

IN RE: VALERIANO DIVIACCHI

NO. BD-2015-042

**S.J.C. Order of Term Suspension entered by Justice Hines on December 3, 2015,
with an effective date of January 2, 2016.¹**

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

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. BD-2015-042

IN RE: VALERIANO DIVIACCHI

MEMORANDUM OF DECISION

This matter is before me on an Information and Record of Proceedings pursuant to S.J.C. Rule 4:01, § 8(6), as appearing in 453 Mass. 1310 (2009), together with a vote of the board of Bar Overseers (board). The board recommended that Valeriano Diviacchi (respondent) be suspended from the practice of law for twenty-seven months. Bar Counsel commenced disciplinary proceedings against the respondent before the board on August 22, 2013, and the respondent filed a response, pro se, on September 10, 2013. The board assigned a hearing committee on October 9, 2013. On November 13, 2013, Bar Counsel filed an amended petition for discipline alleging the following violations of the Massachusetts Rules of Professional Conduct:

- (a) failure to explain to the client contingent fee agreement provisions not contained in Forms A or B of Mass. R. Prof. C. 1.5(f) and to obtain the client's informed consent to these provisions, in violation of Mass. R. Prof. C. 1.5(f);

- (b) limitation of representation of the client, failure to seek the client's lawful objectives, and failure to represent the client competently and diligently, in violation of Mass. R. Prof. C. 1.1, 1.2(a), and 1.3;
- (c) false statements of material fact to the United States District Court and the Boston Municipal Court (BMC), in violation of Mass. R. Prof. C. 3.3(a)(1) and 8.4(c); and
- (d) attempting to charge and collect a clearly excessive fee, in violation of Mass. R. Prof. C. 1.5(a).

The respondent filed a response to the amended petition on November 22, 2013, denying any violation of the disciplinary rules as charged. Public hearings took place on January 28 and 29, February 10, and March 20, 2014.

In a report issued on July 11, 2014, the hearing committee found all the violations charged by Bar Counsel. Finding no mitigating factors and several aggravating factors, the hearing committee recommended the respondent be suspended from the practice of law for fifteen months.

The respondent appealed and filed objections to the hearing committee's report and recommendation on July 31, 2014. Bar Counsel filed an opposition on September 12, 2014. After hearing the matter on October 6, 2014, the board voted unanimously,¹ to file an Information with this court recommending a twenty-seven month suspension.

¹Two members were recused from the matter.

On June 12, 2015, the respondent filed a supplemental brief on appeal. The parties appeared at a hearing before the single justice on June 15, 2015. For the reasons set forth below, I adopt the board's recommendation that the respondent be suspended from the practice of law for a period of twenty-seven months.

Background and Procedural History. The board adopted the hearing committee's findings and made additional findings. I summarize the relevant findings as follows.

The respondent was admitted to the bar of the Commonwealth on June 14, 1990. On recommendation from a mutual acquaintance, the client contacted him seeking representation in a Federal action filed against her by a lender. The lender alleged that the client had defaulted on a construction loan and a line of credit and owed approximately \$2.8 million. Although the client had retained other counsel to represent her in this action, rising legal fees motivated her to seek new representation on a contingent-fee basis.

The client consulted with respondent who agreed to represent her on a contingent fee basis with the upfront payment of costs in the amount of \$25,000. The respondent presented the client with a contingent-fee agreement providing that "[t]he claim, controversy, and other matters

with reference to which the services are to be performed are SOVEREIGN BANK V. [CLIENT] & COUNTERCLAIM." It further provided that, "[t]he contingency upon which compensation is to be paid is: recovery by judgment or settlement or otherwise."

Modifying the language provided in the forms appearing in Mass. R. Prof. C. 1.5(f), the agreement stated the following: "Client is responsible for any amount owed to prior or other counsel not associated with the undersigned. CLIENT IS TO RECEIVE A CREDIT FOR A NON-REFUNDABLE FLAT RATE PAYMENT OF \$15,000 PAID NOW AND \$10,000 STILL DUE." The respondent made additional modifications to the contingent fee agreement which, according to the board, "favor[ed] the Respondent in any attempt to collect fees and expenses from the client if the relationship [was] terminated or if the client obtain[ed] a non-monetary compensation or no money." The client "looked the agreement over quickly; the Respondent did not review the agreement with her paragraph by paragraph; he did not explain to the client the provisions and wording he had added; and he did not obtain her informed consent in writing to the modifications he had made."

The respondent entered his appearance in the Federal litigation on May 8, 2012, and filed an amended

counterclaim and an emergency motion for a thirty-day stay in view of his plans to be out of State for approximately two weeks. The board found the amended counterclaim to be "only marginally different from the one filed by the client's prior counsel." Although the client requested, on multiple occasions, that the respondent stop the scheduled foreclosure of her property because she wanted to end the matter with a short sale, the respondent refused to do so. Consequently, the client hired another attorney, Harold Jacobi (Jacobi), who filed a limited appearance to enjoin the foreclosure. The court denied the client's emergency motion for injunctive relief and Jacobi appealed to the United States Court of Appeals for the First Circuit.

On May 23, 2012, the client contacted the respondent with an inquiry about filing for bankruptcy. In response, the respondent strongly advised the client against this, indicating that such action would not be beneficial.² Nevertheless, the client filed for bankruptcy, which stayed the foreclosure for approximately two months.

Meanwhile, on May 29, 2012, the First Circuit notified counsel of record, including the respondent, of a "Mandatory Pre-Argument Settlement Conference" scheduled

²Valeriano Diviacchi (respondent) told the client to "[t]alk to whatever idiot attorney told you to file for bankruptcy."

for July 12, 2012. The respondent informed Jacobi that he expected him to "handle the First Circuit matters."

In June, 2012, the respondent filed an opposition to the lender's motion to dismiss the counterclaim. The board found that "[t]hereafter, the Respondent did no work of substance on the client's case and filed nothing further on her behalf in federal court."

After refusing to meet with the client between May 29 and July 12,³ the respondent sent an electronic mail (e-mail) on July 12, asking her to make "'the remaining flat rate payment' by the end of July" and threatened to file an attorney's lien if she did not do so. The client wrote in response: "I was not aware there was a deadline on that payment, especially since I thought it was related to costs." The respondent then informed the client, for the first time, that this payment "ha[d] been past due for months." The client begged the respondent not file for the lien as she awaited a sale and settlement. She also indicated that she needed to discuss with him what had happened at the mediation. Nonetheless, the respondent filed a notice of lien on July 17, 2012, and agreed to meet with her the next day. At this meeting, the client

³The respondent wrote to the client, "I was not hired to stop any [foreclosure] sale, my job is to handle the lender liability case."

revealed "disturbing" information from the mediation.⁴ In response, the respondent ordered the client to leave and threatened to telephone the police if she did not do so immediately. At the hearing, he testified that he, in fact, called the police.⁵

With Jacobi appearing as counsel for the client in the lender's Federal court action for default on the note, the client and the lender reached a settlement. The settlement agreement, finalized on July 20, 2012, specified the following terms:

"The client would sell the property to a buyer who had offered \$2.24 million, and the lender would accept \$1.9 million in total satisfaction of its claims against her. The property was to be sold on or before September 5, 2012, and the litigation was to be stayed through that date. The client would pay off the junior lienholders. The lender's suit and the client's counterclaim would both be dismissed with prejudice. The lender and the client would exchange mutual releases, as a result of which the lender would pay no money to the client."

Jacobi represented the client again at the September 5, 2012, closing. The following day, he signed a stipulation of dismissal of the Federal litigation on the client's behalf. The same day, he and the client informed

⁴This information is not divulged in the hearing committee report or the Board of Bar Overseers' memorandum.

⁵According to the respondent, "At this point she was a trespasser and I was entitled to call the police and told her that I would."

the respondent that the matter was resolved and that, following the payment of the junior lienholders and other necessary payments, "the client had received no net funds." The respondent "accused Jacobi of ignoring his lien and threatened to do discovery on it and seek a jury trial." On September 14, 2012, the client filed a grievance with the board. She referenced the respondent's threats and challenged his claim that she owed \$10,000. She also inquired as to whether there was a board fee dispute group which could assist in handling the matter. The respondent was notified of the grievance. Before responding, he filed State and Federal actions against the client.

Around September 17, 2012, the respondent filed a complaint against the client in the Central Division of the Boston Municipal Court Department (BMC), seeking to recover \$10,000 under the contingent fee agreement and quantum meruit for sixty hours that he claimed to have spent on the client's Federal court matter. The respondent stated in the complaint, signed under oath, that the client:

"specifically told Plaintiff that she agreed to the flat rate payment of \$25,000 and would bring such payment to the meeting. That was the first lie told by Defendant to the Plaintiff; she did not bring the full agreed upon flat rate amount but only \$15,000 of such amount"; and,

violated the fee agreement by settling the Federal case "without notice and completely behind Plaintiff's back."

The respondent also filed an ex parte motion for real estate attachment for \$10,000, the amount he claimed to be due on the agreed sum for costs. The motion repeated the same allegations regarding the client's breach of the fee agreement.

Around September 23, 2012, the respondent filed an "Attorney's Motion to Enforce Attorney's Lien Against all Parties," in Federal court. He sought \$96,483.33 in attorney's fee from the client, arguing that since the bank had accepted \$1.9 million from her in lieu of the \$2.24 million sales price of her home, she had received \$340,000 and, based on the contingency fee agreement, he was entitled to one-third of this amount minus her \$15,000 upfront payment, plus costs.⁶ He reiterated the two allegations made in his BMC complaint. Around September 24, 2012, the respondent filed an amended complaint in the BMC, repeating all the claims made above.

⁶The hearing committee and board noted an error in the respondent's calculations. According to the board, "33% of \$340,000 is \$112,200. Even crediting the \$15,000 paid by the client, the amount is \$97,200." However, the board concluded that this error was not material to its determination "[i]n light of [its] conclusion that the fee is excessive, and the fee is unenforceable and does not support the respondent's claim."

On April 2, 2013, the respondent filed a "Conditional Motion to Further Amend the Complaint and to Join Additional Defendants" in the BMC. He supplemented previous allegations with the following:

"Discovery has further revealed that such deceit by the Defendant is her standard habit and business routine for dealing with attorneys. In the past ten years, Defendant has had > 15 different attorneys represent her in a half-dozen matters ranging from a divorce in probate court to a lender liability action in federal court with the same pattern: she hires an attorney, works him or her until she stops paying the bill, fires that attorney and disputes the bill and files a [board] complaint, and then gets another attorney and starts the process again."

Based on these findings, the board concluded that the respondent's conduct violated: (1) Mass. R. Prof. C. 1.5(f) by failing to explain to the client and obtain her informed consent to modified contingent fee agreement provisions; (2) Mass R. Prof. C. 1.2(a) and 1.3 by limiting his representation of the client, failing to seek her lawful objectives, and failing to represent her competently and diligently; (3) Mass. R. Prof. C. 3.3(a)(1) and 8.4(c) by making false statements of material fact to the Federal court and the BMC; and (4) Mass. R. Prof. C. 1.5(a) by attempting to charge and collect a clearly excessive fee.

Maintaining that his conduct in the representation of the client did not violate any disciplinary rules, the respondent objects to the hearing committee's report and

the board's memorandum. He challenges the board's proposed discipline on multiple grounds, arguing that: (1) the conclusions in the hearing committee's report are unsubstantiated by and inconsistent with the evidence; (2) the hearing committee applied a legally erroneous standard; (3) the proceedings violated his right to due process and equal protection; (4) the findings and conclusions in the hearing committee's report lack support from expert testimony; and (5) the credibility determinations are erroneous in that they "derive from the Panel's bias and prejudice against the respondent's combative nature."

Discussion. 1. Standard of review. The standard of review in this bar discipline case is well established. "Although not binding on this court, the findings and recommendations of the board are entitled to great weight." Matter of Fordham, 423 Mass. 481, 487 (1996), citing Matter of Hiss, 368 Mass. 447, 461 (1975). "Subsidiary facts found by the board and contained in its report filed with the information shall be upheld if supported by substantial evidence, upon consideration of the record." S.J.C. Rule 4.01, § 8(4). "'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (6). In the final analysis, however, the task of this court is to review the board's

findings and recommendation, and then reach its own conclusion as to the propriety of the proposed discipline. In re Lupo, 447 Mass. 345, 356 (2006). Applying these standards, I conclude that the board's findings and conclusions are amply supported by substantial evidence and that board's proposed disciplinary sanction of a twenty-seven month suspension is the appropriate sanction for the respondent's conduct.

2. Violations found by the board. a. Contingent fee agreement. The respondent challenges the board's finding that he violated Rule 1.5(f) by failing to explain, or obtain the client's consent to, the contingent fee agreement insofar as it modified the recommended form as set forth in the rule. More specifically, the respondent's contingent fee agreement contained the following additional language:

"The client in the event of discharge of the attorney, bad faith lack of cooperation, or breach of this agreement is to be liable to the attorney for his reasonable expenses, disbursements, and attorneys' fees up to the point of discharge or breach" (emphasis supplied). Paragraph 3(a).

"If the client accepts a settlement that involves only non-monetary compensation, no money, no or limited attorneys' fees that are inconsistent with the result achieved, or unreasonably accepts or refused a settlement not recommended or recommended by the attorney, the client is to be liable to the attorney for his reasonable expenses, disbursements, and

attorneys' fees up to the point of settlement" (emphasis supplied). Paragraph 3(b).

"Please note: The client is to be liable from the amount collected for the attorney's reasonable expenses and disbursements (charges of experts, court costs, fees for accountant and appraisers, fees for services of process, fees for investigators, deposition costs, and other necessary expense)."

The board concluded that these changes are not "nominal" and that the respondent's agreement was both confusing and contradictory.⁷

The respondent admits that he changed the model forms provided in Mass. R. Prof. C. 1.5(f), characterizing the model forms as "worthless for anything but simple personal injury cases." Moreover, he does not deny that he did not explain these modifications to the client. The respondent excuses his lapse on the ground that the client was sophisticated and needed no explanation of the changes in the agreement. Additionally, he contends that her signature on the agreement met the Rule 1.5(f)(2) consent requirement. The hearing committee and board properly

⁷The additional language included by the respondent imposed an obligation on the client to pay fees and costs in the event the relationship is terminated. This language conflicts with the approved form which provides that the attorney may seek payment for work done and expenses paid before the termination. See Mass. R. Prof. C. 1.5 (f), Forms A and B.

rejected both arguments.⁸ The respondent's admissions are dispositive of whether he violated Rule 1.5 (f) as charged and I see no basis to consider the issue further.

b. Scope of representation, competence, and diligence. The respondent disputes the board's finding that he limited his representation by refusing to assist the client with the foreclosure or negotiate with the bank. Effectively conceding that he declined to take these actions, he argues that no consideration was given to his "refusal to abide by [the client's] unexpected departure from their previously agreed plan for the federal case, including his forbearance from filing the spurious bankruptcy petition or the meritless motion for preliminary injunction that she pursued." This argument is unpersuasive. To the extent that the respondent contends that the client asked him to engage in frivolous litigation, the evidence is tenuous at best, especially given the outcome of the Federal court litigation. In any

⁸ On appeal, the respondent reasserts his argument that the committee violated his right to equal protection by its "refusal to consider [the client's] sophistication because Respondent is not a 'big firm' . . . [which] makes the ambiguous form suggestions of Rule 1.5(f) optional for big firms and business and government clients but creates a basis for disciplining practitioners having only individuals (regardless of sophistication) as clients with no rational basis for such difference." The board properly rejected this argument in a pretrial motion.

case, the respondent's disagreement with the client's objectives did not excuse his refusal to meet with her to discuss her case, as reflected in the e-mail exchanges between them.

c. False statements of material fact. The respondent argues that his statements to the BMC about his client's conduct with attorneys constituted a good faith mistake and that he "lacked the required mental state and had no specific intent to deceive." Matter of Murray, 455 Mass. 872, 881 (2010). The hearing committee rejected this argument. In doing so, the committee disagreed that the respondent's statements should be assessed using a "subjective, good-faith-basis standard." See Mass. R. Prof. C. 3.3 comment 3. Based on the hearing committee's "detailed findings" on the falsity and materiality of these claims, the board concluded that "the Respondent's perjury was all of a piece with his vindictive treatment of his own client." The respondent provides no evidence to suggest that he conducted a "reasonably diligent inquiry" prior to making the misrepresentations to two courts. Id. Rather, as the board noted, "[a]t the hearing, the respondent was unable to offer evidence to support his statements."

The respondent further contends that his additional statements to the BMC and Federal court were true, as

established by the record. In his filings, he had claimed that the client failed to pay him \$25,000 as she had promised, consulted more than fifteen other attorneys, and settled the Federal lawsuit and engaged in other conduct "behind his back." The hearing committee found these claims to be knowingly false and material. "The hearing committee . . . is the sole judge of credibility, and arguments hinging on such determinations generally fall outside the proper scope of [the court's] review." S.J.C. Rule 4.01, § 8(4); Matter of McBride, 449 Mass. 154, 161-162 (2007); Matter of Saab, 406 Mass. 315 (1989). Thus to the extent the respondent presses his version of the facts as true, I decline to consider it as a basis to reject the board's finding.

d. Attempt to charge and collect an excessive fee.

The respondent contends that Bar Counsel failed to provide proof that the contingent fee was "clearly excessive" within the meaning of rule 1.5(a)(1). He argues that it is unclear what standard the hearing committee and the board used despite this court's holding that there is "explicitly an objective standard by which attorneys' fees are to be judged." Matter of Fordham, 423 Mass. 481, 492-93 (1996), cert. denied, 519 U.S. 1149 (1997). The respondent argues that the testimony of his expert witness was ignored and

Bar Counsel failed to provide expert testimony or factual evidence supporting the allegation that he had sought excessive legal fees. However, "[e]xpert testimony is unnecessary to prove ethical violations." Matter of Tobin, 417 Mass. 81, 87 (1994), citing Matter of Saab, 406 Mass. 315, 329 (1989).

Relying on Collins v. Town of Webster, 25 Mass. App. Ct. 745 (1988), the respondent also maintains that the client made a gross recovery from the settlement of the civil action and he was, subsequently, entitled to receive one third of \$340,000. The hearing committee and the board rejected this contention, concluding that the BMC complaint seeking the recovery of \$96,483.33 from the client and the "Motion to Enforce Lien" in the federal court were attempts to charge a clearly excessive fee. The board adopted the hearing committee's findings as follows:

"(1) it was not within the scope of the contingent-fee agreement, as the money came not from the counterclaim against the lender--the subject of the fee agreement--but from the sale of the house; (2) the respondent could not recover a 33% contingent fee on the net difference between the gross sale proceeds of \$2.24 million and the lender's \$1.9 million payoff where the contingency identified in the agreement did not result in funds to the client; (3) the respondent did minimal work, having been both preceded and followed by other counsel for the client; and (4) as a matter of quantum meruit, the work performed by the respondent did

not contribute to the outcome of either the litigation or the house sale."

Having reviewed the record, I see no basis to disturb these findings.

e. The respondent's due process claim. "There is no doubt that [the respondent] has a constitutionally protected interest in his license to practice law and that he must be afforded due process of law before he can be deprived of that interest." Matter of Kenney, 399 Mass. 431, 435 (1987). However, there is no merit to the respondent's claims that his due process rights were violated because: (1) one of the panel members who signed off on the hearing committee's report was absent during the respondent's cross-examination; and (2) his testimony about contacts with the client in 2011 was erroneously excluded. Section 3.7(c) of Rules of the Board of Bar Overseers, which the respondent referenced, provides the following:

"Absence of a Hearing Committee or Hearing Panel Member. The absence of a committee or panel member from any hearing shall not be cause for continuing the hearing as long as a quorum of the hearing committee or panel is present. Such member may participate fully in all deliberations of the committee so long as the transcript of the hearing at which he or she was absent is available to him or her."

The board correctly found that "[t]he rule is presumptively valid and the Respondent does not attack

it. Accordingly, [he] cannot claim he was deprived of due process." With regard to the respondent's claims of excluded testimony, the hearing committee and board concluded that he was permitted to testify extensively about his contacts with the client and about other relevant matters.

3. Appropriate sanction. In considering the appropriate disciplinary sanction, review of the board's recommendation is "de novo, but tempered with substantial deference." Matter of Foley, 439 Mass. 324, 333 (2003). Deference notwithstanding, the court must ensure that the sanction imposed is not "markedly disparate" from sanctions in comparable cases. Matter of Alter, 389 Mass. at 156. The review is accomplished by "considering the appropriate sanction for the Respondent's misconduct, and then evaluat[ing] whether the sanction should be heightened or reduced after weighing any aggravating or mitigating factors." Matter of Balliro, 453 Mass. 75, 86 (2009). I consider each violation in light of these principles.

a. Material misrepresentation to the court. While acknowledging "confusion over what sanction should be imposed for the Respondent's most serious misconduct,"⁹

⁹The board's "confusion" apparently related to uncertainty whether the more serious sanction of disbarment

making material misrepresentations under oath to the court, the board recommended a twenty-seven month suspension for this violation.¹⁰ Relying on Matter of Shaw, 427 Mass. 764, 769-70 (1998), the board declined to adopt the one-year suspension recommended by Bar Counsel and the hearing committee and adopted the "usual and presumptive sanction" of a two-year suspension where the attorney gave false testimony under oath but was not charged with or convicted of a crime. See In the Matter of Finneran, 455 Mass. 722, 731 n.13 (2010); Matter of O'Donnell, 23 Mass. Att'y Discipline Rep. 508, 514 n.3 (2007) ("presumptive sanction for lying under oath is a two-year suspension"). Here, the board analogized the respondent's conduct to that of the attorney in Matter of Shaw, 427 Mass. at 764, 768-69, who "made false statements under oath, filed a false affidavit in court proceedings, and issued false and misleading

is the appropriate for perjury. Noting that some cases imposed disbarment as a sanction for perjury, see Matter of Sleeper, 251 Mass. 6, 20 (1925); Matter of Budnitz, 425 Mass. 1018, 13 Mass. Att'y Disc. R. 439, 447 (1996); Matter of Bailey, 439 Mass. 134, 152, 19 Mass. Att'y Disc. R. 12, 34 (2003); Matter of Foley, 439 Mass. 324, 335-336, 19 Mass. att'y Disc R. 141, 154-155 (2003), the board relied instead on those cases establishing a two-year suspension as the presumptive sanction for violation of Rule 3.3(a). See Matter of Shaw, 427 Mass. 764, 14 Mass. Att'y Disc. R. 699 (1998); Matter of Sousa, 25 Mass. Att'y Disc. R. 557, 566 (2009).

¹⁰The respondent's appeal centers on this recommended sanction as it applies only to this violation.

opinion letters signed under oath to which he forged the notarization of another attorney." Id. Although the respondent's conduct was not otherwise as far reaching as the misconduct in Shaw, he too made false statements under oath to two courts. On this basis, the board concluded that "a two-year suspension for [the respondent's] perjured statements is the appropriate starting point in determining the sanction."

The board properly rejected the recommendation of Bar Counsel and the hearing committee where, as here, the respondent's conduct is readily distinguishable from that for which a one year suspension is deemed appropriate. See Matter of Neitlich, 413 Mass. at 416, (one year suspension proper where attorney misrepresented, but not under oath, facts to Probate and Family Court in postdivorce proceeding); Matter of McCarthy, 416 Mass. 423, 423 (1993) (one year suspension appropriate sanction where attorney elicited false testimony, introduced false documents, and failed to correct record in proceeding before Rent Control board). Neither of these cases involved the more egregious conduct at issue here, making false statements under oath to a court. "[A]n attorney who lies under oath engages in 'qualitatively different' misconduct from an attorney who makes false statements and presents false evidence."

Matter of Shaw, 427 Mass. at 769, citing Matter of Budnitz, 425 Mass. 1018, 1019 (1997).

On the record before me, therefore, I discern no reason to disturb the board's finding that the respondent "did not merely write down his falsehoods and then passively allow them to enter into the litigation. He swore to them, he repeated them to two different courts, and he actively sought relief based on them during court appearances he initiated and during which he used his falsehoods in arguments made to the court. Accordingly, I find that a two-year suspension is the appropriate starting point for determining the appropriate disciplinary sanction in this case.

b. Attempt to collect an excessive fee. Despite their differing views on the presumptive sanction for the respondent's misrepresentation, Bar Counsel, the hearing committee, and board agreed that the appropriate sanction for the respondent's attempt to collect an excessive fee is a public reprimand. This is consistent with comparable cases and the American Bar Association Model Standards for Imposing Lawyer Sanctions § 7.3 (1992). See Matter of Fordham, 423 Mass. at 482, 490, 494-95 (finding that public censure appropriate where counsel charged \$50,000 to defend several charges, including operating motor vehicle under

influence of intoxicating liquor, because attorney's fee clearly excessive in comparison to usual fee, even where defendant acquitted and attorney expended significant time developing "novel" argument); Matter of Palmer, 413 Mass. 33, 33-34 (1992) (ordering public censure for attorney who, in addition to other violations of the disciplinary rules, charged \$17,345.80 for administration of estate, rather than reasonable fee of \$9,500); Matter of Kerlinsky, 406 Mass. 67, 76-77 (1989) (affirming single justice's order of public censure for attorney who, among other related violations, took fee in excess of amount provided in contingent fee agreement).

c. Failure to explain contingent fee agreement and violations of Rules 1.1, 1.2(a) and 1.3. Bar Counsel and the hearing committee agreed that an admonition was appropriate for the respondent's failure to explain the nonconforming provisions of the contingent fee agreement to his client as well as for the violations of Rules 1.1, 1.2(a), and 1.3. Such a sanction has been imposed in similar cases. See Admonition No. 08-18, 24 Mass. Att'y Discipline Rep. 895, 896 (2008) (admonition for "failure to execute a written contingent fee agreement"); Admonition No. 10-09, 26 Mass. Att'y Discipline Rep. 777, 778 (2010) (admonition, subject to attendance of continuing legal

education course, for violations of rules 1.1, 1.2(a), and 1.3).

d. Evidence in mitigation and aggravation. On appeal, the respondent makes four claims in mitigation. First, he contends that his behavior was markedly different from some of the client's other counsel who generated unnecessary fees, "bailed on the case," or "piggyback[ed] on [his] work." Second, he contends that "[h]e is not alleged to have stolen money or committed a crime. He is not alleged to have committed malpractice." Third, he argues that he is being "punish[ed] . . . with . . . severity for essentially being 'combative'"; an allegation that lacks support. Finally, he claims that "the [board] BBO and Bar Counsel do not believe his efficient handling of complex litigation has any value, nor that his 25 years of experience on lender liability has any value, nor does the risk he took on handling such litigation on a contingent fee basis have any value." None of these are "special" mitigating factors warranting the imposition of a lesser sanction. See Matter of Alter, 389 Mass. at 157 ("We emphasize the term 'special,' since it is apparent that 'typical' mitigating circumstances have not diverted the Justices from the imposition of disbarment or suspension. One Justice has aptly listed typical mitigating

circumstances as follows: (1) an otherwise excellent reputation in the community and a satisfactory record at the Bar, (2) cooperation in the disciplinary proceeding and with governmental authorities, (3) the occurrence of the criminal proceedings, (4) the pressures of practice, (5) the conviction as a punishment, (6) the absence of any dishonesty, such as a false tax return, and (7) in the final result, no harm to anyone else by the misconduct. Matter of Barkin, 1 Mass. Att'y Discipline Rep. 18, 21 (1977)". Accordingly, I find no mitigating factors.

The hearing committee found the following aggravating factors that the board adopted: the respondent's public reprimand in 2007, his significant experience as an attorney, his "unnecessarily combative and vengeful" attitude toward the client, his failure to show remorse or an understanding of his misconduct, his casting blame on others, and his motivation by personal gain.

Conclusion. While the respondent's misrepresentations under oath alone justify a two-year suspension, his violation of multiple disciplinary rules warrants a harsher sanction. See Matter of Palmer, 413 Mass. at 38 ("it is appropriate for us to consider the cumulative effect of the several violations committed by the Respondent"). The absence of mitigating factors and presence of substantial

aggravating factors further support a departure from the presumptive two-year suspension. The court "must consider what measure of discipline is necessary to protect the public and deter other attorneys from the same behavior" (citation omitted). Matter of Concemi, 422 Mass. 326, 329 (1996). In light of the serious nature of the respondent's misconduct, I conclude that the twenty-seven month suspension recommended by the board is warranted.



Geraldine S. Hines
Associate Justice

DATE ENTERED: December 3, 2015