SJC-13183

IN THE MATTER OF THE DISCIPLINE OF AN ATTORNEY.

May 9, 2022.

Attorney at Law, Disciplinary proceeding, Admonition.

Bar counsel appeals from an order of a single justice of this court, acting on an information filed by the Board of Bar Overseers (board), ordering that the respondent attorney be privately admonished for violation of multiple rules of professional conduct. We affirm.[1]

1. Background. Bar counsel filed a two-count petition for discipline against the respondent, alleging multiple acts of misconduct arising out the respondent's several roles as special personal representative for the estate of an elderly client (grandmother), guardian and coguardian for her disabled grandson (ward), and cotrustee of a special needs trust established for the ward's benefit. A hearing committee of the board conducted an evidentiary hearing and thereafter issued a report of its findings, concluding that bar counsel had established some of the misconduct -- primarily a lack of diligence -- alleged in count one, but none of the violations alleged in count two. It recommended that the respondent be admonished. One member filed a substantial dissent; that member would have found additional misconduct and recommended that the respondent be suspended from the practice of law for six months and a day.

[1] This bar discipline appeal is subject to the court's standing order governing such appeals. See S.J.C. Rule 2:23, 471 Mass. 1303 (2015). We have reviewed the materials filed. Pursuant to our standing order, we dispense with oral argument.

Both the respondent and bar counsel appealed to the board. After a nonevidentiary hearing, the board adopted the hearing committee's report "in part," and "correct[ed]" certain findings "as indicated," essentially accepting many of the dissenting committee member's findings and making additional findings of its own, including that the respondent acted without competence and charged and collected an excessive fee. Considering matters in aggravation and the cumulative effect of the misconduct, the board voted to recommend to the court that the respondent be suspended from the practice of law for three months.

When the matter came before a single justice of this court, she reviewed the information and record of proceedings and concluded, as the hearing committee had previously, that bar counsel established violations of some of the allegations contained in count one but none of the violations in count two, and that the misconduct warranted a private admonition. She concluded that the differences between the hearing committee and the board as to misconduct largely revolved around disputes of fact, which in turn rested substantially on witness credibility. She also reasoned that the differences in the recommended sanctions rested principally on the weight given to certain aggravating factors and the extent to which the individual violations were treated as part of the same misconduct. We agree that the substantial evidence supports the single justice's findings and that an admonition is the appropriate sanction.

2. Sufficiency of the evidence of misconduct. The single justice reviewed the record and concluded that, in amending the hearing committee's findings and making certain additional findings of misconduct, the board failed to accept the hearing committee's role as the "sole judge of the credibility of the testimony presented at the hearing," as S.J.C. Rule 4:01, § 8 (5) (a), as appearing in 453 Mass. 1310 (2009), requires. See Matter of Dasent, 446 Mass. 1010, 1012 (2006); Matter of Tobin, 417 Mass. 81, 85-86 (1994); Matter of Saab, 406 Mass. 315, 328 (1989). She agreed with the board, however, that there was substantial evidence to support the misconduct that the hearing committee did find. See Matter of Abbott, 437 Mass. 384, 393-394 (2002), and cases cited. See also Matter of Segal, 430 Mass. 359, 364 (1999) ("as long as there is substantial evidence, we do not disturb the board's finding, even if we would have come to a different conclusion if considering the matter de novo"). On appeal, "[w]e review the single justice's decision (on issues other than the initial choice of a sanction at the disciplinary stage) to determine whether there has been

an abuse of discretion or clear error of law." Matter of Weiss, 474 Mass. 1001, 1002 (2016).

We agree with the single justice that the hearing committee's findings of misconduct are supported by the record and the evidence the hearing committee found credible.

a. Count one. Count one concerned the respondent's role as a coguardian and guardian for the ward and trustee of the ward's special needs trust. It alleged that the respondent handled a matter when he was not competent to do so, failed to familiarize himself with procedures and law applicable to his role as coguardian, engaged in a conflict of interest, and failed to represent the ward's interests competently and diligently and to seek the client's objectives in violation of Mass. R. Prof. C. 1.1, as appearing in 471 Mass. 1311 (2005); Mass. R. Prof. C. 1.2 (a), as appearing in 471 Mass. 1313 (2015); Mass. R. Prof. C. 1.3, as appearing in 471 Mass. 1318 (2015); and Mass. R. Prof. C. 1.7, as appearing in 471 Mass. 1335 (2015); that he paid himself his legal fees as guardian without obtaining approval from the Probate and Family Court, in violation of Mass. R. Prof. C. 1.5 (a), as amended, 480 Mass. 1315 (2018); and that he failed promptly to release retirement funds that he was holding in his Interest on Lawyers' Trust Account (IOLTA account) on the ward's behalf after a conservator had been appointed, in violation of Mass. R. Prof. C. 1.15 (c), as appearing in 471 Mass. 1380 (2015).

The hearing committee determined that bar counsel proved a subset of the charged misconduct, conduct that it found manifested a lack of diligence but not incompetence. In particular, the hearing committee found, and the board agreed, that the respondent failed to act diligently as guardian and coguardian for the ward, in violation of Mass R. Prof. C. 1.3 (diligence), in two respects: by failing to file annual care plans, see G. L. c. 190B, § 5-309 (b); and failing to secure a home for the ward that was not "unclean, littered with clutter, and had dog and rodent feces in it."[2] In addition, the respondent deposited the ward's income and benefits into his IOLTA account rather than a special needs trust or other individual interest bearing account, in violation of Mass. R. Prof. C. 1.15 (e) (5), as appearing in 440 Mass. 1338 (2004) (prior to July 1, 2015), and Mass. R. Prof. C. 1.15 (e) (6)

[2] A majority of the hearing committee determined that bar counsel had not proved violation of Mass. R. Prof. C. 1.1 (lack of competence) for the same conduct.

(after July 1, 2015). Finally, after conservators were appointed for the ward, the respondent delayed remitting to the conservators funds that the respondent held on the ward's behalf, in violation of Mass. R. Prof. C. 1.2 (a), and Mass. R. Prof. C. 1.15 (c).[3,4]

The board, however, disagreed with the hearing committee's findings in several respects, concluding in particular that the respondent's conduct also reflected a lack of competence. As the single justice correctly observed, however, factual findings predicated on the credibility of witnesses are the province of the hearing committee. See S.J.C. Rule 4:01, § 8 (5) (a); Matter of Saab, 406 Mass. at 328, quoting Salem v. Massachusetts Comm'n Against Discrimination, 404 Mass. 170, 174 (1989) ("[a] mere reading of the transcript is not an adequate substitute for actually observing and hearing the witnesses in determining credibility"). See also Matter of Barrett, 447 Mass. 453, 460 (2006). They "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), quoting Matter of Barrett, supra. Although the board may have accorded weight to certain testimony that the committee did not, that "does not render the evidence supporting

[3] A majority of the hearing committee concluded that the respondent did not violate Mass. R. Prof. C. 1.15 (c) by continuing to receive income on the ward's behalf into his IOLTA account after successor fiduciaries were appointed because it was not the respondent's obligation to notify the payor retirement board to send the funds elsewhere. It also determined that the respondent did not fail to seek the lawful objectives of his client in refusing to assent to a petition for partition, in violation of Mass. R. Prof. C. 1.2 (a); engage in a conflict of interest, in violation of Mass. R. Prof. C. 1.7 (b), as amended, 430 Mass. 1301 (1999) (prior to July 1, 2015), and Mass. R. Prof. C. 1.7 (a) (2) (after July 1, 2015); or charge a "clearly excessive" or "illegal" fee, in violation of Mass. R. Prof. C. 1.5 (a).

[4] The respondent alleged that the dissenting member of the hearing committee had a conflict of interest, arising out of his representation of the spouse of a witness called by bar counsel, who was an adult child of the grandmother. The board considered the claim on appeal, noted that the respondent was aware of the connection before the hearing, and waived his objection based on the member's disclosure and representations. It stated that the board "discern[s] no bias in the dissent."

the committee's findings 'not substantial,'" Matter of Dasent, 446 Mass. at 1012, or inconsistent.

We acknowledge that, pursuant to S.J.C. Rule 4:01, § 8 (5), the board "may revise[] the findings of fact, conclusions of law, and recommendation of the hearing committee." That said, the single justice determined that the board's "corrections" in this case failed to "accord the committee's findings appropriate deference." Matter of Dasent, 446 Mass. at 1012. The board was not free, for example, to reject the hearing committee's findings concerning the credibility of witnesses who testified about the condition of the grandmother's home, the respondent's testimony concerning the relationship between the ward and a relative who provided care for the ward, or the respondent's explanation as to why he did not join the petition to partition the grandmother's home or act with respect to the mortgage on it. The board similarly was not free to reject the respondent's explanation for retaining certain funds in his IOLTA account. Although the hearing committee did find that the respondent "concealed" from (by failing to disclose to) the conservator that he withheld funds from which he planned to take his legal fees, it credited his testimony that he reasonably believed that, had he sought payment from the conservator, she would not have paid the bill. See Mass. R. Prof. C. 1.15. Because the hearing committee credited the respondent's testimony concerning the remaining funds in his IOLTA account, the single justice's determination that the length of the delay was "minimal" is not clearly wrong.

With respect to the respondent's failure to file an annual "care plan" for the ward, pursuant to G. L. c. 190B, § 5-309 (b), the hearing committee credited the respondent's testimony in support of its finding that the respondent's failure constituted a lack of diligence, in violation of Mass. R. Prof. C. 1.3, but not a lack of competence, in violation of Mass. R. Prof. C. 1.1. Although not specifically referenced in the hearing committee's findings, for example, there was testimony that the respondent attended at least one annual meeting to determine an individual education plan for the ward, which the respondent testified were more detailed that the general care plan required by statute.

With respect to the issue of excessive or illegal fees and the respondent's withholding of funds to pay his fees, the hearing committee determined that an attorney does not violate Mass. R. Prof. C. 1.15 (c) by retaining funds to pay a fee if the attorney has a reasonable belief that the fee otherwise

would not be paid. See Mass. R. Prof. C. 1.15 comment 3. The hearing committee also determined that the respondent was not required to obtain court approval before retaining a reasonable fee for his services. See G. L. c. 190B, § 5-413 (providing for reasonable compensation for attorneys, guardians, and others without prior court order); Mass. R. Prof. C. 1.5 (a). We agree with the single justice that the fact of withholding the fee, without obtaining an initial court order, did not itself establish a violation of the rules of professional conduct, and that where there is a reasonable "risk that the client may divert the funds [from which the lawyer's fees will be paid] without paying the fee," a "lawyer is not required to remit the portion from which the fee is to be paid," provided that any disputed portion must be kept in trust until the dispute is resolved. Mass. R. Prof. C. 1.15 comment 3.

b. Count two. The second count of the petition charged misconduct associated with the respondent's temporary role as special personal representative of the grandmother's estate. It alleged that the respondent failed to exercise his duties and obligations to preserve assets and administer the estate, and failed to take action on certain lawsuits and claims filed against the estate, in violation of Mass. R. Prof. C. 1.1 (competence), 1.2 (a) (seeking lawful objectives of client), and 1.3 (diligence); that he failed promptly to deliver $6,064.20 of estate funds that he was holding in his IOLTA account to a successor personal representative, in violation of Mass. R. Prof. C. 1.15 (c); and that he performed few services for the estate and paid himself a clearly excessive fee, in violation of Mass. R. Prof. C. 1.5 (a).

A majority of the hearing committee determined that bar counsel did not prove the charged violations. It credited the respondent's explanations for his actions as special personal representative. With respect to the delivery of estate funds in particular, the hearing committee concluded that the respondent did not violate Mass. R. Prof. C. 1.15 (c) by failing promptly to deliver a portion of the funds to a successor representative. Citing comment 3 to the rule, the hearing committee reasoned that the respondent was not required to remit the portion of the funds from which he would be paid, considering his testimony that there was a risk that his fees would not be paid.[5] It also

[5] Comment 3 to Mass. R. Prof. C. 1.15 provides:

"Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the

determined there was no intent to defraud or misappropriate client funds, but only a lack of promptness in accounting. Finally, the hearing committee found that bar counsel did not establish that the respondent's fee was illegal or excessive.

The board generally declined to accept the hearing committee's findings as to this count. It concluded that the evidence established that the respondent failed to marshal the grandmother's estate assets and failed to respond to litigation involving a nursing facility and a foreclosure notice on the grandmother's home, in violation of Mass. R. Prof. C. 1.1 (competence) and 1.2 (a) (seeking lawful objectives of client), and failed promptly to deliver to a successor fiduciary relevant funds held in his IOLTA account, in violation of Mass. R. Prof. C. 1.15 (c). It concluded that comment 3 to Mass. R. Prof. C. 1.15 (c) did not apply in these circumstances, because the comment concerns a "client" who may divert a fee, and not third parties such as a conservator or personal representative. We disagree. For purposes of comment 3, the term "client" includes a fiduciary who acts on behalf of the client. The board also found that the fee charged by the respondent, more than $6,000, was excessive, in violation of Mass. R. Prof. C. 1.5 (a), and that it was "illegal" because he collected the fee without court approval, at a time after he had resigned as special personal representative. Although the single justice did not separately address this point, the hearing committee considered the evidence and the respondent's testimony. It concluded that although the respondent was "sloppy" in his record keeping and lacked diligence in his accounting, the "services performed and the amounts charged appear to be reasonable." Although the respondent did not seek court approval for the fees, they were not "illegal." Cf. G. L. c. 190B, § 5-413. When the hearing committee's determination is accorded due deference, we cannot say there was error in its conclusion.

Finally, we note that the board made certain additional findings concerning uncharged misconduct. We agree with the single justice that, to the extent that any determination was

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client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a layer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed."

made that the respondent used funds from the grandmother's estate to pay expenses for various services at her home solely to benefit one of her family members, it was not charged in the petition for discipline. See Matter of the Discipline of an Attorney, 448 Mass. 819, 825 n.6 (2007) ("The petition did not charge the respondent with deceiving bar counsel. To the extent that the hearing committee determined that the respondent violated disciplinary rules for [the deceptive act], we determine this to be error"); Matter of Orfanello, 411 Mass 551, 556 (1992) (error to rule that attorney violated disciplinary rule that was not charged).

3. Appropriate sanction. The findings adopted by the board amply support the conclusion that the respondent violated multiple rules of professional conduct. Turning to the question of sanction, we consider whether the sanction imposed by the single justice is "markedly disparate from those ordinarily entered by the various single justices in similar cases." Matter of Alter, 389 Mass. 153, 156 (1983). Considering the "cumulative effect of the several violations committed by the respondent," Matter of Palmer, 413 Mass. 33, 38 (1992), we conclude that an admonition is appropriate. See Matter of Gordon, 385 Mass. 48, 58 (1982) (although board's recommendation as to sanction is entitled to substantial deference, "the ultimate duty of decision rests with this court"). Although we give "substantial deference" to the board's recommendation, ultimately, we "decide every case on its own merits such that every offending attorney receives the disposition most appropriate in the circumstances" (alterations and citation omitted). Matter of Moran, 479 Mass. 1016, 1021 (2018).

a. Respondent's conduct. In the main, the facts establish that the respondent failed to act with reasonable diligence in his role as guardian, coguardian, and trustee. The hearing committee did not, however, find that the conduct constituted a pattern or repeated failure, nor that there was either serious harm or a potential for serious harm an issue here: among other things, although not excusing the misconduct, the hearing committee considered that the conduct occurred in the context of the respondent's undertaking multiple roles at the behest of his long-standing client, the grandmother, and that he was placed in the "unenviable position between family members who were hostile to each other."

Absent aggravating factors, similar misconduct has typically resulted in either a private admonition or a public reprimand. See Matter of Kirby, 29 Mass. Att'y Discipline Rep.

366 (2013) (public reprimand for neglect of one matter, with aggravating factors); Matter of Berkland, 26 Mass. Att'y Discipline Rep. 40 (2010) (public reprimand for failure of diligence, failure to seek client's lawful objectives, and failure to communicate adequately, in one matter); Admonition No. 05-20, 21 Mass. Att'y Discipline Rep. 712 (2005) (admonition for neglect of one matter, without actual harm); Matter of Kane, 13 Mass. Att'y Discipline Rep. 321 (1997). In this case, the hearing committee expressly did not find that the respondent's lack of diligence constituted a pattern, nor were repeated failure, serious harm, or potential for serious harm at issue. Because the misconduct was limited to one ward and the period surrounding the grandmother's death, the respondent's lack of diligence is not as egregious as the conduct involved in Matter of Kane, 13 Mass. Att'y Discipline R. at 328 (absent aggravating and mitigating factors, suspension is warranted for "misconduct involving repeated failures to act with reasonable diligence, or when a lawyer has engaged in a pattern of neglect, and the lawyer's misconduct causes serious injury or potentially serious injury to a client or others").

Likewise, failing to place the ward's funds in a trust or separate interest-bearing account, in violation of Mass. R. Prof. C. 1.15 (e), would typically warrant a private admonition or a public reprimand, as would the respondent's multiple violations of accounting requirements. See Admonition No. 15-19, 31 Mass. Att'y Discipline Rep. 779 (2015); Admonition No. 15-25, 31 Mass. Att'y Discipline Rep. 791 (2015). Although he retained third-party funds and failed promptly to remit the funds to the client's fiduciary, he kept the funds in an IOLTA account under the client's name, without commingling, without an intention to convert the funds, and without deprivation to the client. In the circumstances, an admonition is warranted.

b. Aggravating and mitigating factors. Like the hearing committee, the board weighed in aggravation the respondent's substantial experience in the practice of law, his having engaged in multiple violations of the rules of professional conduct (albeit over the course of related matters), and his failure to disclose that he was withholding funds to pay himself for services that had not been billed. See Matter of Gillis, 5 Mass. Att'y Discipline Rep. 136, 141 (1987) (substantial experience in practice of law weighed in aggravation).

Although the hearing committee found no explicit factors to weigh in mitigation of sanction, implicit in its recommendation of an admonition was its acknowledgement that the respondent

"found himself in the middle of a squabble between a dysfunctional family," and its recognition that his "several lapses, other than failure to promptly account for and remit monies, were the result of a combination of a very difficult family situation and his lack of diligence, not a result of any malfeasance." Although we agree with the board that neither a difficult assignment nor lack of harm is considered a special mitigating factor, it does serve to provide context for the misconduct. Considering all the circumstances, we agree with the single justice that an admonition is most appropriate in these circumstances, and we accordingly affirm her order.

So ordered.

The case was submitted on the record, accompanied by a memorandum of law.

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