillespie (prior administrative suspensions for non-payment), place this matter closer to cases where the attorney received an admonition for a single instance of unauthorized practice occurring after notice of an administrative suspension.[5]

Based on this reasoning, and the fact that the respondent's knowing unauthorized practice was brief and concerned but a single corporate client, we would uphold the committee's recommendation for an admonition without further discussion but for bar counsel's objection to the committee's findings in mitigation. Bar counsel argues that because matters the committee found in mitigation can be categorized as "typical," as that term has been defined in precedent, they must not be given substantial weight in determining the sanction. The respondent, citing Matter of Alter, 389 Mass. 153, 3 Mass. Att'y Disc. R. 3 (1983), and Matter of Barkin, 1 Mass. Att'y Disc. R. 18 (1977), rejoins that precedent

---

demonstrate, mitigating and aggravating factors, such as the length and circumstances of the unauthorized practice, must be considered as well.

[5] AD-09-10, 25 Mass. Att'y Disc. R. 670 (2009) (attorney left the practice of law and was administratively suspended after he failed to file his registration statement; "without thinking about the administrative suspension," the attorney filed an appearance in the district court for a family friend); AD-04-20, 20 Mass. Att'y Disc. R. 697 (2004) (with the exception of one bankruptcy matter, the attorney left the practice of law and stopped paying his registration fees, resulting in his administrative suspension; the attorney continued to represent that one client in that one matter "without thinking about the administrative suspension").

disfavors "typical" mitigation only in matters involving suspension or disbarment for a serious crime.

We need not address the respondent's broader arguments, concerning categories of violations where "typical" mitigation will or will not bear significant weight, to dispose of bar counsel's contentions.[6] In appropriate circumstances, "typical" mitigating factors have carried weight in decisions of the single justices. See, e.g., Matter of Grew, 23 Mass. Att'y Disc. R. 232, 241 (2007) ("typical" mitigating factors may be considered to determine the appropriate sanction within the permissible range); Matter of Doyle, 429 Mass. 1013, 1014 n.5, 15 Mass. Att'y Disc. R. 170, 172, n.5 (1999) (although "typical" mitigation historically has not been given substantial weight, "[t]hat is not to say, however, that these considerations can play no role at all in the process, in an appropriate case"). See also Matter of Surprenant, BBO File No. C3-07-0046, board memorandum at 7-8, n.3 (April 11, 2011) ("typical" mitigating factors, taken together, demonstrated that misconduct was not comparable to cases where a presumptive sanction was imposed), S.J.C. No. BD-2011-044 (2011), information pending. At least where our choice is between admonition and public reprimand, two sanctions falling within the range appropriate for this type of violation, it is appropriate to give weight to findings in mitigation that might fall under the rubric of "typicality," especially where, as here, the committee has made more than one such finding and those findings shed light on both the nature of the respondent's misconduct and the appropriate level of corrective and deterrent discipline.

Consequently, in determining the appropriate sanction, we weigh the respondent's relative inexperience, his sincere remorse and acceptance of responsibility, the absence of

---

[6] Taken literally, the respondent's position is erroneous. Matter of Finn, 433 Mass. 418, 17 Mass. Att'y Disc. R. 200 (2001), concerned the appropriate sanction for misrepresentations on the attorney's bar application. Imposing a three-month suspension, the Court rejected one of the attorney's arguments in mitigation as follows: "We consider the absence of any complaints against the respondent for the past eight years a 'typical' mitigating factor that does not warrant a reduction in his sanction. See Matter of Budnitz..." Finn, 433 Mass. at 425, 17 Mass. Att'y Disc. R. at 213.

any self-interested motive and of any history of discipline, the respondent's prompt efforts to obtain reinstatement, and his belief that by late March or early April 2009 he had substantially resolved the problem by sending the board checks to cover his fee arrears. As the Court has often observed, each case to be decided on its own merits, and every attorney should receive the sanction that is most appropriate in the circumstances. See, e.g., Matter of Balliro, 453 Mass. 75, 85-86, 25 Mass. Att'y Disc. R. 35, 47 (2009).

3. Conclusion.

For the foregoing reasons, and with the exceptions noted above, we adopt the hearing committee's findings of fact, conclusions of law, and recommended disposition. The respondent shall receive an admonition.

Respectfully submitted,

THE BOARD OF BAR OVERSEERS

By: _____
Mary B. Strother
Secretary

Voted: July 11, 2011

ADMONITION NO. 11-13

CLASSIFICATION:

Obtaining Evidence in Violation of Legal Rights of Third Person [Mass. R. Prof. C. 4.4]

SUMMARY:

The respondent's practice includes collections litigation and domestic relations cases. In connection with his collections work, the respondent established a subscription for his firm with a credit reporting service. The respondent agreed when he set up the subscription to use it only for permissible purposes and otherwise in strict compliance with the Fair Credit Reporting Act, 15 USC § 1681 *et seq.* (FCRA).

During 2009, the respondent represented a client in a contempt action by the client's former wife for nonpayment of child support and in a modification brought for the client to reduce the client's support obligation. The ex-wife had provided a number of addresses during the proceedings. The client suspected that one of his children for whom he was providing child support did not actually live with the ex-wife.

The respondent wanted to verify the ex-wife's current address. To do so, in June 2009, he used the credit reporting subscription to obtain an on-line collection report on the ex-wife. The report provided address information as well as, among other things, credit accounts, account numbers and account status. Address verification is not a permissible purpose for obtaining such a report under § 1681b of the FCRA, and the respondent had no entitlement to credit information on the ex-wife. In addition, the respondent had requested and obtained the report in circumstances where it was illegal for the credit agency to furnish the information under the FCRA and G.L. c. 93, § 51.

The respondent did not print the collection report and did not use information from the report in the probate court proceedings. The ex-wife subsequently learned of the respondent's inquiry when she obtained a copy of her own credit report.

The respondent's conduct in obtaining a consumer report that was not permitted by law violated Mass. R. Prof. C. 4.4 (prohibiting the use of methods of obtaining evidence that violate the legal rights of a third person).

The respondent was admitted to the Massachusetts bar in 1991 and has no history of discipline. The respondent misunderstood the limits of his access to the collection data and did not deliberately flout the law. He caused no ultimate harm to the ex-wife. The respondent received an admonition, conditioned on his attendance at a continuing legal education course designated by bar counsel.

ADMONITION NO. 11-14

CLASSIFICATIONS:

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

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

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

SUMMARY:

In October 2009, the respondent appeared on behalf of three plaintiffs in a defamation and slander case pending in superior court. The defendants had counterclaimed against the plaintiffs.

In April 2010, the plaintiffs in counterclaim filed a motion for default judgment due to the failure of the respondent's clients to produce discovery. In May 2010, the respondent drafted a motion in opposition to the defendants' request for default judgment and assisted his clients in preparing affidavits to attach to the motion.

One of the respondent's clients was out of the country dealing with a family crisis. The respondent called the client and read the affidavit to him. The client authorized the respondent to sign his name to the affidavit, which he did. The respondent followed the signature with "/s/" in an effort to signify that the client had not personally signed the affidavit.

In May 2010, the plaintiffs in counterclaim filed a motion to strike the respondent's motion opposing the default, alleging among other things that the client had not signed the affidavit. The respondent admitted in his response to the motion that the client had not signed the affidavit and that he had personally signed the client's name with the client's consent. On June 17, 2010, the court held a hearing during which the client, who had returned to the country, affirmed that he had given the respondent permission to sign his name. The court denied the motion for default and extended the time for discovery.

By signing his client's name to the affidavit, the respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Mass. R. Prof. C. 8.4(c); engaged in conduct prejudicial to the administration of justice, in violation of Mass. R. Prof. C. 8.4(d); and engaged in conduct that adversely reflects upon his fitness to practice law, in violation of Mass. R. Prof. C. 8.4(h).

The respondent received an admonition for his conduct in this matter.

ADMONITION NO. 11-15

CLASSIFICATIONS:

Unauthorized Practice of Law [Mass. R. Prof. C. 5.5(a)]
Conduct Prejudicial to the Administration of Justice [Mass. R. Prof. C. 8.4(d)]

SUMMARY:

Between April 2009 and August 2010, the respondent was administratively suspended from the practice of law for nonpayment of her annual registration fees. During this time, she continued to practice law as in-house counsel to a corporation. Much of her work was administrative and non-legal in nature.

The respondent did not seek reinstatement within thirty days of the entry of the order of administrative suspension and thus became subject to the notice and compliance provisions of Supreme Judicial Court Rule 4:01, sec 17(1), (5) and (6).

During the period leading up to and after her suspension, the respondent was frequently out of town caring for elderly parents and working remotely. She believed, incorrectly, that she had sent in her registration form and fee and she was unaware of her suspension. She ceased practicing law when she learned that she had been suspended and thereafter promptly sought reinstatement.

By practicing law after her administrative suspension, the respondent violated Mass. R. Prof. C. 5.5(a). By failing to timely file an affidavit of compliance, the respondent violated Mass. R. Prof. C. 8.4(d) and S.J.C. Rule 4:01 sec 17(5) and (6).

In mitigation, the respondent accepted full responsibility for her error, expressed remorse, took immediate action to obtain reinstatement, and cooperated fully with bar counsel's investigation. She has no prior discipline. Accordingly, the respondent received an admonition.

ADMONITION NO. 11-16

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 2008, a foreign national living in Boston, Massachusetts hired the respondent to file an application on her behalf to adjust to permanent resident status. At the time, the client, who had entered the country legally but had overstayed her visa, was working for a local company.

In February 2008, the respondent filed Applications for Adjustment of Status on behalf of the client and her husband and daughter (as derivative beneficiaries) with the U.S. Customs and Immigration Services (USCIS). The applications sought to qualify the client as the substituted beneficiary of a labor certification previously granted to the employer. While the respondent had successfully obtained adjusted status for a different client as a substituted beneficiary of a labor certification, the client's likelihood of obtaining the same relief was low. The respondent failed to discuss fully with the client the costs, risks and likelihood of success so the client could make an informed decision as to whether to seek that relief.

The applications of the client and her family members were denied in 2009 and the USCIS instituted deportation proceedings. The client discharged the respondent and hired successor counsel, who was able to have the deportation proceedings terminated based on technicalities in the USCIS paperwork. The client remains at risk that USCIS will re-institute deportation proceedings.

After the client filed a request for investigation with bar counsel, the respondent agreed to refund the filing and attorneys' fees for the applications.

By failing to inform the client of the costs, risks and likelihood of success of pursuing an adjustment of status as a substituted beneficiary of a labor certification, the respondent violated Mass. R. Prof. C. 1.3 and 1.4. The respondent was admitted to the Massachusetts Bar in 2001 and has no prior discipline. He received an admonition for his conduct in this matter.

ADMONITION NO. 11-17

CLASSIFICATION:

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

SUMMARY:

The respondent represented a client who was the former president and CEO of a successful business in two litigation matters relating to his divorce. The respondent's representation of the client in the litigation ended on September 27, 2004.

On September 27 or September 28, 2004, the respondent spoke with the client about a project for which the respondent was the project manager and in which he had an ownership interest in two condominium units. The respondent informed his client that the project required additional funding. The client agreed to loan the respondent a sum of money at an interest rate of 10% per annum. On September 28, 2004, the client signed a promissory note that he drafted. The respondent provided no security to the client on the loan. The note stated that the interest would be payable in monthly installments and that the note was due in one year.

The respondent made some interest payments on the note in the next two years but did not pay the note when due. When the client inquired as to the status of the loan, the respondent advised him that he was attempting to sell the two units in order to repay the loan. Ultimately in 2007, both units were taken over and sold by the bank that held the mortgages, at a loss to the respondent. The client made no further inquiry and took no action to collect on the note.

The client died on October 1, 2010, survived by his second wife. The widow filed a complaint with bar counsel but has indicated, through counsel that she does not intend to pursue collection. She also declined the respondent's offer to make a substantial partial payment on account and has rebuffed his attempts at reaching a resolution.

At the time of discussion and finalization of the note, the respondent did not prepare a written disclosure explaining the potential conflicts in such a business transaction. The respondent did not specifically advise the client to seek independent legal counsel. In addition, the transaction was not fair to the client because there was no security for the loan.

By entering into a business transaction with a client the terms of which were not fair to the client, without recommending that the client seek the advice of independent counsel and without obtaining the client's informed consent to the conflict in writing, the respondent violated Mass. R. Prof. C. 1.8(a).

The respondent was admitted to the bar on July 11, 1984. He has no prior discipline.

The respondent received an admonition for his conduct, conditioned upon his attendance at a CLE program designated by bar counsel.

ADMONITION NO. 11-18

CLASSIFICATIONS:

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

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

Failure to Comply with the Rules of the Board of Bar Overseers [Supreme Judicial Court Rule 4:01, Section 17(5) and (6) and 4:02 (1)]

SUMMARY:

From 2003 until August of 2007, the respondent worked as an associate at a large firm and the firm paid her annual registration fee. In August of 2007 the respondent relocated her residence and, in September of 2007, changed employers and began working as a vice-president and in-house counsel for a bank. The respondent neglected to update her address changes with the Board of Bar Overseers, as required by S.J.C. Rule 4:02, § (1) (annual registration requirement).

The Board mailed the registration notices for the December 2007 billing cycle to the respondent's home and office addresses on file. The respondent did not receive these notices. The respondent failed to register and pay her annual registration fee due in December of 2007. On August 4, 2008, the respondent was administratively suspended because of her failure to register. She was not aware of her administrative suspension and continued her employment at the bank.

The respondent did not seek reinstatement within thirty days of the entry of the order of administrative suspension. She therefore became subject to the notice and compliance provisions of S.J.C. Rule 4:01, § 17(1), (5) and (6).

On March 2, 2010, the respondent learned that she had been administratively suspended. On March 3, 2010, the respondent requested reinstatement materials from the Board and promptly submitted an affidavit in support of reinstatement and her registration fees. The respondent was reinstated on March 23, 2010.

The respondent's failure to provide the board with her current address information was in violation of S.J.C. Rule 4:02, § (1) (annual registration requirement). Her failure to file a timely affidavit of compliance was in violation of Mass. R. Prof. C. 8.4(d) and S.J.C. Rule 4:01, § 17(5) and (6). By continuing to work as in-house counsel while she was administratively suspended from practicing law, the respondent violated Mass. R. Prof. C. 5.5(a).

In mitigation, during the period of her administrative suspension, the respondent mistakenly believed that her new employer was paying her annual bar registration fees.

The respondent was admitted to practice in Massachusetts in 2003, and has no disciplinary history. She received an admonition for her misconduct.

ADMONITION NO. 11-19

CLASSIFICATIONS:

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

Responsibilities Regarding Non-lawyer Assistants [Mass. R. Prof. C. 5.3(b)]

SUMMARY:

At the end of March of 2010, a client hired the respondent to file an application with the Social Security Administration (SSA) for benefits and signed a contingency fee agreement to that effect. The respondent, who concentrates in SSA claims, delegated the task of filing the online application to a non-attorney assistant. In April of 2010, the assistant began, but did not complete, the online application process. Nevertheless, the assistant told the respondent that the application had been successfully completed. Shortly thereafter, the assistant voluntarily left the respondent's employment and moved out of state. The respondent made no attempt to confirm that the client's SSA application had been completed and had no procedures in effect at the time to obtain or retain confirmation of the completed filing of an electronic application for SSA benefits.

Unbeknownst to the respondent, the client thereafter contacted the SSA himself and learned the application had not been completed. The client then notified the SSA that he was terminating the respondent and, in July of 2010, filed his own *pro se* application. The respondent received no written notice of termination from the client.

In August of 2010, believing his office had completed the SSA benefits claim on behalf of the client, the respondent filed a fee application with the SSA. In November of 2010, the client received from the SSA a lump sum payment of back benefits less a fee award to the respondent, and the respondent received a separate fee award check directly from the SSA. Upon learning of the fee award to the respondent, the client called the respondent, objecting to the fee award and demanding a refund of the fee because he said the benefits were awarded on the basis of his *pro se* application after the respondent's office failed to

complete an application on his behalf. The respondent deposited the disputed fee check into his IOLTA account and, after receiving confirmation from the Office of the Bar Counsel that his assistant had in fact never completed the benefits application for the client, the respondent paid the entire fee to the client.

By failing to exercise appropriate supervisory authority over his non-attorney assistant and by failing to assure completion of the client's SSA application, the respondent violated Mass. R. Prof. C. 1.3 and 5.3(b). The respondent was admitted to the Massachusetts Bar in 1994 and has no prior discipline. He received an admonition for his conduct in this matter.

ADMONITION NO. 11-20

CLASSIFICATION:

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

SUMMARY:

The respondent was contacted by a client who had received notice of the death of her ex-husband, who lived in Hawaii. The client advised the respondent that she wished to contest the probate of her ex-husband's estate in Hawaii, but had no legal contacts in Hawaii. The respondent filed an objection to the probate petition with the Third Circuit Court of the State of Hawaii in an effort to protect the client's interests until she was able to obtain local counsel. The respondent was not licensed to practice law in the State of Hawaii.

By filing the objection to the probate petition, the respondent engaged in the unauthorized practice of law in Hawaii in violation of Mass. R. Prof. C. 5.5(a).

The respondent was admitted to practice in Massachusetts in 1983, and has no disciplinary history. He received an admonition for his misconduct.

ADMONITION NO. 11-21

CLASSIFICATION:

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

SUMMARY:

In March 2011, the respondent agreed to represent the client regarding restoring visitation with his children. A hearing was scheduled on a complaint for modification and the respondent appeared on behalf of the client. After hearing, the court ordered that the children be interviewed by family services and another hearing be held. Following the next hearing, the client's visitation rights were restored. Despite the outcome, the client was unhappy with the respondent's representation and the relationship deteriorated. In May 2011, the respondent filed a motion to withdraw with the court, to which the client assented.

In the motion, the respondent stated that there was a complete breakdown of communication and cooperation with the client. The respondent also stated that the client owed the respondent $1,242 in fees, and owed his former attorney $600 in fees. The respondent attached to the motion his invoice for services as well as email correspondence between the client and himself. All of the above information was confidential and very little of it was necessary to support the respondent's withdrawal, since the client assented. The motion to withdraw with attachments was filed with the court and produced to the parties. The respondent made no effort to have the papers impounded or to present the motion to the court in chambers.

By revealing confidential information in his motion to withdraw, the respondent violated Mass. R. Prof. C. 1.6.

The respondent has been a member of the bar since 1998 and has no disciplinary history. The respondent received an admonition for the above misconduct conditioned on attendance at a CLE program designated by bar counsel.

ADMONITION NO. 11-22

CLASSIFICATION:

Improper Fee-sharing with Non-lawyer [Mass. R. Prof. C. 5.4a]

SUMMARY:

In 2004 and 2006, a tax lawyer who specialized in providing tax law advice to high net-worth individuals agreed to represent a husband and wife concerning possible investments. In both 2004 and 2006, the lawyer and the clients signed legal engagement letters, where the lawyer agreed to provide legal services in connection with determining the tax law consequences of the proposed investments. The lawyer disclosed to the clients, and confirmed in the engagement letters, that he would be paying a portion of his legal fee to others.

After receiving his fee payments from the clients, the lawyer paid 20% of his legal fee to the financial adviser who had referred the clients to him, and 1% of his legal fee to the financial entity in which they were investing. Both payments were made with the knowledge of the clients. Neither the financial adviser nor the financial entity was a lawyer.

By sharing his legal fee with nonlawyers, the respondent violated Mass. R. Prof. C. 5.4(a).

The lawyer had no prior discipline. The lawyer received an admonition for his conduct.

ADMONITION NO. 11-23

CLASSIFICATIONS:

Failing to Communicate Adequately with Client [Mass. R. Prof. C. 1.4]
Failure to Withdraw Generally [Mass. R. Prof. C. 1.16(a)(1)]
Withdrawal Without Protecting Client [Mass. R. Prof. C. 1.16(d)]
Unauthorized Practice of Law [Mass. R. Prof. C. 5.5(a)]
Conduct Prejudicial to the Administration of Justice [Mass. R. Prof. C. 8.4(d)]

SUMMARY:

In July 2009, the respondent was retained to represent a client in a divorce and filed a notice of appearance. In August 2009, the respondent suffered a back injury and began to wind down his practice. During the winter of 2009, the parties requested multiple continuances to continue discovery.

On January 26, 2010, the respondent registered as inactive with the registration division of the Board of Bar Overseers. The respondent notified the client that he was on inactive status but failed to tell him that he was not permitted to appear or negotiate a settlement while on inactive status and that he could no longer represent his interests in the divorce. The respondent also failed to withdraw his appearance in the probate court.

A status conference was scheduled for April 1, 2010, on the divorce matter. The client requested that the respondent attend the April 1, 2010, conference to see if a final settlement agreement could be reached. The respondent mistakenly believed that inactive status only prohibited him from representing the client at a trial but that he could still negotiate on the client's behalf and appear in court.

On April 1, 2010, the respondent appeared before a judge in the probate court on behalf of his client. Following the hearing, the respondent informed opposing counsel that he was on inactive status. On April 30, 2010, the respondent withdrew his appearance, and the client's new counsel entered his appearance.

After the respondent withdrew his appearance, he moved out of state and stopped practicing law. The client was not harmed by the respondent's conduct.

By failing to inform his client that he could not appear in court or negotiate a settlement on his behalf, failing to withdraw promptly so that his client could obtain new counsel, failing to withdraw his appearance when he assumed inactive status, and appearing in court on behalf of his client, the respondent violated Mass. R. Prof. C. 1.4, 1.16(a)(1) and (d), 5.5(a) and 8.4(d).

The respondent received an admonition for his misconduct.

ADMONITION NO. 11-24

CLASSIFICATIONS:

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

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

SUMMARY:

The respondent graduated from law school in 1995. He subsequently was admitted to practice law in Massachusetts in February of 1996, and in the District of Columbia in December of 1997. The respondent voluntarily transferred to "inactive" status in September of 1996 (Massachusetts) and in August of 2002 (District of Columbia). He was not (and is not) admitted to practice law in any other jurisdiction.

From August 2002 until December 2008, the respondent worked as a lawyer in the in-house legal department of a company outside of Massachusetts. In this capacity, the respondent rendered legal advice only to the company. Throughout this time period, the respondent's law licenses remained "inactive."

In January of 2009, the respondent accepted a new position at the company and ceased working as a lawyer. He has not worked as a lawyer since accepting that position.

By working as an in-house lawyer in another state without an active law license, the respondent violated Mass. R. Prof. C. 5.5(a) [Unauthorized Practice of Law] and Mass. R. Prof. C. 8.4(d) [Conduct Prejudicial to the Administration of Justice].

In mitigation, during the relevant period (August 2002 through December 2008), the respondent mistakenly believed that he could practice law as an in-house lawyer in another state without an active law license because he was not appearing before any court, regulatory and/or administrative bodies. Furthermore, because the respondent's employer paid for his bar registration fees, he was not motivated by self-interest.

The respondent has no disciplinary history. He received an admonition for the misconduct described above.

ADMONITION NO. 11 – 25

CLASSIFICATION:

Conflict from Responsibilities to Lawyer's Own Interests [Mass. R. Prof. C. 1.7(b)]

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

SUMMARY:

Between September 2000 and March 2004, the respondent represented a client in a post-divorce modification proceeding and in a probate matter related to the client's father's estate. At the time, the client was providing house-cleaning services to the respondent. The respondent agreed to bill the client at an hourly rate of $150.00. The respondent and the client agreed that the respondent's fee would be offset by the client's $100.00 per week fee for house cleaning.

By January 31, 2003, the respondent's bill exceeded the value of the cleaning services received from the client. The respondent told the client that he would need security for the past-due bill and to pay for ongoing legal services. The respondent and the client agreed that the client would give the respondent a lien on real property owned by the client and unrelated to the post-divorce proceeding.

The respondent memorialized his agreement in a document that he styled as "Mortgage." The mortgage was not for a specified period of time, there was no underlying note, and the mortgage did not contain a statutory power of sale.

The "mortgage" recited that it was to secure the amount of $7,500.00 "with interest payable at 5% per annum, and such further sums as may be advanced" to the client. In addition, the mortgage stated that it "shall constitute an agreement that [the client] hereby promises to pay the [respondent] such sums due for any and all of the

[respondent's] rendering of legal services and expenses" in connection with the post-divorce modification proceedings. The client signed the "mortgage" on January 31, 2003, and the signature was notarized by an employee of the respondent's office.

The respondent did not give the client an adequate opportunity to seek the advice of independent counsel, and he did not obtain the client's consent in writing to the transaction. The respondent did not appreciate that his ongoing representation of the client might be materially limited by his acquisition of a secured interest in his client's property.

In March 2004, the respondent ceased representing the client, and the client provided no further cleaning services to the respondent. At that time, the client owed the respondent at least $6,100.00 for his legal fees.

On May 3, 2004, the respondent recorded the mortgage at the registry of deeds. To date, the mortgage remains on record.

By knowingly acquiring a security interest adverse to his client without giving the client a reasonable opportunity to seek the advice of independent counsel, and obtaining the client's informed consent in writing, the respondent violated Mass. R. Prof. C. 1.7(b) and 1.8(a).

The respondent, who was admitted to practice in 1974, received a private reprimand in 1984 for neglect of a client's matter. Private Reprimand No. PR 84-4, 4 Mass. Att'y Disc. R. 191 (1984). Because the private reprimand was more than twenty years ago, and because the respondent has not had any additional reported misconduct in the intervening years, the respondent received an admonition for his conduct.