

**ADMONITION NO. 13-01****CLASSIFICATIONS:**

Failing to Seek Client's Lawful Objectives [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:**

The respondent represented a client in a civil forfeiture case filed by a district attorney's office. The client had previously pled guilty to various drug charges, as well as a probation violation and other crimes, and was imprisoned. The prosecutor was seeking forfeiture of \$8,180 in cash recovered from the client's residence in a warrant search conducted in May 2009. Of this sum, \$8,000.00 was recovered from a closet and \$180.00 was recovered from the person of the client. The location of the money and the manner in which it was kept suggested that it was used in connection with drug sales.

The respondent did not adequately investigate the client's claims, which bank records would have supported, as to a legitimate source of funds in an amount consistent with the sum sought to be forfeited. This evidence would have been useful in both negotiations and the client's defense of the claim.

The respondent also did not diligently respond to outstanding discovery in the civil forfeiture case or take steps to assure that his client timely provided requested information. On November 16, 2010, the respondent filed answers to interrogatories but answers to two of the questions were obviously incomplete. On January 26, 2011, prosecutor asked for, among other matters, complete answers to the two incomplete questions. The respondent did not respond or notify his client of the request.

On April 12, 2011, the prosecutor requested final judgment. On May 13, 2011, the Court granted an extension to comply with discovery to June 15, 2011, with no further extensions, and scheduled a pre-trial conference for June 29, 2011. The respondent did not notify his client of the final date for compliance or of the pre-hearing conference. The respondent did not appear at the pre-hearing conference or ask for any extension.

On June 29, 2011, the Court entered judgment for the Commonwealth. The respondent thereafter sought relief from judgment. On October 3, 2011, the Court denied the requested relief after review of the docket of the case, ruling that the respondent had been given ample opportunity to comply with discovery.

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The respondent's failure to fully investigate a potential defense and his failure to diligently represent his client by making reasonable efforts either to comply with discovery or to communicate the status of the case to his client, as described above, is conduct in violation of Mass. R. Prof. C. 1.2(a), 1.3 and 1.4(a).

The respondent was admitted in 1997 and has no prior discipline. The respondent reimbursed the client a fair estimate of the settlement value of the case. Accordingly, the respondent received an admonition, conditioned upon attendance at a CLE program designated by bar counsel.

## ADMONITION NO. 13-02

### 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(a) and (b)]

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

### SUMMARY:

In 2005, the respondent represented a client who was rear-ended in an automobile accident. The client was permanently disabled by the accident. The respondent filed a civil action on behalf of the client within the statute of limitations. The respondent failed to effect service, causing the case to be dismissed. The respondent was able to have the case reinstated, but it was dismissed again on December 15, 2009 when the respondent failed timely to respond to discovery requests.

The respondent did not inform the client of either dismissal. On December 17, 2010, the respondent filed an emergency motion to vacate the dismissal. The motion was untimely and was denied.

The respondent failed to respond to his client's requests for information concerning the status of the matter. The client contacted the court and learned that the matter had been dismissed. The client retained successor counsel and sent an email to the respondent directing him to send the client's file to the client's new lawyer. The respondent failed to send the file or otherwise respond to the client's request.

The client pursued a malpractice claim against the respondent. The respondent cooperated with successor counsel in reaching a satisfactory settlement of the malpractice claim.

The respondent's failure to diligently pursue the client's case violated Mass. R. Prof. C. 1.1 and 1.3. The respondent's failure to inform the client that the case had been dismissed violated Mass. R. Prof. C. 1.4(a) and (b). The respondent's failure to respond to the client's inquiries about the case violated Mass. R. Prof. C. 1.4. The respondent's failure to promptly return the file upon request violated Mass. R. Prof. C. 1.16(d).

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The respondent was admitted to the Bar of the Commonwealth in December 1985 and had no prior history of discipline. In mitigation of his misconduct, the respondent cooperated with successor counsel in the resolution of the malpractice claim. The respondent received an admonition for his misconduct.

### ADMONITION NO. 13-03

#### CLASSIFICATIONS:

Conduct Solely to Embarrass, Delay, Burden Third Person [Mass. R. Prof. C. 4.4]

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

#### SUMMARY:

The respondent represented a man in a very contentious divorce proceeding. At issue, among other things, was the custody of the divorcing couple's 6 year old son. The wife was seeking full legal and physical custody of the child due to her husband's allegedly abusive personality. The respondent's client opposed this request on the grounds that his wife was now living with a boyfriend who was a bad influence on his son.

The respondent undertook an extensive effort to uncover evidence that the boyfriend was indeed a bad influence on her client's son. Of most significance, she obtained a voluminous set of court records from the boyfriend's own divorce proceeding. Based on these records, the respondent filed a motion seeking to remove the boyfriend from the marital home and to preclude him from having any future contact with her client's son. The respondent did not conduct a careful enough review of the divorce papers before filing her motion. As a result, and in an apparent effort to depict the boyfriend in the worst light possible, she negligently misrepresented various facts in the motion.

After being advised of the respondent's negligent misrepresentations, the court denied the respondent's motion. Dissatisfied by this outcome, the respondent next issued a series of overreaching and open-ended subpoenas to seemingly anyone associated with the boyfriend. Recipients of the subpoenas included the boyfriend's current and former landlords, and his current employer. Motions to quash followed. They resulted in an order prohibiting the respondent from conducting any future discovery of the boyfriend unless pre-screened and approved by the court.

By filing a motion that included negligent misrepresentations of fact, the respondent was inadequately prepared and did not provide competent representation in violation of Mass. R. Prof. C. 1.1. In addition, by pursuing overzealous discovery directed at third parties, she engaged in conduct that had no substantial purpose other than to burden those parties in violation of Mass. R. Prof. C. 4.4.

The respondent has no prior history of discipline. She received an admonition for the foregoing misconduct.

**ADMONITION NO. 13-04**

**CLASSIFICATIONS:**

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

Withdrawal of Fees Without Accounting [Mass. R. Prof. C. 1.15(d)(2)]

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

**SUMMARY:**

In 2008, the respondent was appointed a co-executor of the decedent's estate, along with the decedent's daughter. By agreement with his co-executor, the respondent also provided the necessary legal services to the co-executors in connection with the probate of the estate. The major asset of the estate was a one-half interest in a piece of residential property. This property was co-owned by the decedent with another of her children (not the respondent's co-executor).

In 2009, as the respondent endeavored to gather assets belonging to the estate, a dispute developed over the disposition of the real estate. The respondent, representing the interests of the co-executors, negotiated a settlement pursuant to which the property was sold in April of 2011 to his co-executor's sibling.

As part of the sale, the respondent received a deposit in the amount of \$15,000. The monies were deposited in the respondent's IOLTA account. Within a few days of the closing, and with his co-executor's consent, the respondent transferred \$5,000 from these funds to pay a real estate broker's fee for the transaction. He then transferred the remaining monies (\$10,000) to his firm's business account as payment for some portion of his incurred (and as of yet unpaid) legal fees. The fees were related to the legal work undertaken by the respondent in the dispute over the real estate. The respondent failed to prepare an invoice for these fees or otherwise notify his co-executor of the transfer of the \$10,000 for his legal work on the estate's behalf.

By the end of 2011, the co-executor began asking the respondent questions about the whereabouts of the \$10,000 that she thought remained from the sale of the real estate. The respondent provided partial answers to her inquiries. He did not fully account for the funds until he provided an invoice to her a few months later.

By failing to promptly render a full written accounting of his distribution of the \$10,000 to his co-executor, the respondent violated Rule 1.15(d)(1).

By failing to deliver to his co-executor, on or before withdrawing the \$10,000 for legal fees incurred on the property dispute, an invoice, notice of the amount and date of withdrawal and a statement of the balance remaining, the respondent violated Rule 1.15(d)(2).

By failing to promptly comply with his co-executor client's reasonable requests for information regarding the \$10,000 payment, the respondent violated Rule 1.4.

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The respondent has no prior history of discipline. He received an admonition for the foregoing misconduct.

## ADMONITION NO. 13-05

### CLASSIFICATIONS:

Handling a Legal Matter Without Adequate Preparation [Mass. R. Prof. C. 1.1]

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

### SUMMARY:

In about December 2010, the respondent agreed to act as settlement agent and counsel to a lender in connection with the sale of a residential property held in a family trust established for the benefit of the settlor. The respondent also agreed to issue the title policies for both the owner and the lender after the closing. The trustee of the trust was the settlor's son, who had borrowed \$320,000 from the same lender secured by a mortgage on the property. The buyer was the settlor's other son. The purchase price was \$340,000, and the buyer was borrowing \$331,381 from the lender to purchase the property. The buyer was not required to make a deposit, and the seller made a disclosed gift of equity to the buyer in the amount of \$11,900 to bridge the difference between the sale price and the loan amount.

Neither the buyer nor the seller disclosed to the respondent that the mortgage payments were in arrears. The respondent was unable to obtain a payoff figure from lender prior to the closing on January 18, 2011, and was unaware that the seller had defaulted on his mortgage payments to the lender.

On January 18, 2011, the lender wired \$324,062.61 to the respondent's account, but, unbeknownst to the respondent, this amount was insufficient to satisfy the existing mortgage. The family members urged the respondent to proceed with the sale, and the seller assured the respondent that the proceeds would be sufficient to pay him \$20,000. Without getting a final payoff figure from the lender and assuring himself that the funds he had received would be sufficient to pay off all existing liens, the respondent proceeded with the closing and recorded the deed and mortgage on January 19, 2011. He also represented to the title insurer that prior liens on the property had been satisfied.

On January 21, 2011, the lender faxed the payoff statement to the respondent showing that \$346,636.85 was due. The respondent immediately notified the loan officer and the payoff department that there were insufficient funds to pay the loan in full, and he also informed the seller that he had to make up the deficit. The seller failed to remit the amount necessary to satisfy the deficit, and the lender declined to accept anything other than payment in full.

In April 2011, the title insurer directed the respondent to pay over to the lender the closing funds that he was holding. The respondent paid the funds to the lender on April 8, 2011. In about August 2012, the respondent's malpractice insurer paid the shortfall on the mortgage. A discharge was recorded in September 2012.

By closing the real estate transaction prior to receiving the payoff statement for the prior mortgage, and issuing the title insurance policies without making an exception for the outstanding mortgage, the respondent handled the real estate transaction without adequate preparation and reasonable diligence in violation of Mass. R. Prof. C. 1.1 and 1.3.

The respondent, who was admitted to practice in 1982 and had no prior discipline, received an admonition for his conduct.

## ADMONITION NO. 13-06

### CLASSIFICATIONS:

Failing to Communicate the Limitations of the Representation [Mass. R. Prof. C. 1.2 (c)]

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

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

### SUMMARY:

In February 2009, by way of a written fee agreement, the client engaged the services of the respondent to represent him in a chapter 7 bankruptcy proceeding. The bankruptcy was discharged on October 20, 2009.

In or about May 2012, the client tried to sell his home, and he discovered a judicial lien on the property, which had been recorded in or about March 2009. The client had made the respondent aware of the lien, but the respondent did not pursue removal of the lien and did not advise him to do so. Although the debt for which the lien was entered was discharged, the lien remained of record.

In or about May 2012, the client attempted to contact the respondent regarding the lien by calling and leaving several messages, but the respondent did not promptly return his telephone calls. Only after the client contacted the Office of the Bar Counsel did the respondent contact the client. The respondent informed the client that she no longer practiced bankruptcy law, and that he should seek other counsel to have the lien removed.

The respondent believed that she had not been engaged to remove judicial liens on the client's property, but only to have the client's debts discharged, which she did. The respondent had filed with the bankruptcy court a Disclosure of Compensation of Attorney for Debtor form, which explicitly exempted representation of the debtor in any judicial lien avoidances. It was her practice to charge a separate fee to avoid a judicial lien. However, the respondent's fee agreement did not explicitly exclude removing liens as part of her representation. The respondent did not adequately explain this to the client or obtain his consent to the limited representation.

In mitigation, since 2010, the respondent has been in treatment for cancer and has ceased taking on bankruptcy cases. Therefore, the respondent was not routinely checking her messages and was not expecting any telephone calls from the client. The client has obtained new counsel who has agreed to seek removal of the lien *pro bono*.

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By failing to adequately communicate the limitations of her representation with her client, neglecting to advise him to remove the lien and to promptly return his telephone calls, the respondent violated Mass. R. Prof. C. 1.2(c), 1.3 and 1.4. The respondent has been a member of the Massachusetts bar since December 20, 1979, and has received no prior discipline. The respondent received an admonition for her conduct.

## ADMONITION NO. 13-07

### 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]

Conflict Directly Adverse to Another Client [Mass. R. Prof. C. 1.7(a)]

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

### SUMMARY:

From about 2007 through the spring of 2008, the respondent handled the legal affairs of an LLC in the acquisition of commercial property for investment purposes. The respondent drafted and filed the LLC's incorporation papers in late 2007. In January 2008, the respondent drafted the LLC's operating agreement. The operating agreement lacked clear terms and failed to identify the value of each member's contribution to the startup costs, which became a later source of contention amongst the members.

The respondent had represented the members in various capacities prior to the LLC's formation. Before the operating agreement was signed in January 2008, the respondent sought the members' consent to his representation of the LLC through a "representation disclosure." This disclosure stated in one part of the document that the respondent was representing the members individually as well as the LLC and then, in another part, that he represented the LLC only and none of them individually. In addition, the disclosure recited the members' supposed agreement that the representation did not create any conflict of interest. The respondent failed to appreciate the conflicts among the members, including that the LLC was about to become the landlord of one member as a tenant and would be a debtor to another member as creditor. While the disclosure stated that the parties were encouraged to get independent counsel, and one member did have counsel, that did not cure the inadequacy of the disclosure.

The closing on the commercial property took place later in January 2008. Disputes among the members arose within weeks after the closing. The respondent attempted to “mediate” the disputes in his capacity as the LLC’s counsel. His attempts, however, had the effect of favoring the interests of some members over others. After those attempts proved unsuccessful, the respondent’s representation was terminated in or about the spring of 2008.

The respondent’s lack of diligence and competence in drafting the operating agreement violated Mass. R. Prof. C. 1.1 and 1.3. The respondent’s failure to appreciate the conflicts of interest among the members and between the members and the LLC and to obtain consent after consultation violated Mass. R. Prof. C. 1.7(a) and (b). The respondent’s subsequent attempts to settle the members’ disputes resulted in further violation of Mass. R. Prof. C. 1.7(a) and (b).

The respondent had no history of discipline. The respondent received an admonition for his misconduct conditioned upon his taking continuing legal education courses designated by bar counsel.

## ADMONITION NO. 13-08

### 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:

A boy lived in a rental apartment with his mother and grandmother from his birth in October 1987 to November 1989. In early November, the boy tested positive for lead paint poisoning, and the premises were shortly thereafter found in violation of the state law and sanitary code governing lead paint in apartments where children resided. The housing inspector ordered the landlord to de-lead the premises.

The family temporarily moved out of the apartment, and the boy was admitted to a hospital for treatment for lead poisoning, incurring medical bills of about \$2,500. The mother hired the respondent at the end of November 1989 to represent her as her son's next friend in a lawsuit against the owner of the building.

The building's owner had died in February 1989. In November 1989, a special administrator was appointed with authority to manage the real property for the estate. The respondent learned that there was insurance coverage available in the amount of \$100,000. The respondent did not file a claim against the estate within nine months of the probate court's approval on September 5, 1990, of the bond of the administrator cta. The administrator died in 2004, and the probate of the estate was never completed.

The respondent obtained medical records and a doctor's report on the boy. Those reports showed that the child's lead level had returned to a normal range, but the respondent was informed by the doctor that long-term neurological damage could not be ruled out. In 2000, an evaluation by Children's Hospital also failed to establish that lead exposure had caused neurological harm although the boy had some neuropsychological difficulties consistent with lead poisoning.

From 1989 continuing into 2010, the respondent continued to advise the mother to monitor her son and to let him know if she obtained medical evidence that he had suffered ongoing harm from lead poisoning. The respondent told her that her son had three years from the time he turned eighteen to file a lawsuit, but he did not tell the

mother that pursuing the landlord's estate was more problematic given the amount of time that had passed since the landlord's death and the approval of the administrator's bond. By October 2009, there was no likelihood that the son or his mother had any viable claim, but the respondent did not inform either the son or the mother of this. Instead, even in 2010, the respondent told the mother that he would file a lawsuit if she found a doctor to support the claim.

The respondent moved his law office and changed his telephone number sometime in 2010 without informing the mother or her son. In 2011, the mother located the respondent with the assistance of another lawyer. In July 2011, the mother demanded that the respondent return her file, which he did.

The mother asked the office of bar counsel to investigate the respondent. In 2012, the respondent paid the mother \$2,500.

By failing to preserve the son's claims against the estate, the respondent violated Mass. R. Prof. C. 1.1 and 1.3. By failing to explain the matter adequately to the clients so that they could make an informed decision about the representation and by failing to maintain reasonable communications with the clients, the respondent violated Mass. R. Prof. C. 1.4(a) and (b).

The respondent was admitted to practice in 1967 and had no prior discipline. The respondent received an admonition for his conduct.

**ADMONITION NO. 13-09**

**CLASSIFICATION:**

False or Misleading Communication [Mass. R. Prof. C. 7.1]

**SUMMARY:**

The respondent is a solo practitioner who concentrates his practice in criminal defense.

In June 2012, the respondent engaged a Web marketing vendor. The vendor proceeded to make a video interview of the respondent. In the video, the respondent made several statements that derogated bar advocates and public defenders, to the effect that bar advocates and public defenders always instruct their clients to take plea deals, rather than try their cases. The respondent suggested that clients facing criminal charges should hire him or attorneys like him if they desired competent representation and good results. The respondent's statements on the video were false and misleading. The respondent caused the video to be posted on his Web site, where it remained for approximately six months. The respondent removed the video from his Web site immediately after bar counsel notified him that she had opened a complaint concerning the information on his Web site.

The respondent received an admonition for violations of Rule 7.1 ("a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.")

**ADMONITION NO. 13-10**

**CLASSIFICATIONS:**

Handling Legal Matter Without Adequate Preparation [Mass. R. Prof. C. 1.1]  
Failure to Act Diligently [Mass. R. Prof. C. 1.3]

**SUMMARY:**

In 2011, the respondent was retained by the client to file a bankruptcy petition on her behalf. Prior to this time, the respondent had limited bankruptcy experience and did not understand how to properly utilize the electronic filing system of the bankruptcy court. The initial bankruptcy petition filed by the respondent was dismissed due to the respondent's failure to properly file the matrices. The respondent then incorrectly filed a Motion to Vacate the Dismissal. The respondent was ordered to correct the deficiencies in the original filing, however instead filed a new bankruptcy case on behalf of the client. The respondent continued to experience difficulty properly filing required documents through the electronic filing system, resulting in the suspension of the respondent's electronic filing privileges. Due to her lack of understanding of the bankruptcy process, the respondent provided unclear and conflicting responses to the court during a hearing on an order to show cause as to why her electronic filing privileges should not be suspended and, in so doing, made negligent misrepresentations. The respondent sought the assistance of a more experienced bankruptcy counsel and the debtor/client was discharged and suffered no harm.

The respondent's failure to competently and diligently represent the client in the bankruptcy action violated Mass. R. Prof. C. 1.1 and 1.3.

The respondent was admitted to practice in Massachusetts in 2001 and has no prior discipline. She received an admonition for this misconduct.

## ADMONITION NO. 13-11

### CLASSIFICATIONS:

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

Failing to Seek Client's Lawful Objectives [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(a) and (b)]

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

### SUMMARY:

A client who was a Florida resident hired the respondent to prosecute a previously-filed complaint for contempt in a Florida probate court against her ex-husband, also a Florida resident, to obtain payment of child-support arrearages and expenses. The court had scheduled a hearing on the complaint for contempt.

The client also wanted to obtain an order to require future supports payments to be made by direct deposit to her account. Florida law provided for the issuance of such an order upon proof of a valid child support order. The order, known as an "income deduction order," required payments to Florida's Department of Revenue, which then wired the funds to the account designated by the payee. This process protected the payee's private account information.

The respondent was not admitted to practice in Florida, but reasonably expected to be admitted *pro hac vice* in the client's case. The client paid the respondent's requested \$2,500 retainer and signed the respondent's fee agreement. The client provided the respondent with a copy of the complaint and the notice of the hearing.

On several occasions, the client attempted to communicate with the respondent by telephone and email to prepare for the hearing. The respondent failed to promptly respond to the client's efforts to discuss and prepare for the hearing. The replies to the client that the respondent did make were inadequate to address the client's concerns.

The respondent was not familiar with the law and procedures in Florida for securing direct deposits of support payments. In the week prior to the hearing, the respondent negotiated a stipulation with the ex-husband that included his agreement to pay child support by direct deposit. The respondent told the client that her ex-husband had agreed to pay the outstanding obligations and have future support payments deposited directly to the client's account. The respondent emailed the proposed stipulation to the client and the ex-husband.

The ex-husband consulted a lawyer and refused to sign the stipulation. By this time, he was no longer in arrears on his child support obligations but he still owed the client for certain expenses. The respondent incorrectly advised the client that she should file a separate complaint for modification to obtain an order of direct deposit. Following the respondent's instructions, the client filed the complaint for modification.

The ex-husband reversed himself and agreed to sign the stipulation for direct deposit in exchange for account and income information from the client. The client declined the ex-husband's offer and discharged the respondent. The client hired a lawyer in Florida, who appeared with her and obtained an income deduction order and other relief.

The client requested the return of her retainer from the respondent. The respondent agreed to send a bill, but she failed to do so or otherwise respond to the client's requests for a refund. The client filed a request for investigation of the respondent's conduct with bar counsel. The respondent refunded the \$2,500 retainer to the client

The respondent's failure to timely respond to the client's requests for information violated Mass. R. Prof. C. 1.3 and 1.4(a) and (b). Her failure to research and properly advise the client on the correct method for obtaining direct deposit of the support payments violated Mass. R. Prof. C. 1.1, 1.2 and 1.3. The respondent's failure to promptly provide an accounting upon the client's request violated Mass. R. Prof. C. 1.15(d)(1).

The respondent was admitted in 1971 and has no prior discipline. In mitigation, the respondent was distracted during the course of the representation by her mother's serious illness. The respondent received an admonition for her conduct.

## ADMONITION NO. 13-12

### CLASSIFICATIONS:

Knowingly Disobeying Rules of Tribunal [Mass. R. Prof. C. 3.4(c)]

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

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

### SUMMARY:

In February of 2007, the respondent received a copy of a deposition transcript from a stenographer which he previously ordered, but did not pay the stenographic fee of \$396.33. On January 25, 2008, the stenographer filed a small claims action in Newton District Court seeking to collect the fee. The respondent failed to appear at the trial and a default judgment was entered in the amount of \$432.45, which the court ordered the respondent to pay by April 11, 2008. The respondent did not pay the judgment and failed to appear at the payment review hearing on June 25, 2008. On June 26, 2008, the respondent was found in contempt and a *capias* issued. The respondent failed to take any steps to satisfy the judgment or vacate the *capias*.

The stenographer filed a request for investigation with the Office of Bar Counsel in September of 2008. In April of 2009, the respondent agreed to make monthly payments to satisfy the judgment until paid. The respondent made one monthly payment in the amount of \$50.00 and failed to make any further payments. On February 13, 2012, the stenographer obtained another *capias* against the respondent from the Newton District Court and in March of 2012 filed another request for investigation with the Office of Bar Counsel. In July of 2012, the respondent entered into another payment plan with the stenographer, agreeing to pay \$100.00 per month until the balance was paid in full. The respondent made one payment in July of 2012. In May of 2013, the respondent made full payment to the stenographer of the balance owed.

The respondent's failure to pay the judgment and to appear at the review hearing on June 25, 2008, resulting in a finding of contempt and the issuance of two *capiases* violated Mass. R. Prof. C. 3.4(c) and 8.4(d) and (h).

The respondent was admitted to practice in Massachusetts in 1977 and has no prior discipline. He received an admonition for this misconduct.

## ADMONITION NO. 13-13

### CLASSIFICATIONS:

Handling Legal Matter Without Adequate Preparation [Mass. R. Prof. C. 1.1]  
Failing to Act Diligently [Mass. R. Prof. C. 1.3]

### SUMMARY:

The respondent represented the ex-husband on a complaint filed by his ex-wife in probate court to modify the judgment. On September 9, 2010, the day before a scheduled pre-trial hearing, the ex-wife, acting pro se, filed an ex parte motion to continue the hearing. In her motion, wife stated that she could not get the day off from work and would lose her job if she failed to arrive for her shift. The ex-wife had asked for the day off, but her employer refused her request and told her that she would be discharged if she did not come to work that day. The court allowed the motion and sent notice to the respondent via facsimile, which the respondent received the same day.

The respondent's client believed that his ex-wife misrepresented her ability to appear at the hearing and asked the respondent to have the complaint for modification dismissed. The respondent instructed her support staff to call the ex-wife's place of employment to find out the employer's policy regarding requests for time off. The respondent's staff made two phone calls to the employer's office, but did not identify themselves. The staff members told the respondent that the employer's general policy was to have employees note the dates they would be out on a calendar. They did not ask, nor were they informed, about the ex-wife's specific situation.

The respondent did not confront the ex-wife with this information, nor did she propound discovery to determine whether the ex-wife had told the truth. On October 9, 2010, the respondent filed a motion with the probate court requesting attorney's fees and sanctions and representing that the ex-wife had lied to the court when she stated in her motion for continuance that she could not get the day off from work without losing her job. The respondent filed this motion without adequate thoroughness, preparation, or reasonable diligence under the circumstances. Specifically, in addition to her failure to contact the ex-wife, the respondent failed to take account of the fact that she had no information as to the ex-wife's particular

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circumstances and failed to realize that the information gathered by her staff was incomplete. Unbeknownst to the respondent, the ex-wife did have a letter signed by her manager stating that she would be terminated if she failed to arrive for her shift the following day. The court did not allow the respondent's motion.

The respondent's conduct in filing a motion in court without adequate preparation or reasonable diligence under the circumstances was in violation of Mass. R. Prof. C. 1.1 and 1.3. She received an admonition for her conduct in this matter.

**ADMONITION NO. 13-14**

**CLASSIFICATION:**

Improper Contingent Fee [Mass. R. Prof. C. 1.5(c)]

**SUMMARY:**

The respondent received an admonition for his conduct in two related cases.

In the first case, the respondent agreed to represent a client in his effort to collect debt owed to him under a promissory note. Except for an initial retainer, his fee was to be contingent upon the successful resolution of the matter. The respondent, however, failed to execute a written agreement. The respondent subsequently filed a collection action on behalf of his client. The action was settled by way of a payment of the full amount owed under the note plus incurred interest, fees and costs. The respondent distributed a portion of the settlement proceeds to his client and kept the remainder as his contingent fee. The respondent failed to provide his client with a written statement that adequately explained the outcome and showed how his remittance was calculated. After the client raised concerns about the distribution of the settlement proceeds, the respondent waived his fee and sent the rest of the proceeds to the client.

In the second case, the respondent agreed to represent another creditor in his effort to collect debt from the same debtor. The fee arrangement was the same as above. Again, however, the respondent failed to execute a written agreement. At the settlement of the matter (which also resulted in a payment of the full amount owed under the note plus incurred interest, fees and costs), the respondent distributed a portion of the settlement proceeds to his client and kept the remainder as his contingent fee. When the client raised concerns about how the settlement proceeds were distributed, he agreed to waive his contingent fee, and all settlement proceeds were transferred to his client.

By failing to enter into a written contingency fee agreement with these clients, the respondent violated Mass. R. Prof. C. 1.5(c).

By failing to provide, at the conclusion of the first matter, a writing to the client that adequately explained the outcome and showed how the client's remittance was calculated, the respondent violated Mass. R. Prof. C. 1.5(c).

The respondent had no history of discipline. He received an admonition for his misconduct in these matters.

## ADMONITION NO. 13-15

### CLASSIFICATIONS:

Failing to Communicate Adequately with a Client [Mass. R. Prof. C. 1.4(b)]

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

### SUMMARY:

In September 2009, the respondent agreed to represent a client in various matters involving property that the client owned. The respondent agreed to charge the client \$250 per hour and requested a retainer of \$10,000.

The client was able to pay only \$3,000 towards the retainer. He offered the respondent monthly rental payments of \$1,000 from an apartment in a building that he owned that was not part of the representation to cover the remaining \$7,000 of the retainer. The respondent told the client that he would represent him only if the client signed a non-interest-bearing note for \$10,000 to be paid in monthly increments of \$1,000 and a mortgage on the apartment building securing the note. The client agreed.

The respondent caused a notice to be drafted to the apartment tenants instructing them to forward all rental payments to the law firm until otherwise notified. He also caused a note to be drafted that called for the client to pay at the rate of \$1,000 per month \$10,000 plus "any and all additional legal fees." Finally, he had a mortgage drafted on the apartment building.

The transaction was not fair and reasonable to the client in that the client had already paid \$3,000 of the retainer. The respondent also did not explain clearly to the client that the note called for payment not only of the full \$10,000 retainer, but also for fees beyond the \$10,000 retainer, and that the mortgage applied to a debt that could exceed \$10,000.

By June 17, 2010, the client had paid the respondent the balance of the \$10,000 retainer, but he had incurred an additional \$6,125.63 in legal fees. The respondent continued to seek payment of the remaining \$6,125.63, but he did not seek to foreclose on the mortgage. In August 2012, the client requested that bar counsel investigate the respondent's conduct because the note had been paid but the respondent had not released the mortgage. On May 20, 2013, the respondent filed a release of mortgage without payment by the client of the outstanding balance.

**AD NO. 13-15**

**Page Two**

By entering into a business transaction with a client that was not fair and reasonable to the client and without fully disclosing the terms of the transaction to the client orally or in writing in a manner that could be reasonably understood by the client, the respondent violated Mass. R. Prof. C. 1.4(b) and 1.8(a).

The respondent was admitted to the bar since 1978 and had no history of discipline.

**ADMONITION NO. 13-16**

**CLASSIFICATION:**

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

**SUMMARY:**

During a period of several years, the respondents, who are law partners, failed to hold trust funds separate from personal or business funds. Specifically, in addition to the deposit and disbursement of client funds, the respondents kept excess personal funds in their IOLTA account. The respondents then used these personal funds for such purposes as advancing expenses for client matters.

The respondents' conduct in maintaining excess personal funds in their IOLTA account and in advancing expenses and disbursing funds before supporting deposits were made violated Mass. R. Prof. C. 1.15(b)(2).

The respondents have no prior discipline. They accordingly each received an admonition for their conduct in this matter.

**ADMONITION NO. 13-17**

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

**SUMMARY:**

Starting in or about 2009, the respondent was employed by a corporation as a senior vice president, but also at various times as head of legal affairs and, in 2012-2013, as general counsel. The respondent expected the corporation, as it had in past years, to pay his bar registration fees for the September 2012 billing cycle. He was aware, however, as early as December 2012 that his registration form and payment were overdue.

On April 25, 2013, the respondent was administratively suspended by the Supreme Judicial Court for failure to register. On April 30, 2013, he provided his employer with the executed documents required by the Board of Bar Overseers for reinstatement (an affidavit requesting reinstatement and the registration form), but did not follow through to ensure that the papers and fees were sent to the board. The employer in fact took no action. Over the next several months, the respondent continued functioning as senior vice president and general counsel to the corporation, despite not having received any notification of reinstatement. In early August 2013, he realized that he remained suspended, retrieved the paperwork from his employer, and submitted the affidavit and registration form with his own check. He was reinstated a few days later.

The respondent's conduct in this matter constituted unauthorized practice of law in violation of Mass. R. Prof. C. 5.5(a). The respondent was admitted to practice in 2001 and has no prior discipline. He accordingly received an admonition for his misconduct.

**ADMONITION NO. 13-18**

**IN THE MATTER OF DISCIPLINE OF AN ATTORNEY**  
**See Memorandum of Decision**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
No: BD-2013-074

IN RE: MATTER OF AN ATTORNEY

JUDGMENT FOR ISSUANCE OF ADMONITION  
BY BAR COUNSEL

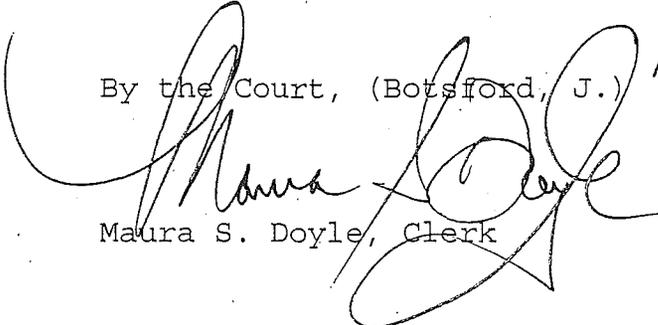
This matter came before the Court, Botsford, J., on an Information and Record of Proceedings with the Vote and Recommendation of the Board of Bar Overseers filed by Bar Counsel on July 16, 2013. A hearing was held on August 22, 2013, attended by assistant bar counsel and the lawyer's counsel.

After hearing, and in accordance with the Memorandum of Decision of this date, it is ORDERED and ADJUDGED that an admonition be administered to the lawyer by the Office of Bar Counsel.

It is FURTHER ORDERED that the lawyer is required to

attend a course on estate administration to be approved  
by bar counsel.

By the Court, (Botsford, J.) <sup>MB</sup>

  
Maura S. Doyle, Clerk

Entered: September 30, 2013

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
DOCKET No. BD-2013-074

IN RE: MATTER OF AN ATTORNEY

MEMORANDUM OF DECISION

The Board of Bar Overseers (board) has filed an information in which a majority of its members recommend that the respondent be publicly reprimanded for charging and collecting excessive fees. The respondent argues that the underlying petition for discipline should be dismissed. After a hearing, and based on my review of the record before me, I conclude that the respondent should receive an admonition.

Background. Bar counsel brought a petition for discipline against the respondent on October 19, 2011, alleging that in violation of Mass. R. Prof. C. 1.5(a), she had charged clearly excessive fees in connection with her work as executrix of and attorney for the estate of her former client. A hearing committee of the board conducted an adjudicatory hearing and thereafter issued a decision concluding that the fees charged by the respondent were clearly excessive and recommending that the respondent receive a public reprimand. The respondent appealed to the board. In a decision dated June 27, 2013, a majority of the board adopted the hearing committee's findings and its recommendation of a public reprimand.<sup>1</sup> This information

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<sup>1</sup> More particularly, seven members of the Board of Bar Overseers (board) recommend a public reprimand; the four dissenting members recommend that the underlying petition for

followed.

1. Facts. I summarize the facts as found by the hearing committee and as accepted by the board. The respondent was admitted to the Massachusetts bar in 1988. From approximately 2002 to the present, she has worked as a solo practitioner, with about twenty-five to thirty per cent of her practice consisting of probate matters. In May of 2002, the respondent prepared a healthcare proxy, a durable power of attorney, and a will for her client, who executed the documents that month. The respondent was named in them as the healthcare agent, the attorney in fact, and the executrix of the client's estate, and was also to be the attorney for the estate. The will provided for two charitable bequests and, after directing the executrix to sell the client's personal property, left the remainder of the estate to a friend of the client and children of other friends.<sup>2</sup>

On July 3, 2006, the client died. At the time of her death, the estate was valued at approximately \$1,220,600.<sup>3</sup> The estate consisted of the following property: a condominium valued at \$364,650, furniture and furnishings valued at \$10,000,<sup>4</sup> clothing and jewelry valued at \$9,000, and a car valued at \$42,670. The estate also included checking and savings accounts with a balance of \$53,392.52, a premium deferred annuity worth \$251,798.27, mutual funds valued at \$485,361.40, and a claim against an antique dealer for \$3,786.75.

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discipline be dismissed, or in the alternative the matter be remanded to the hearing committee for further findings.

<sup>2</sup> The property was dispensed as follows: (1) fifty per cent to one individual; (2) thirty per cent to another individual; and (3) ten per cent each to two other individuals.

<sup>3</sup> This valuation is based on the estate inventory that the respondent prepared and submitted in January, 2007.

<sup>4</sup> In the amended first and final account, the value of the furniture and furnishings was increased from \$10,000 to \$15,410.

On October 13, 2006, a judge in the Norfolk Probate and Family Court appointed the respondent as executrix of the estate. The will directed the respondent to sell the testatrix's personal property. The respondent testified that, prior to her death, the client orally instructed her to sell the property to people that would appreciate it as much as she did.

On August 28, 2008, the respondent filed a first and final account with the Probate and Family Court. As there reflected, the respondent's hourly fees were \$225 for her work as executrix and \$300 for her work as an attorney. The respondent charged the estate a total of \$134,437.50 for her fees – \$99,787.50 for her work as executrix<sup>5</sup> and \$34,650 for her work as attorney. After receiving a copy of the first and final account, two of the residuary beneficiaries filed objections, and one of them also filed a complaint with bar counsel. The respondent paid each objecting beneficiary \$10,000 from her personal funds to settle the dispute, and the estate was charged \$15,000 for legal fees resulting from the settlement negotiations. Subsequent to the settlement, the respondent filed an amended first and final account that listed \$85,387 in fees charged to the estate for her work as executrix, and \$34,650 in fees for her services as attorney.<sup>6</sup> The Probate Court judge accepted the amended account on November 9, 2009.

Although the Probate Court accepted the amended first and final account, the hearing committee found that the fees that the respondent charged as executrix and as attorney were clearly excessive. In reaching this determination, the hearing committee implicitly appeared to accept that the respondent's hourly rates were reasonable, but nevertheless concluded that the number of hours she spent on the estate was unreasonable. It concluded that a reasonable total

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<sup>5</sup> Included in this total is \$14,400 the respondent charged for services provided before the respondent was formally appointed as executrix. She charged \$200 per hour for these services. No claim is made that the respondent did not perform these pre-appointment services.

<sup>6</sup> The account did not include the \$14,400 for services charged by the respondent for services she had performed before her appointment as executrix. See note 5, supra.

for both executrix and attorney services for an estate of this size would have been approximately \$60,000-\$65,000 rather than the \$134,437.50 that the respondent had charged and received. In particular, with respect to her executrix fees, the hearing committee noted that the respondent charged the estate more to sell the furniture and furnishings than their value of \$15,410, including charges for multiple trips to consignment shops and a \$4,644 consignment fee. The respondent also spent and charged for two internet car listings. After charging the estate for three hours to clean out a safety box and locate a cemetery deed, the respondent subsequently charged the estate approximately four additional hours to verify that the safety deposit box was empty and to close it. Additionally, the respondent made twenty-four trips from her home or law office to the testatrix's condominium.

With respect to legal fees, the respondent charged more than thirty hours to prepare and file the first and final account for the Probate Court; the hearing committee found that a reasonable amount of time for this task would have been approximately four to five hours. Despite being able to mail a petition to the Probate Court, the respondent instead charged three hours to file the petition for approval of the court in person, including her travel time. Additionally, the respondent spent approximately twenty-one hours preparing estate tax returns even though the respondent has an LL.M in tax law and the task could have been performed in under five hours using tax preparation software.

Based on its conclusion that in her roles as executrix and attorney the respondent charged a clearly excessive fee in violation of Mass. R. Prof. C. 1.5(a) (rule 1.5[a]), the hearing committee recommended that the respondent receive a public reprimand. As previously indicated, the board's decision on the respondent's appeal from the hearing committee's decision was split. A majority of seven members of the board agreed with the hearing committee that the

respondent had violated rule 1.5(a) by charging and collecting a clearly excessive fee, and recommended that she receive a public reprimand. The dissenting members asserted that this case required either dismissal or a remand.

Discussion. Rule 1.5(a) prohibits a lawyer from charging a "clearly excessive fee." Mass. R. Prof. C. 1.5(a) (rule 1.5[a]).<sup>7</sup> The rule provides a non-exclusive list of eight factors to be considered in deciding whether a fee is "clearly excessive." In addition, quoting language in an earlier version of this rule, this court has stated that "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee." Matter of Fordham, 423 Mass. 481, 492 (1996), cert. denied, 519 U.S. 1149

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<sup>7</sup> Rule 1.5 (a) of the Massachusetts Rules of Professional Conduct states:

"A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:

"(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

"(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

"(3) the fee customarily charged in the locality for similar legal services;

"(4) the amount involved and the results obtained;

"(5) the time limitations imposed by the client or by the circumstances;

"(6) the nature and length of the professional relationship with the client;

"(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

"(8) whether the fee is fixed or contingent."

(1997), quoting S.J.C. Rule 3:07, DR 2-106(B). Rule 1.05(a)'s prohibition applies to a lawyer in connection with the direct provision of legal services as well related services, such as those performed as executrix of a client's estate. See Mass. R. Prof. C. 5.7.<sup>8</sup>

In determining that the fees charged to the estate by the respondent for her services as executrix and attorney were clearly excessive, the hearing committee reviewed the facts it found in light of the eight factors listed in rule 1.05(a), and concluded in substance that the respondent spent far too many hours performing the work necessary to administer the relatively simple estate of her client and to perform the necessary legal work. The board agreed. The subsidiary facts contained in the board's majority report are supported by substantial evidence in the record of the hearing, see S.J.C. Rule 4:01, § 8(6), and I agree with the board majority as well as the hearing committee about the excessive nature of the fees. The rate's reasonableness is not dispositive; the number of hours exceeding what a prudent and experienced lawyer would have spent must be considered. See, *e.g.*, Matter of Fordham, 423 Mass. at 490 ("the number of hours spent was several times the amount of time any of the witnesses had ever spent on a similar case"); Matter of Woodhouse, 23 Mass. Att'y Discipline Rep. 787, 789 (2007) ("The number of hours spent by the respondent on the case was substantially in excess of the hours a reasonably prudent experienced lawyer would have spent").

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<sup>8</sup> Rule 5.7 of the Massachusetts Rules of Professional Conduct provides in pertinent part:

"(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to law-related services, as defined in paragraph (b), if the law-related services are provided:

"(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; . . . .

"(b) The term 'law-related services' denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."

The assets in the client's estate included a condominium and highly liquid monetary assets -- a deferred annuity, mutual fund investments, checking and savings accounts; these assets were all known and easily accessible to the respondent, and not difficult to appraise. While the client's furniture, furnishings, and clothes have been a major source of contention in these proceedings, at the end of the day, I share the board's view that regardless of whether one takes into account the instructions that the respondent testified her client gave orally to sell the personal property to purchasers who would appreciate the items as much as the client did, the hours spent by the respondent in removing the property from the client's condominium and consigning it for sale, resulting in executrix fees that equaled or exceeded the property's value, were far in excess of what should appropriately be charged to the estate.<sup>9</sup> With respect to legal fees, as mentioned, the respondent charged over thirty hours to prepare and file the first and final account; supported by the testimony of bar counsel's expert witness, the hearing committee found that this task should have taken four to five hours to complete. In fact, even the respondent's own expert testified that it would take between ten and twenty hours to complete the first and final account for this estate. Charging over thirty hours to prepare and file the account was thus well beyond a reasonable fee by either expert's measure. The same is true of the other examples of hours and resulting fees highlighted by the hearing committee and the board majority.

I appreciate that none of the individual fee amounts referred to in the preceding paragraph is outrageously or even remarkably high; the same is true of the fee total of \$134, 437.50,

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<sup>9</sup> As previously stated, the respondent charged the estate six hours at a rate of \$225 per hour to post two internet car listings. She also charged the estate for twenty-four trips between her home or office and the testatrix's condominium. Including travel time, the respondent charged the estate over fifty-five hours to pack and clean the condominium. Additionally, the respondent charged over fifteen hours to drop off and pick up clothing from various consignment shops.

particularly when viewed in light of the total value of the client's estate. But what is "clearly excessive" obviously must be considered in a particular factual context, and when evaluated in light of the specific facts presented here about the nature of this client's estate, I conclude that the fees were clearly excessive.

In arguing against this view, the respondent contends that when the factors listed in rule 1.5(a) are considered as a whole, as they must be, the fees she charged were reasonable. She has emphasized four factors in particular: the first factor – time and labor, novelty and difficulty and the skill required; the fourth – the amount involved and results obtained; the sixth – the nature and length of the professional relationship; and the seventh – the experience, reputation, and ability of the lawyer. I do not agree that these factors weigh heavily in the respondent's favor.

While she claims that it was unusual for a will to direct the sale of personal property like furniture, furnishings, clothes, and jewelry, because usually family members are interested in and simply given such items, it is of course not unusual for an executrix or administratrix of an estate to be required to sell many types of property belonging to a decedent, and there is no evidence that the particular items here were of such a nature that arranging for their sale should have been extraordinarily difficult or time-consuming. As for results obtained, the respondent points to the increase in value of the estate's monetary investments over the duration of the estate's administration. But the respondent did not select the deferred annuity or the mutual funds involved – it appears that she simply did nothing to sell or dispose of them. I do not accept the respondent's view that this passive retention of an annuity and an investment in mutual funds offers a justification of a fee award that significantly exceeds a reasonable limit for the nature of

the work involved.<sup>10</sup>

Turning to the nature and length of the respondent's professional relationship with her client, I accept that during the final years of the client's life, the respondent worked closely with her and, it appears, the client put great trust in her. But to some extent, the close relationship between attorney and client, and in particular the respondent's familiarity with her client's home, property, and assets overall, support the hearing committee's and board majority's conclusion that the many hours spent by the respondent in collecting and disposing of client's personal property, as well as in preparing the final account and estate tax return were grossly excessive. Finally, with respect to the respondent's experience and reputation, the factor does not appear particularly relevant or helpful to her position. As stated, the evidence shows this was a relatively simple estate that did not require special or particular skills to administer. The respondent's advanced degree in taxation and her apparent experience in administering estates argue in favor of requiring less rather than more time to administer this one.

The respondent also supports her position by joining in some or all of the points made by the dissenting members of the board. I turn to those points.

1. Effect of the Probate Court's judgment. The dissenting members acknowledge that the Probate Court's approval of the respondent's amended first and final account, including the amount of fees charged by the respondent as listed in the account, is not res judicata in relation to this disciplinary proceeding. At the same time, they assert that the Probate Court judge's "allowance of the respondent's accounts should be dispositive on the issue of the reasonableness

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<sup>10</sup> The increase in value of these investments appears more related to positive developments in the market rather than any affirmative action by the respondent. If one accepts the respondent's argument that she should be credited for this increase in the estate's assets, it would follow logically that an executrix who left assets alone should be held responsible for the investments' loss in value should the market decline. Thus, "results obtained" under rule 1.5(a) would be subject to the vagaries of the market rather than affirmative action by the executrix.

of the respondent's fees" (Report, p. 31), and that "the opinion of a court on the reasonableness of a fee should be the final word." (*Id.*, p.35.) The argument fails.

Under rule 4:01, §11, a judgment or ruling in a civil proceeding concerning the same allegations does not prevent bar counsel from pursuing disciplinary proceedings.<sup>11</sup> "The thrust of the rule is to permit the board to go forward with its business without regard to other criminal and civil proceedings." Matter of Segal, 430 Mass. 359, 363 (1999). Although another tribunal may adjudicate similar issues based on the same factual allegations, the question whether an attorney's conduct warrants professional discipline is a separate matter that bar counsel and the board are entitled to investigate, and its resolution ultimately rests with this court. See Matter of Weiss, 460 Mass. 1012, 1013 (2011) ("The duties and prerogatives of bar counsel and the board – and this court's power to superintend the bar and impose discipline when appropriate – are not preempted or compromised in any way by the decisions of other counsel . . . or the judge in the underlying litigation"). The Probate Court judge's acceptance of the respondent's amended first and final account did not preclude bar counsel or thereafter the board from investigating and determining that the respondent charged a clearly excessive fee in violation of rule 1.5(a).

Nevertheless, there is a substantial overlap between the factors considered by a court in awarding attorney's fees and the factors that inform a determination by the board or this court as to whether an attorney's fees are clearly excessive. In determining an appropriate fee award, a court must determine whether the fees sought are fair and reasonable. See, *e.g.*, McMahon v. Krapf, 323 Mass. 118, 123 (1948); Cummings v. National Shawmut Bank of Boston, 284 Mass. 563, 569 (1934). Factors that bear on this determination include (1) the ability and reputation of

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<sup>11</sup> Supreme Judicial Court Rule 4:01, § 11, provides in relevant part: "a verdict, judgment, or ruling in the lawyer's favor in civil, administrative, or bar disciplinary proceedings shall not require abatement of a disciplinary investigation predicated upon the same or substantially similar material allegations."

the lawyer; (2) the demand of a lawyer's services by others; (3) the amount and importance of the matter involved; (4) the time spent; (5) the prices usually charged for similar services by other attorneys in the same area; (6) the amount of money or the value of the property affected by the controversy; and (7) the results secured. See Cummings, supra. Rule 1.5(a) directs that similar factors be weighed when determining whether a lawyer's fees are clearly excessive. (See note 7, supra, where the rule is quoted.) Given this correspondence between considerations relevant to fee awards and the factors listed in rule 1.5(a), a judge's fee award in the same matter may well provide useful and even persuasive guidance to bar counsel, a hearing committee, the board, or this court in determining whether the attorney has charged or collected a clearly excessive fee, but as rule 4:01, § 11, makes clear, the fee award is not dispositive. See Matter of Weiss, 460 Mass. at 1013.<sup>12</sup>

2. The respondent's testimony regarding her client's wishes. The respondent and the dissenting members contend that the hearing committee and the board were incorrect in failing to take into account the respondent's testimony that the testatrix wanted her personal property given to people who would appreciate it as much as she did. The hearing committee stated in its decision that "while we do not affirmatively disbelieve the respondent's testimony about [the testatrix's] expression of her wishes, we disregard the testimony pertaining to those alleged wishes" because it concluded in substance that the will was unambiguous, and the client's

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<sup>12</sup> There is disagreement between the majority of the board and the dissenting members over whether the Probate Court judge made a "finding" with respect to the appropriateness of the attorney's fees included in the respondent's amended first and final account. The board contends that the judge did not make such a finding in accepting the account – that the language used by the judge was essentially boilerplate; the dissenters advance the opposite conclusion. It is impossible to resolve this dispute on the present record, but in the end, resolution is not required because, as indicated in the text, even if the judge did carefully review and approve the fees charged – as opposed to accepting the parties' settlement of their fee dispute – such a determination would not be binding on bar counsel or the board.

alleged instructions would conflict with the terms of the will. See Flannery v. McNamara, 432 Mass. 665, 667-668 (2000); Putnam v. Putnam, 366 Mass. 261, 266 (1974). See also McMillen v. McMillen, 57 Mass. App. Ct. 568, 572 (while extrinsic evidence may be admitted to understand testator's intent at time will drafted, and "while intent is the lodestar of testamentary construction, it cannot be used to displace what a will has said") (quotation and citation omitted).

It is not necessary to resolve this dispute. As I have stated previously, accepting the existence of the client's alleged directions to the respondent does not change the fact that the respondent still had a duty under rule 1.5(a) to ensure that the amount she was charging was not clearly excessive, and the hours and associated fees charged by the respondent in relation to the disposition of her client's personal property indicate that the respondent failed to satisfy that duty.

3. Justification for crediting experts. The dissenting members contend that the hearing committee was obligated to explain its reasons for crediting the testimony of bar counsel's expert witness and not the respondent's. I disagree.

As a preliminary matter, expert testimony is not always a necessary prerequisite to finding that an attorney has committed an ethical violation. Matter of Saab, 406 Mass. 315, 329 (1989), quoting Fishman v. Brooks, 396 Mass. 643, 650 (1986). Nonetheless, expert testimony is usually warranted in petitions for clearly excessive fee violations under rule 1.5(a) because the hearing committee needs to consider the fee customarily charged in the locality for similar legal services. See Mass. R. Prof. C. 1:5(a)(3). When expert testimony is offered, however, the hearing committee and the board are not bound by an expert's testimony even if there is no opposing expert. See Matter of Minkel, 13 Mass. Att'y Discipline Rep. 548, 552 (1997).

Under S.J.C. Rule 4:01, § 8(5)(a), the hearing committee is "the sole judge of the

credibility of the testimony presented at the hearing." See Matter of Donaldson, SJC No. BD-2012-045 (April 4, 2011), citing S.J.C. Rule 4:01, § 8(5)(a). See also Matter of McCabe, 13 Mass. Att'y Discipline Rep. 501, 506-507 (1997). Absent clear error or a finding that the determination is wholly inconsistent with other findings, a court cannot disturb the hearing committee's credibility determinations. Matter of Nissenbaum, 21 Mass. Att'y Discipline Rep. 513, 523 (2005); Matter of Hachey, 11 Mass. Att'y Discipline Rep. 102, 103 (1995). "The hearing committee . . . is the sole judge of credibility, and arguments hinging on such determinations generally fall outside the proper scope of our review." Matter of McBride, 449 Mass. 154, 161-162 (2007). While clearly it may be helpful in a particular case, especially in connection with a fact witness, for a hearing committee to explain why it chose to believe or disbelieve the witness, there is no requirement that it do so. See Matter of Donaldson, supra at 7-9 (stating that board did not need to provide thorough explanation for why it accepted part of respondent's testimony and rejected part); Matter of McCabe, supra at 506-507 (contrasting narrow review of hearing committee's credibility determinations with review applicable to administrative hearing officers). Moreover, the defining characteristic of an expert witness is his or her ability to offer opinion testimony, and opinion testimony by its nature often does not admit to fine parsing by the fact finder to pinpoint exactly why it was persuasive. The board's minority suggests that the risk presented by expert opinion testimony is that a hearing committee will accept the expert's opinion as to an ethical violation, and will do so without independent analysis. But, as the board's majority points out, that risk did not materialize here. The hearing committee accepted the expert testimony of bar counsel's expert on a variety of issues and implicitly discredited opposing opinions of the respondent's expert, but the hearing committee also made its own findings from the evidence that supported its ultimate determination that the

fees here were clearly excessive.

The board's dissent also contends that bar counsel's expert's testimony was inappropriate because (1) the expert opined on the ultimate issue, and the hearing committee relied on this opinion in finding that there was a violation, and (2) he relied for his opinions on his own experience in his own legal practice rather than general principles. Both of these arguments are unpersuasive.

Although bar counsel's expert, as well as the respondent's expert, testified about whether given fees were "clearly excessive," the hearing committee did not adopt those statements point blank. Rather, as suggested in the previous paragraph, the hearing committee credited factual and opinion testimony of bar counsel's expert that supported its ultimate conclusion that the respondent's fees were clearly excessive. For example, the hearing committee adopted bar counsel's statements that a fair and reasonable amount of fees for such an estate, including both legal and executrix fees, would be \$60,000-\$65,000. The hearing committee also credited the testimony of bar counsel expert's that the estate was not complex. Both of these opinions supported the conclusion that the respondent's fees were clearly excessive, but neither touched directly on that ultimate issue.

The separate argument that bar counsel's expert testified as to his own practice is equally unavailing. Most of the statements that the hearing committee credited were opinions pertaining to the character of the estate and the amount of time it should take to complete various tasks. It is the case that the hearing committee adopted the expert's testimony that the fees charged for the basic administration tasks – selling clothing, selling furniture, and cleaning the condominium – were too high because the respondent did not take reasonable steps to minimize time spent on costs and expenses and failed to delegate to others, and in connection with that testimony, the

expert discussed his own practice. But the expert's testimony on this subject was not necessary to the hearing committee's determination that the respondent's fees connected to the disposition of personal property were clearly excessive: merely comparing the amount that the respondent spent in fees to sell various items to the items' value provides its own justification of the determination.<sup>13</sup>

6. Sanction. The remaining issue is the appropriate sanction in this case. The hearing committee and board majority recommend that the respondent receive a public reprimand. Although I am not bound by the board's recommendation, it is entitled to "substantial deference." Matter of Finneran, 455 Mass. 722, 739 (2010), quoting Matter of Tobin, 417 Mass. 81, 88 (1994). In deciding what sanction to impose, I must make sure that the sanction I select is not "markedly disparate from judgments in comparable cases." Matter of Finn, 433 Mass. 418, 423 (2001). For the reasons set forth below, I find that an admonition is the appropriate sanction in this case.

The board majority and bar counsel point to Matter of Fordham, 423 Mass. at 494-495, as establishing a presumptive sanction for charging a clearly excessive fee as a public reprimand. I am not wholly convinced that the case does establish a presumption, compare, *e.g.*, Matter of Schoepfer, 426 Mass. 183, 187-188 (1997), but in any event, this case is distinguishable from Fordham. The attorney there charged over three times a fair and reasonable amount for his attorney's fees, and much of that time was spent teaching himself criminal law principles that were new to him and outside of his areas of legal practice. See *id.* at 490. Here, the respondent

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<sup>13</sup> In addition, the board's dissenting opinion argues that the finding of a rule 1.5(a) violation for clearly excessive fees under these circumstances will have a negative practical effect on solo practitioners. This presents an interesting theoretical argument, but it is inappropriate to impose a different standard for fees based on an attorney's type of practice. At every level of practice, an attorney must exercise discretion when charging fees to ensure that they are not unreasonable.

charged two times the amount that the hearing committee found was reasonable, and there is no indication that she was charging the estate for her self-education.

Matter of Fordham may be the only contested case of public discipline in which the sole misconduct charged was clearly excessive fees.<sup>14</sup> Attorneys in other excessive fee violation matters have received admonitions. In Admonition No. 06-02, 22 Mass. Att'y Discipline Rep.

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<sup>14</sup> In Matter of Lewis, 19 Mass. Att'y Discipline Rep. 271 (2003), the parties stipulated to the imposition of a public reprimand. The facts of the case, found in Lewis v. Committee for Pub. Counsel Servs., 50 Mass. App. Ct. 319, 320-323 (2000), reflect that Lewis, a lawyer appointed to represent indigent clients, spent well over fifty per cent of the time for which he billed in reviewing and updating his client files. In Matter of Palmer, 413 Mass. 33, 34, 38-40 (1992), the lawyer received a public reprimand where his fees to administer an estate were approximately twice the reasonable rate. However, the lawyer committed numerous other violations in addition to the clearly excessive fee violation. Id. at 37. The court determined that public censure was appropriate given the cumulative effect of violations. Id. at 38-40.

There are other cases in which the lawyer received a term of suspension rather than a public reprimand. As in Matter of Palmer, the lawyers in these cases were charged with multiple disciplinary rule violations. In Matter of Rafferty, 26 Mass. Att'y Discipline Rep. 538 (2010), a lawyer permitted a client to dictate a litigation strategy that involved excessive and improper discovery requests resulting in little to no value to the client, but generating high fees: the lawyer charged approximately \$700,000 for discovery in two cases. Acknowledging that the hourly fee was reasonable, the board concluded the lawyer's total fee was excessive and substantially exceeded fees typically charged in such cases. Id. at 540. In addition to the clearly excessive fee violation, the lawyer violated three other ethical rules: competent representation under Mass. R. Prof. C. 1.1, diligent representation under rule 1.3, and failure to explain matters to allow the client to make an informed decision under rule 1.4(b). Id. at 539. Additionally, the lawyer had a prior history of discipline and was motivated by self-interest. Id. at 541.

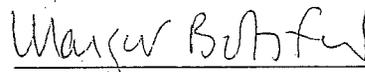
In Matter of Woodhouse, 23 Mass. Att'y Discipline Rep. 787 (2007), a lawyer charged for seventy-four hours at a rate of \$200 per hour – resulting in a total of \$10,500 in fees – to write a letter to the wrong governmental body, to file a procedurally improper complaint in Federal District Court, and to oppose a motion to dismiss that action. As a result of the lawyer's action and inaction, the client lost the right to pursue his age discrimination claims in either the Federal or State court, rendering his legal services valueless. Id. at 789. The attorney had received a retainer for \$10,000, and failed to return it. The number of hours spent by the lawyer was substantially in excess of the number of hours a prudent and experienced lawyer would have spent on the matter. Id. at 789-790. The lawyer also violated Mass. R. Prof. C. 1.1 for competent representation and rule 1.16(d) by failing to return unearned fees after the lawyer was discharged. Id. at 790. There was also a history of discipline for related conduct, and the lawyer demonstrated a lack of insight into the wrongfulness of his misconduct. Id.

848, 848 (2006), a lawyer represented a client as sole heir at law and administrator of a small estate and charged the client at a rate of \$225 per hour for services that were both unnecessary and redundant. The lawyer made restitution of such fees, and received an admonition conditioned upon attending a course on estate administration. In Admonition No. 00-78, 16 Mass. Att'y Discipline Rep. 563 (2000), a lawyer became trustee of two inter vivos trusts for the benefit of an elderly client and the client's brother in 1993, and charged a flat fee of \$10,000 per year to serve as trustee of each trust, although he performed no legal services connected to the trusts except the probate of the brother's estate in 1995. Beginning in 1994, the lawyer also charged the client his hourly legal fee to perform non-legal caretaking services for the client, who was very elderly and only borderline competent. In mitigation, the lawyer was not aware before bar counsel so informed him that he could not charge at this rate for non-legal services, the lawyer refunded "a substantial sum to the trust," and he also had taken "very good care" of the client over the years. The lawyer was admonished for his misconduct. Id. at 564. See also Admonition No. 12-17, (2012), <http://www.mass.gov/obcbbbo/admon2012.pdf>. (attorney who sent a prospective client an illegal and overly generous contingency fee agreement for primarily ministerial work, but never actually collected a fee, received an admonition for charging a clearly excessive fee).

Each of these cases presents different factual circumstances than the present one, to be sure. But in the present case, the evidence indicates that from when she first began to represent the client in 2000 until the client's death in 2006, the respondent committed herself to providing the client with attentive, competent legal services and to make sure the client's needs were met. This is not a case with any evidence of bad faith or overreaching on the respondent's part, nor one involving charges of disciplinary rule violations in addition to the fee issue. Nor is there any

aggravating factor of prior discipline: the respondent has none. The amount of professional time the respondent spent on this estate was clearly excessive, but there is no suggestion that she charged the estate for more hours than she actually devoted to the tasks that were listed. Finally, as a result of the settlement with the beneficiaries regarding the first and final account and the fees charged, the respondent paid each of the contesting beneficiaries \$10,000 from her personal funds. In all the circumstances, I conclude that an admonition, with the additional requirement that the respondent attend a continuing legal education course on estate administration to be approved by bar counsel, is not markedly disparate and is the appropriate sanction.

Conclusion. For the reasons stated, a judgment is to enter that an admonition be dispensed to the respondent with the condition that she attend a course on estate administration to be approved by bar counsel.



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Margot Botsford  
Associate Justice

DATED: September 30, 2013

**ADMONITION NO. 13 -19**

**CLASSIFICATION:**

Trust Account Violation [Mass. Att'y Disc. R. 1.15 (b)(2)(ii)]

**SUMMARY:**

During at least 2005 and 2006, the respondent failed to hold trust funds separate from personal and business funds. In addition to client funds, the respondent retained earned fees in his IOLTA account. The respondent's conduct in maintaining earned fee funds in his IOLTA account violated Mass. R. Prof. C. 1.15(b)(2)(ii).

The respondent received an admonition contingent upon his attending a continuing legal education course designated by bar counsel.

**ADMONITION NO. 13-20**

**CLASSIFICATION:**

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

**SUMMARY:**

The respondent was administratively suspended from the practice of law in Massachusetts for failure to file his annual registration statement and pay his annual fees. At the time, the respondent was caring for an elderly parent and did not pay adequate attention to mail received at his registered address. The respondent was unaware that he had been administratively suspended and continued employment as in-house counsel to a corporation in Massachusetts.

In June of 2013, while searching the Board of Bar Overseers website, the respondent learned he had been administratively suspended since 2008. The respondent promptly notified his employer and took immediate steps to return to active status. The respondent was reinstated to practice on July 11, 2013.

The respondent's representation of his client while he was administratively suspended from the practice of law violated Mass. R. Prof. C. 5.5(a).

The respondent has been a member of the Massachusetts bar since 1995 and has received no prior discipline. He received an admonition for his conduct.

**ADMONITION NO. 13-21**

**CLASSIFICATION:**

Failing to Communicate Adequately with Client [Mass. R. Prof. C. 1.4(a) and (b)]

**SUMMARY:**

The respondent represented a client in an appeal of a criminal conviction. The conviction was affirmed by a decision issued in December 2011. The respondent failed timely to notify the client of the decision and failed to respond to the client's inquiries about the status of the appeal until June 2012, after the client complained to bar counsel. The respondent's failure to give the client timely notice of the decision on appeal and inform the client of the client's further rights and options violated Mass. R. Prof. C. 1.4(a) and (b).

The respondent was admitted to the Massachusetts bar in 1992 and was admonished in 2010 for lack of diligence and competence in another matter. He received an admonition for his misconduct in this case, conditioned on an audit by the Law Office Management Assistance Program (LOMAP).

ADMONITION NO. 13-22

CLASSIFICATIONS:

Failing to Seek Client's Lawful Objectives [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(a) and (b)]

SUMMARY:

In May 2010, the attorney represented the client on criminal charges of trafficking in cocaine in excess of 100 grams. The client was convicted, and the attorney filed a timely notice of appeal. By early 2011, the attorney had obtained the trial transcripts, but he did not visit or contact the client and he took no further action of substance in the matter.

In 2011 and 2012, the client wrote to the attorney asking for information on the status of the appeal. The attorney did not respond to the client. In July 2012, the client asked the office of bar counsel to investigate the attorney's conduct.

After being contacted by bar counsel, the attorney returned the file to the client. The client had counsel appointed by CPCS in August 2012. The client's assigned lawyer filed the appeal brief in October 2013,

The attorney's lack of diligence in preparing and filing the appeal brief violated Mass. R. Prof. C. 1.2(a) (lawyer shall seek a client's lawful objectives) and 1.3 (lawyer shall act diligently in his representation of a client). The attorney's failure to keep the client apprised of the status of the appeal and his lack of progress in pursuing the appeal violated Mass. R. Prof. C. 1.4(a) and (b).

The attorney was admitted in 1974. In 1989, the attorney received a private reprimand for lack of competence and diligence in a criminal case. PR-89-22, 6 Mass. Att'y Disc. R. 376 (1989) In mitigation, the attorney entered into a mentoring arrangement with an experienced criminal defense lawyer.

The attorney received an admonition for his conduct.