

IN RE: VINCENT J. CAMMARANO

NO. BD-2013-040

S.J.C. Order of Indefinite Suspension entered by Justice Duffly on November 29, 2013.

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COMMONWEALTH OF MASSACHUSETTS

07/15

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-2013-040

IN RE: VINCENT J. CAMMARANO

AMENDED MEMORANDUM OF DECISION

This matter came before me on an information and record of proceedings, together with a vote of the board of bar overseers (board) recommending that the respondent be indefinitely suspended from the practice of law. Bar counsel filed a five-count petition for discipline against the respondent and one of his former employees, Denis Patrick Fleming, on August 19, 2011, asserting that the two mishandled five immigration matters. Fleming filed an answer to the petition on September 30, 2011. Represented by different counsel, the respondent filed his answer on November 1, 2011; thereafter his counsel withdrew and the respondent proceeded pro se. A special hearing officer was appointed to consider the matter. After additional filings, the hearing officer conducted evidentiary hearings over six days in February, 2012, at which seven witnesses testified for bar counsel and ninety-eight exhibits were entered in evidence. The respondent and Fleming both testified and neither called any other witnesses. The hearing officer recommended that the respondent be suspended indefinitely, and both the respondent and

bar counsel filed cross appeals.

Bar counsel claimed error in the hearing officer's decision that the respondent did not violate Mass. R. Prof. C. 8.4(c) (dishonesty, deceit, fraud, or misrepresentation) by declining to refund the retainers, and did not violate Mass. R. Prof. C. 1.5(a) (clearly excessive or illegal fees) by charging a fee where the clients received no concrete benefit. The respondent challenged a variety of evidentiary determinations and factual findings. Following a hearing, the board rejected both parties' claims. The board voted to adopt the findings of fact, conclusions of law, and sanction recommended by the special hearing officer.

A hearing on the board's information was held before me on April 29, 2013; the respondent appeared pro se. The respondent challenged the sufficiency of the evidence before the special hearing officer. His primary contentions appeared to be that Fleming was solely responsible for the conduct of all immigration matters and dealt directly with the clients; that the respondent was unaware of most of the cases and their status until either requests for refunds by the clients, years later, or as a result of the investigation by bar counsel; and that, contrary to testimony before the hearing examiner, the respondent had not acted as alleged when clients requested refunds. In addition, the respondent objected to the recommended sanction, stating that

it was far too harsh in comparison to other attorneys charged with similar misconduct; unfairly punished him for the actions of Fleming, who received a public reprimand; and failed to take into account the respondent's long and distinguished career involving significant public service. As discussed, infra, I conclude that the board's findings are supported by the record, the sanction is appropriate, and the respondent shall be suspended indefinitely from the practice of law.

1. Background. I summarize the special hearing officer's findings and conclusions as adopted by the board. The respondent was admitted to the practice of law in the Commonwealth on June 5, 1978. During the period relative to the misconduct at issue here, the respondent was the sole owner and operator of a law firm known as Cammarano & Associates; the firm handled, inter alia, immigration matters, and advertised its immigration practice on television. The respondent employed clerical staff who were referred to variously as paralegals, administrative assistants, or secretaries.

From 2004 through February, 2009, the respondent also employed an attorney, Fleming, as a salaried employee. Fleming was admitted to the bar of the Commonwealth in 1998. After the respondent stopped paying his salary in February, 2009, Fleming opened his own practice. During his employment, Fleming worked on all of the immigration matters handled by Cammarano &

Associates. Although no longer employed by Cammarano & Associates after February, 2009, Fleming continued to meet with the respondent and remained involved in immigration matters which he had handled while employed by the respondent.

As are the clients in the five matters underlying the petition for discipline, most of the respondent's staff were Spanish speaking. Neither the respondent nor Fleming speak Spanish; they relied on the clerical staff or clients' family members for translation of both conversations and documents. The fee agreements signed by the clients in the five relevant matters were written in English, and there is no indication that they were ever transcribed into Spanish. The fee agreements were all drafted by the respondent, and contained a provision stating the firm's "no refund" policy that retainers and would not be refunded under any circumstances. In addition to this provision in the fee agreement, the respondent adopted policies that no work would commence on a matter until the client had paid half of the required retainer and all of the anticipated filing fees.

The petition for discipline contains five counts, each relating to a separate client matter, initiated between 2007 and 2009. During this period, Fleming handled all of the immigration matters for Cammarano & Associates; the respondent met with the clients, at most, only for an initial intake, and thereafter upon their requests for refunds after having terminated the

relationship with Cammarano & Associates. He and Fleming met regularly to discuss business matters, however, and the respondent testified that he watched Fleming "like a hawk." In the period from 2007 through January 2010, the offices of Cammarano & Associates were relocated four times. The hearing officer determined that "some efforts" were made to notify clients of the relocations, but that many clients were not notified and had to find the new location on their own.

In each of the five matters, the respondent agreed to file documents with what was at that time the United States Citizenship and Immigration Services (USCIS). The respondent set a flat fee for the anticipated services, and demanded and received payment of retainers and filing fees before beginning work on the matters. In each case, the documents were either not filed, or were returned because they had been submitted with an incorrect filing fee. The files contained no contemporaneous case notes by either the respondent or Fleming and few letters or records of electronic communication with clients. In each case, the hearing officer, and the board, found that the respondent intentionally misrepresented the status of the matter when confronted with questions by the clients. In each case, the clients terminated the respondent's representation and hired successor counsel; in four of the five matters, successor counsel was able to obtain the result sought by the client; a hearing on

the fifth matter, involving an adjustment of status based on being a skilled worker, was pending at the time of the disciplinary proceedings. In each case, the respondent refused to refund any portion of the fees advanced or the retainers paid.

The hearing officer determined, contrary to bar counsel's petition, that the respondent had not converted any of the retainers paid, and therefore declined to find a violation of Mass. R. Prof. C. 8.4(c). The board adopted this conclusion, over bar counsel's appeal. The board noted that the respondent did deposit the fees into his operating account, as was permissible; did undertake work on the matters, which likely was valuable to successor counsel; that the fees on their face were not extravagant or excessive; and that there was no evidence introduced to show the value of this type of services or the fees generally paid to other attorneys for such services. As the hearing examiner stated, bar counsel introduced no evidence that the fees charged "were excessive, let alone 'clearly' excessive" so as to be in violation of Mass. R. Prof. C. 1.5(a).

The facts supporting each of the counts in the petition for discipline are set forth below, based on the findings of the special hearing officer, as adopted by the board.

a. Count one: Dorian Salinas. This matter involved filing an application for an "I-485" adjustment of status for a fifteen year old high school student who had been born in Peru. The

respondent agreed to handle the matter for \$2,000 as a flat fee for legal services and \$1,400 in filing fees; he previously had represented the family in another immigration matter. There was no written fee agreement. The client's father paid \$1,400 initially, and received a receipt. The hearing officer, crediting the father's testimony, determined that the father also paid an additional \$1,000 in cash approximately a week later. The hearing officer noted that the respondent prepared the necessary forms and sent them to USCIS with a letter dated July 25, 2007, and a check in the amount of \$1,395, also dated July 25; under the firm's policy concerning prepayment of filing fees, the respondent would not have done so had he not received the additional \$1,000.

The forms and the check were returned to the respondent with a letter informing him of increases in filing fees effective July 30, 2007, which had been announced on June 29, 2007. The respondent did not inform the client that an additional \$600 would be needed to file the documents, but, rather, told the father that the documents had been rejected by mistake. The client continued to make inquiries, and, in the fall of 2008, requested a letter stating that the application had been filed, a prerequisite to obtaining college financial aid. When no letter was forthcoming, the client made further inquiries. In April, 2009, the respondent directed Fleming (who was no longer employed

by Cammarano & Associates), to go with the client to the USCIS offices to check on the status of the application. At that point, the hearing officer found, Fleming was aware that no such application was pending, and the respondent should have known this, or, at a minimum, should have checked his records. The client was forced to leave school temporarily because she was unable to obtain financial aid. After she hired successor counsel, the client obtained permanent resident status. The respondent refused to refund any of the retainer.

The board concluded that, by failing to refile the application and by failing to advise the client that he had not done so, the respondent's conduct violated Mass. R. Prof. C. 1.1 (competence); 1.2(a) (pursue client's lawful goals through reasonably available means); 1.3 (diligence); and 1.4(a) (communication with client) and (b) (explanations to client so that client can make informed decisions). The board concluded further that the respondent's refusal to return the unearned portion of his legal fee after being discharged violated Mass. R. Prof C. 1.16(d) (duties on withdrawal of representation, including failure to return unearned portion of legal fee and filing fee after being discharged). The hearing officer, and the board, over bar counsel's appeal, concluded that there was no conversion of funds entrusted to the respondent, and no violation of Mass. R. Prof. C. 8.4(c) (dishonesty, deceit,

misrepresentation, or fraud), because the respondent did complete the necessary documents and did mail them.

b. Count two: Tomas Landaverde. Landaverde is a bricklayer from El Salvador who came to the United States in the early 1990s and who had been granted "temporary protected status" by USCIS. He does not speak English and is not able to read in English or Spanish. Landaverde had hired an attorney to complete an "I-140" form for him so that he could obtain permanent resident status through his seasonal employment as a skilled worker for a state-wide construction firm; Landaverde's employer had asked him to try to obtain skilled worker status. In August, 2007, Landaverde hired the respondent to complete the I-140 paperwork; he paid the respondent \$2,300 for this filing.

On August 24, the prior attorney sent a copy of Landaverde's file to the respondent; it contained a request for more information from UCSIS, dated July 25, with a response due by October 17. The prior attorney confirmed this request, in writing, with the respondent. On August 21, Landaverde's employer also faxed to Cammarano & Associates copies of documents from UCSIS requesting additional information. In November, 2007, Landaverde met with Fleming, who was then unaware of the I-140 filing, and requested representation in arranging travel to El Salvador to visit his mother, who was ill. Landaverde paid the filing fee for the paperwork to seek travel permission, but did

not pay any legal fees; the two did not discuss the skilled worker application. Landaverde subsequently decided not to travel until July, 2008, so that he could obtain additional documents. In July, Fleming filed the request for permission to travel, which was granted.

Also in November, 2007, USCIS rejected the skilled worker application that had been filed by prior counsel, because Landaverde's employer had not provided the additional information requested. Cammarano was notified of this rejection, by prior counsel, no later than November 16. At some point, Fleming also learned of this rejection. Neither Cammarano nor Fleming told Landaverde of the rejection or took any steps to file the requested information or to revive the application. Landaverde learned of the rejection of his I-140 application in July, 2009, when he contacted USCIS directly. At that point, he terminated the services of Cammarano & Associates and hired another attorney, who refiled the I-140 application. When Landaverde requested his file and a refund of the \$2,300, the respondent refused to refund any money and required Landaverde's son to sign a release form stating that it released Cammarano & Associates from "liability related to my case" before returning the file.

The hearing officer found that the respondent violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3, and 1.4 (a) and (b) by not timely responding to the USCIS request for additional information, not

taking steps to respond to the rejection of the permanent resident application, and failing to notify Landaverde of the rejection of his application. The hearing officer found also that the respondent violated Mass. R. Prof. C. 1.4(a) and (b), 1.8(h) (no settlement of legal malpractice claim without first advising client in writing that independent representation is appropriate), 1.16(d) (failing to return unearned portion of fee), and 8.4(c) by requiring Landaverde's son to sign the "release of file and representation" form without advising either Landaverde or his son that they should seek independent counsel regarding the clause in that form purporting to release the respondent from liability.

At the time of the hearing before the special hearing officer, Landaverde's new application was pending a determination. The respondent argued before the hearing officer, and again before me, that Landaverde was not eligible to become a permanent resident under the skilled worker provision, because he was only a seasonal worker. The hearing officer rejected this argument, stating that there was no evidence that the respondent (or Fleming) were aware of this potential issue at the time of Cammarano & Associates' representation of Landaverde, or ever discussed it with him.

c. Count three: Brisa and Monica Mendoza. Brisa and Monica are sisters who came to the United States from Mexico as

young children. In November, 2007, their father hired Cammarano & Associates to file "I-485" applications for permanent resident status for the two sisters.¹ The fee agreement states that Cammarano & Associates would file the applications for \$2,500 for each sister, plus filing fees, and that the fees are nonrefundable. The Mendoza family ultimately paid \$8,700 to Cammarano & Associates, in installments. The respondent did not meet with Brisa during the initial representation, all of which was undertaken by Fleming, who had several additional meetings with Brisa. Fleming also prepared a notice of appearance and sent it, along with the a prepared "Form I-485," to Monica in California for her signature. She signed and returned the documents. Neither Fleming nor the respondent filed a "Form I-485" application on behalf of Brisa or Monica; from June, 2008 through January, 2010, Brisa made numerous inquiries, by telephone and in person, concerning the status of the applications.

In January, 2010, Brisa initiated written correspondence directly with the respondent concerning the applications. The respondent told her that the applications were "waiting for priority dates" and that USCIS would take no action "until the

¹ The father is a naturalized United States citizen and a resident of Massachusetts. At all relevant times for purposes of the disciplinary action, Brisa lived in Massachusetts and Monica lived in California.

dates become current." He also advised her to go to USCIS to check directly on the status of the applications. When Brisa requested the application receipt numbers, the respondent wrote to her informing her that the applications had not been filed and that they could not be filed based on her father's "I-130" petition until unspecified "priority dates" became current, which could be a matter of years.

In February, 2010, Brisa terminated the services of Cammarano & Associates and demanded a refund and the return of the files for both sisters. On March 2, the respondent returned the files but refused to provide any refund. Brisa subsequently retained counsel through a legal services office; successor counsel filed an application for permanent resident status based on another Federal statute which provides relief for victims of domestic violence. Concluding that there was insufficient evidence that Brisa had ever informed the respondent or Fleming that she was a victim of domestic violence, the hearing officer declined to find any misconduct in the respondent's failure to file under this status. The hearing officer determined, however, that the respondent violated Mass. R. Prof. C. 1.5(a) (clearly excessive or illegal fees) by entering into a fee agreement for a flat, non-refundable fee; Mass. R. Prof. C. 1.16(d) by failing to refund the unused portion of the legal fee and the filing fees after the representation was terminated; and Mass. R. Prof. C.

1.3, 1.4 (a) and (b), and 8.4(c) by sending knowingly misleading communications to Brisa.

d. Count four: Edwin Guity. Guity retained Cammarano & Associates in November, 2007, to file a "Form I-90" to replace a green card that he had lost. He had previously, through other counsel, filed several I-90 forms, all of which had been denied. Fleming therefore suggested that Guity file a Freedom of Information Act request to determine the reason for the previous denials before filing any additional I-90 form. Cammarano & Associates entered into a signed fee agreement with Guity, stating that, for a nonrefundable fee of \$1,300, it would file the Freedom of Information Act request and the I-90 form, and would respond to requests for information from the USCIS. Guity paid \$1,000 of the fee amount, and thereafter paid an additional \$400.

Fleming filed a notice of appearance and the Freedom of Information Act request, and received a notice from USCIS that the request had been received. Until his departure in February, 2009, Fleming continued to await a response to his Freedom of Information Act request, and thus did not file the I-90 form. Fleming testified at the hearing, without explanation, that he "knew" that the respondent had received a response to the Freedom of Information Act request in April, 2009; the respondent testified that he received no such response. There was no copy

of any response in the file and no such copy was introduced at the hearing. Additionally, in a letter to bar counsel on May 11, 2010, Fleming stated that no response had been received. The hearing officer found that no response was received prior to Fleming's departure from the firm, and bar counsel had failed to prove that any response was ever received thereafter.

In November, 2009, Guity contacted USCIS directly and learned that no I-90 request had been filed. In February, 2010, he terminated the representation by Cammarano & Associates and demanded a refund. The respondent sent Guity a letter in March, 2010, denying that Guity had paid anything; at the hearing, the respondent admitted that Guity had paid approximately \$1,500. The hearing officer found that no refund had been made to Guity as of that time. He concluded that the respondent violated Mass. R. Prof. C. 1.5(a) by charging a nonrefundable fee, and Mass. R. Prof. C. 1.16(d) by failing to refund the unearned portion of the fee after being discharged.

e. Count five: Rosa Flores. In June, 2008, Obed and Maria Almeyda retained Cammarano & Associates to file an adjustment of status application to obtain permanent resident status and work authorization for Maria's mother, Rosa Lidia Flores, who is from El Salvador. The Almeydas signed a written fee agreement to pay a flat fee of \$3,000 plus filing fees of \$1,300 for this application. By "mid-June," the Almeydas had paid the filing

fees and half of the legal fee, so that the application could be filed, pursuant to the respondent's office policy. In December, 2008, the Almeydas paid the remaining portion of the fee, believing that it was necessary to do so in order that they obtain any documents or work authorizations sent to the respondent from USCIS. Fleming completed the application paperwork in June, 2008, and gave it to a clerical employee of Cammarano & Associates for filing. In September, 2008, Fleming learned (as he admitted at the hearing) that the application had not been filed, but he took no action; there were no copies of the application or of a check for filing fees in the file, and Fleming could find no indication that such a check had ever been written. At some later point, Fleming confirmed through contact with USCIS that no application had been filed.

In March, 2009, Obed contacted USCIS directly and learned that no application had been filed. The hearing officer credited Fleming's testimony that, at that point, if not sooner, Fleming informed the respondent that no application had been filed. On March 28, 2009, Fleming (who no longer worked at the firm but was available to answer questions on prior immigration cases) told Obed that he would check with his secretary concerning the status of the application. On March 29, Obed told Fleming that he was terminating the representation by Cammarano & Associates and wanted a full refund of all fees paid. The hearing officer found

that some of Obed's emails to the firm "were intemperate" and that Obed was "abusive" to the clerical staff during telephone conversations. Fleming did not communicate with Obed after this point.

On May 1, 2009, the respondent sent a letter to Obed stating that the application had been filed; this statement was false and the hearing officer found that the respondent knew it to be false, based on information provided to him by Fleming. The respondent refused to refund any portion of the fees the Alymedas had paid. They subsequently retained another attorney, who filed an application on behalf of Flores; that application was allowed within three months. The hearing officer found that the respondent had violated Mass. R. Prof. C. 1.16 (d) by failing to return the unearned portion of the fee and the expense money, and Mass. R. Prof. C. 1.1, 1.3, 1.4(a) and (b), and 8.4(c) by falsely informing Obed that the application had been filed when the respondent knew that it had not been.

f. Recommended discipline. The hearing officer found that the respondent offered no evidence in mitigation, and that bar counsel offered no evidence in aggravation. Bar counsel argued, however, that facts in the evidence supported a finding of aggravating factors.

Bar counsel sought a suspension of three years for Fleming, who had five years of experience when he came to work for

Cammarano & Associates; he sought a private admonition, relying on disciplinary decisions in which there was a single instance of neglect of an immigration case. Citing a series of cases in which public reprimands had been imposed for multiple instances of neglect of immigration cases, the hearing officer concluded that a public reprimand should be imposed. See, e.g., Matter of Honore, 21 Mass. Att'y Disc. R. 341 (2005); Matter of Harsch, 20 Mass. Att'y Disc. R. 227 (2004); Matter of Garrigan, 17 Mass. Att'y Disc. R. 233 (2001).

The hearing officer noted that other cases in which a term suspension much shorter than that sought by bar counsel had been imposed involved significant harm to the clients. See, e.g., Matter of Lagana, 26 Mass. Att'y Disc. R. 295 (2010) (three-month suspension stayed with conditions for neglect of two immigration cases, one of which resulted in arrest of client, where aggravating factors of attorney's substantial experience, lack of candor, and prior discipline for similar misconduct); Matter of Mparaganda, 26 Mass. Att'y Disc. R. 374 (2010) (three-month suspension for neglect of two immigration cases, resulting in detention of one client and deportation of another).

Without citation to relevant disciplinary proceedings, but apparently in agreement with bar counsel as to the existence of aggravating factors in the evidence, the hearing officer found that the respondent's conduct merited a much more severe

sanction. The respondent was the senior attorney at the firm, with many years of experience, and he set the policies of the firm, including the no refund policy, which on its face interfered with clients' rights to discharge their attorney and seek alternate representation. When confronted by clients whose cases had been neglected, the respondent "responded with brazen and false denials accompanied by a refusal even to refund funds that had been advanced for filing fees, which had never been paid and for which [the respondent] could have no cognizable claim."

The hearing officer stated also that he found the respondent's testimony as to "almost every contested matter not believable." The hearing officer found that the respondent was "combative" in his testimony and in his cross-examination of witnesses, and apparently had no insight into the "wrongful nature of his conduct." The hearing officer noted also that the respondent claimed that the fact that he had not communicated directly with a client "somehow absolves him of responsibility" for what happened to clients of his firm.

Based on the evidence and the respondent's conduct at the hearing, the hearing officer recommended an indefinite suspension be imposed, with reinstatement conditioned on reimbursement in full of all clients.

g. Proceedings before the board. Bar counsel cross-appealed on the grounds of the hearing officer's decision that

there was no violation involving a clearly excessive fee on counts 1 and 3. The respondent also appealed. The respondent argued primarily that he should not be held responsible under a theory of vicarious liability for the actions of Fleming. He also argued that two of the clients did not appear, and the findings as to them were based only on documentary evidence, and, more generally, challenged certain credibility determinations of the special hearing officer.

After argument by both parties, the board adopted the special hearings officer's "ultimate findings and conclusions" and his recommendation for discipline. The board also supplemented its decision with other evidence in the record. The board noted that the hearing officer had declined to find the respondent in violation of Mass. R. Prof. C. 5.1 concerning the respondent's allegedly inadequate supervision of Fleming, and thus that the respondent had no viable ground of appeal on that basis. More significantly, the board emphasized that the hearing officer had found, explicitly, numerous violations based on points at which the respondent personally acted or failed to act.

h. Hearing before me. Both parties made essentially the same arguments before me as they did before the board. Bar counsel argued that an excessive fee could be found by "inference and circumstantial evidence." Bar counsel maintained that there was evidence of one matter, (the Landaverde matter involving the

USCIS request for further information) in which Cammarano & Associates did "no work" in response to the USCIS request for further evidence, so that a fee of \$2,300 was inherently excessive. As to the Mendoza matter, bar counsel argued that the sisters were not eligible for an adjustment of status with their father as sponsor until several years in the future, and that Brisa was eligible on a different basis. Bar counsel claimed that "nothing" was done on the matter other than paperwork sent to Monica, but Monica would not be eligible for an adjustment of status for several more years. Bar counsel argued also that there was no "work of value" for Salinas, even though the completed forms were mailed, so the fees were excessive, as they were in the Flores matter, where the forms were completed but misfiled with respect to USCIS, such that no "service of value" was provided for the benefit of the client.

Bar counsel also continued to challenge before me the finding of no violation of Mass. R. Prof. C. 8.4(c), claiming that the failure to return filing fees was a conversion. I conclude that there was no error. The board determined that the respondent's refusal to return the filing fees had been treated appropriately in the finding of violations of Mass. R. Prof. C. 1.16(d) (failure to return unearned fee), and that a finding of "conversion" would neither establish violation of a disciplinary rule nor assist in determining the appropriate

sanction. As the board noted, there was no particular evidence of deceit by the respondent, who refused outright client requests for refunds of fees, directly in conversations with them and in letters to them.

I reject bar counsel's argument that "threatening and abusive conduct," (something that, in any event, the board did not find), to "stave off requests for refunds," is equivalent to deceit, misrepresentation, or fraud under Mass. R. Prof. C. 8.4(c). See Matter of Schoepfer, 426 Mass. 183, 187 (1997) (excluding misuse of retainers and advances of expenses, with deprivation, from presumptive sanction of disbarment or indefinite suspension).

As the board observed, handling of these types of cases required delivery of component services, and the respondent did provide some component services to the clients, such as preparing complete sets of filings. Bar counsel did not argue in bringing the petition for discipline, or on appeal, that the fees charged were excessive when charged or collected. Moreover, there was no evidence of the fair market value of these services, the value of those portions performed by the respondent's firm, or how the flat fees the respondent charged compared to the value of the services reflected in the fees charged by other attorneys for similar services.

The respondent, likewise, raised the same claims of lack of

responsibility for the actions of another about which the respondent claimed total lack of knowledge, insufficient evidence due to the absence of live testimony from two clients, and improper credibility determinations. The respondent cited also his lengthy career (thirty-five years), absence of prior discipline, and previous years of dedicated public service. In addition to challenging the board's findings, the respondent disputed the length of the sanction, asserting that it was disproportionate both to the sanction of public reprimand imposed on Fleming and to sanctions imposed on other lawyers for similar conduct.

The respondent asserted repeatedly that the case "revolves" around Fleming and Fleming's actions, and that the respondent had no knowledge of any of the issues until he either was contacted by clients seeking refunds or received communications from bar counsel. The respondent emphasized that Fleming, not the respondent, saw the client files and signed the contracts with the clients, the clients "admitted" on cross-examination that they dealt exclusively with Fleming, and that all of the misrepresentations as to matters being pending or on appeal with USCIS were Flemings's. Contrary to his statement at the hearing that he "watched" Fleming "like a hawk," the respondent argued that he was involved in other areas of trial work and had no knowledge of Fleming's actions.

The respondent maintained further that no refunds were due, because work had been done, the amounts in the agreements had been expended, and the refunds were requested years later; that he would have honored refund requests had they been made at the time, but not once bar disciplinary proceedings had been commenced; and also that he had "no memory" of having been harsh or combative with any clients who requested refunds, stating that as a long-time business person, he knew better than to "yell" at clients. He emphasized that there was no evidence of any kind that the fees set forth in the agreements were excessive, and no evidence of what any other attorney charged for such services. The respondent maintained, repeatedly, that nothing could have been accomplished for Landaverde because he was a seasonal worker, or for the Mendoza sisters, sponsored by their father, until several years in the future, and that Brisa had not mentioned being a victim of domestic violence as a separate basis for filing an adjustment of status.

In sum, as the special hearing officer found, the respondent disclaimed all responsibility for the wrongfulness of his conduct, expressed no remorse or sympathy for his vulnerable clients, made assertions of fact that are blatantly contrary to the testimony and other evidence at the hearing and inconsistent with the board's findings of fact, and attempted to place all blame for his actions on a much less experienced attorney whom he

supervised, contrary to the board's explicit findings as to actions and omissions specifically by the respondent.

2. Discussion. I first consider the respondent's arguments with regard to the special hearing officer's findings, and then address the recommended sanction.

a. Preponderance of the evidence standard. In attorney disciplinary proceedings, bar counsel bears the burden of proving misconduct by a preponderance of the evidence. See Mass. R. Prof. C. 3.28 ("[i]n all disciplinary proceedings Bar Counsel shall have the burden of proof by a preponderance of the evidence").² The applicability of this standard was first established in Matter of Mayberry, 295 Mass. 155, 167 (1936), and was codified in the board's rules in 1975. See Mass. R. Prof. C. 3.28. See also Matter of Budnitz, 425 Mass. 1018, 1018 n.1 (1997). Despite attempts to require a more exacting standard, see Matter of Ruby, 328 Mass. 542, 547 (1952), this standard has not been changed, and the United States Court of Appeals for the First Circuit has upheld its use against constitutional challenge. See In re Barach, 540 F.3d 82 (1st Cir. 2008) ("the use of a preponderance standard is not so arbitrary or irrational as to render state disciplinary proceedings that use it fundamentally unfair"). See also Matter of Kerlinsky, 428 Mass.

² Respondents bear the same burden of proof with respect to affirmative defenses and matters in mitigation. See Mass. R. Prof. C. 3.28.

656, 664 n.10 (1999).

Thus, the respondent's contentions that the evidence was insufficient because two clients did not appear to testify, and the hearing officer relied, instead, on written correspondence from those clients, is unavailing. The testimony of the seven nonparty witnesses and the ninety-eight exhibits, as well as the testimony of the respondent and Fleming, amply meet the preponderance of the evidence standard to establish the violations found.

b. Credibility determinations. The respondent contends also that there was insufficient evidence to meet the board's burden of proof on the ground that the special hearing officer did not sufficiently support his credibility determinations. According to the respondent, the hearing officer failed to address important credibility issues, and made credibility determinations without any explanation of how he chose to believe any given witness on any given point, or some witnesses on some points and not others.

As did the board, I reject this argument. Supreme Judicial Court Rule 4:01, § 8(5)(a), recognizes the hearing committee as the "sole judge of the credibility of the testimony presented at the hearing." See Matter of McCabe, 13 Mass. Att'y Disc. R. 501, 506-507 (1997). The special hearing officer is thus entitled, like any finder of fact, to believe some portions of a witness's

testimony and disbelieve others. "The hearing committee's credibility determinations will not be rejected unless it can be said with certainty that [a] finding was wholly inconsistent with another implicit finding." Matter of Murray, 455 Mass. 872, 880 (2010). See Matter of McCabe, supra ("[w]e may not disturb these findings absent clear error"). "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).

Having reviewed the special hearing officer's decision, as well as the hearing transcripts, I conclude that the hearing officer's factual findings have adequate bases in the record, and that his credibility determinations were not inconsistent or contradictory.

c. Appropriate sanction. I turn to the appropriateness of the board's recommended sanction of indefinite suspension. The appropriate disciplinary sanction to be imposed is one which is necessary to deter other attorneys and to protect the public. Matter of Foley, 439 Mass. 324, 333 (2003), quoting Matter of Concemi, 422 Mass. 326, 329 (1996). "If comparable cases exist in Massachusetts, [I] apply the markedly disparate standard in imposing a sanction." Matter of Griffith, 450 Mass. 500 (2003), citing Matter of Finn, 433 Mass. 418, 423, 742 N.E.2d 1075 (2001). I must ensure that the board's recommended sanction is

not "markedly disparate" from sanctions imposed on attorneys found to have committed comparable violations. See Matter of Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited.

Failure to refund retainers or fees paid in advance, as here, requires a fact specific inquiry. See Matter of Sharif, 459 Mass. 558, 566-570 (2011); Matter of Pudlo, 460 Mass. 400, 405-406 (2011). It does not, categorically, however, establish a presumption of indefinite suspension or disbarment. Id. To the contrary, attorneys who have refused to refund unearned portions of purportedly nonrefundable flat fees have received relatively short terms of suspension. See, e.g., Matter of Ahn, 24 Mass. Att'd Disc. R. 10 (2008) (public reprimand for failing to return unearned \$12,500, purportedly nonrefundable, flat fee, six weeks after being discharged, failing to return client file, and charging attorney rate for administrative services); Matter of Cohen, 23 Mass. Att'y Disc. R. 70 (2007) (three month suspension for failure to return prepaid fees to two clients, as provided in contract, after collecting judicial fee awards from defendants); Matter of Morgan, 17 Mass. Att'y Disc. R. 427 (2001) (suspension for one year and one day where attorney refused to return files and unearned fees in multiple matters from which attorney had been discharged until bar counsel became involved).

Moreover, as discussed, supra, neglect of multiple clients' immigration matters, resulting in harm to the clients, has also

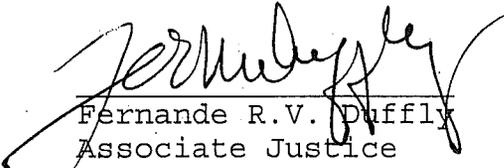
been sanctioned by short terms of suspension. See Matter of Honore, 21 Mass. Att'y Disc. R. 341 (2005) (public reprimand); Matter of Harsch, 20 Mass. Att'y Disc. R. 227 (2004) (same); Matter of Garrigan, 17 Mass. Att'y Disc. R. 233 (2001) (same). See, e.g., Matter of Lagana, 26 Mass. Att'y Disc. R. 295 (2010) (three-month suspension stayed with conditions); Matter of Mparaganda, 26 Mass. Att'y Disc. R. 374 (2010) (three-month suspension where neglect resulted in detention of one client and deportation of another).

Here, in conduct more egregious than any of the foregoing matters, the respondent neglected multiple client matters, over a period of several years, and deliberately and knowingly made misrepresentations to those clients concerning the status of their cases. He drafted fee agreements which, by stating that retainers were nonrefundable, on their faces violated the rules of professional conduct, and was solely responsible for enforcement of his firm's improper no-refund policy; he has continued to refuse to refund any of the fees, notwithstanding the involvement of bar counsel. Indeed, he contends that the commencement of disciplinary proceedings precluded any decision he might otherwise have made to refund any portion of the fees. See Matter of McCarthy, 23 Mass. Att'y Disc. R. 469, 470 (2007) (ability to make restitution and failure to attempt to do so reflects poorly on attorney's moral fitness).

Considered with the other conduct found by the board, see Matter of Palmer, 413 Mass. 33, 38 (1992) (we consider "the cumulative effect of the several violations committed by the respondent"), including the respondent's refusal to acknowledge any wrongdoing, his attempts to blame employees for his actions, his statements that are inconsistent with the record and that the hearing officer found blatantly noncredible, and his treatment of particularly vulnerable clients, I have little doubt that indefinite suspension is the appropriate sanction in this case, in order to preserve public trust and confidence in the legal profession. See Matter of Goldberg, *supra*. Accordingly, I impose that sanction, recommended by the special hearing officer and agreed to by the board.

3. Disposition. A judgment shall enter suspending the respondent indefinitely from the practice of law in the Commonwealth.

By the Court



Fernande R.V. Duffly
Associate Justice

Entered: November 29, 2013.