COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, *ss.*

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2024-047

IN RE: MATTHEW J. DUPUY

MEMORANDUM OF DECISION

In an information filed by the Board of Bar Overseers (board) in April 2024 under S.J.C. Rule 4:01, § 8 (6), as appearing in 453 Mass. 1310 (2009), the respondent, Matthew Dupuy, was charged with multiple ethical violations relating to his representation of an elderly client including, inter alia, charging clearly excessive fees, failing to communicate with his client, and engaging in a self-interested transaction. At a hearing before this court, the Office of Bar counsel (bar counsel) and the board recommended that the respondent be suspended from the practice of law for three months. The respondent accepted the Hearing Committee's (committee) findings of fact and contested only the severity of the board's recommended sanction. Upon consideration of the record and arguments before the court, and for reasons set forth below, it is ordered that the respondent's license to practice law be suspended for a period of three months.

1. Background. The following facts were found by the committee. The respondent was admitted to the Massachusetts Bar on December 18, 1978. At all times relevant to this proceeding, the respondent was a partner at Ardito Law Group, P.C., with a practice focused on estate planning and administration, real estate law, and elder law.

The client, N.Z.,[1] a retired professional in her seventies, was an in-patient resident of an assisted living facility. Her stay at the facility was precipitated by a fall she suffered in her home six months prior. N.Z. had no close friends or family and exhibited symptoms associated with the first stage of dementia, exacerbated in part by alcohol-induced delirium.

Having grown frustrated at the facility, N.Z. contacted the respondent for assistance in returning to her home. On September 10, 2019, the two met for the first time at the facility. There, N.Z. voiced several complaints about life at the facility, chief among them that she was subject to "elder abuse" and had been "kidnapped and [] imprisoned" by staff, claims that the respondent neither credited nor investigated. The respondent understood that the sole objective of his representation was moving N.Z. out of the facility and back into her home.

[1] To protect the privacy of the victim-client, the court refers to her by a set of initials.

Two days later, N.Z. and the respondent met again at the facility. The respondent agreed to represent N.Z. He made clear, however, that his representation was conditioned on her execution of three documents: a durable power of attorney over her assets, income, and financial affairs; a real estate trust for her home (with the respondent as co-trustee); and a deed transferring the title of her home into said trust. N.Z. agreed to the conditions and executed the documents that same day.

N.Z. also signed an Hourly Fee Agreement (agreement), which the respondent styled as "Elder Abuse Representation." The agreement represented that N.Z. would pay the respondent a rate of $375 per hour, billed against a $1500 retainer, which she later paid. Despite the title, the agreement lacked any mention of the respondent investigating alleged elder abuse, nor did it refer to moving N.Z. back to her home. The respondent acknowledged in his testimony before the committee that the agreement failed to "capture the sense" of the services he was hired to provide.

On September 30, 2019, the respondent received a report from a clinical neuropsychologist commissioned by Elder Services to evaluate N.Z. In the report, the neuropsychologist reaffirmed that N.Z. suffered from alcohol-induced delirium and likely first-stage dementia; described her as exhibiting "poor reasoning [and] judgment"; and concluded that she "remain[ed]

appropriate for [] care" at an assisted living facility, as she would be "at a high risk for self-neglect as well as returning to alcohol if she were living at home" alone. The report recommended that the respondent "make decisions on [N.Z.'s] behalf" in order to "maintain a positive rapport with" his client. Notwithstanding the report's unfavorable portrait of N.Z.'s condition, N.Z. was not placed under a guardianship or conservatorship nor found incompetent at any time relevant here.

Upon executing the agreement, the respondent immediately went to work arranging for and taking part in the repair and clean-up of N.Z.'s home, which had fallen into disrepair. The respondent also arranged for home health aides to provide personal services to N.Z. and worked closely with the client's town's Council on Aging to provide her with "round-the-clock care." As a result of the respondent's efforts, N.Z. was able to move home on October 13, 2019, approximately one month after N.Z. retained the respondent.

Once N.Z. moved home, the respondent continued to bill for his services at his legal rate, charging his client $375 per

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[2] The court does not discount the efforts required to achieve this aim within approximately one month's time, particularly given the "disastrous condition" in which the respondent discovered N.Z.'s home. See BBO No. C5-20-00265844, Tr. Vol. II at *217-18 (2024) ("half of the . . . ceiling installation had fallen" into the basement; "[d]ead mice" and other refuse had to be removed; and neither the hot water heater nor the refrigerator worked properly).

hour for tasks that included, among others, having her mail forwarded to him for review, paying her bills, and ordering non-alcoholic wine. In addition to charging his professional rate for services that were not legal in nature, the respondent often "block-billed" N.Z. for his time, with little detail. For example, one entry charged N.Z. for 3.5 hours of work labeled simply "conference."

Between September 2019 and September 2020, the respondent charged N.Z. a total of $22,831.25 in legal fees for 61.15 hours of work, plus $9,071.20 in expenses. Although he did provide some legal services, such as establishing a real estate trust and drafting the durable power of attorney for N.Z., he did not bill for those services. Rather, the 61.15 billed hours encompassed a variety of tasks that required neither a law degree nor a license to practice law.

In total, the respondent charged N.Z. $31,902.45 and collected $29,890.14.[3] He paid himself out of her assets but did not inform her that he was doing so.

At the time N.Z. retained the respondent, she possessed some liquid assets, which the respondent used to pay for repairs

[3] The difference between the amounts charged and collected reflects that the respondent did not pursue payment of his final invoice in the amount of $2,012.31, after bar counsel began investigating his representation of N.Z. The respondent later refunded an additional $5,204 of the amount he had collected.

to her home. The respondent paid his own fees by invoking the durable power of attorney to sell roughly $60,000 of N.Z.'s stock in Public Service Electric & Gas (PSE&G) over the course of three transactions starting October 21, 2019. He did so without consulting N.Z., who in later correspondence with the respondent expressed sentimental attachment to the stock and dismay over what she considered to be its unauthorized sale.

The respondent claimed that he consulted with N.Z. and obtained her permission before selling the stock. According to the respondent, he told N.Z. that he was "going to have to sell the [stock] because [she] need[ed] the money," and, while she was upset at having to sell it, she "understood [that] [i]t had to be done." However, the respondent did not bill N.Z. for the alleged conversation, received no writing from his client authorizing the sale, and offered no contemporaneous notes memorializing the conversation. For her part, N.Z. conveyed her strong displeasure with the respondent's sale of the PSE&G stock in a February 2020 letter, where she accused the respondent of, essentially, stealing $60,000 from her.

To liquidate the stock, the respondent used the services of his daughter, Lindsay Dupuy, a licensed stockbroker. He did not investigate alternative methods for selling the PSE&G stock, such as using a discount broker, nor discuss with his client the potential conflict of interest of using a family member to

effectuate the transaction.[4] Lindsay Dupuy offered no investment advice; rather, she simply opened a brokerage account for N.Z., transferred the stock to her father under the power of attorney, and sold the shares. According to Lindsay Dupuy, the services she provided would have taken an average person "two to three hours." For her services, Lindsay Dupuy (or her firm) received $927.06 in brokerage fees, paid for by a portion of the stock sale proceeds.

On learning of the sale of the PSE&G stock in January 2020, N.Z. immediately rescinded the respondent's power of attorney and revoked his authority to receive her mail. She then sent the respondent a letter in February 2020, accusing him of stealing $60,000 from her and demanding that he reconvey the title to her home. The respondent testified that, in response to the letter, he and N.Z. had a conversation over the telephone, and she elected to "keep things as they were."

On April 29, 2020, N.Z. sent another letter demanding that the respondent reconvey title to her. In his testimony, the respondent equivocated about whether he received the letter, stating both that he had not seen the April letter prior to bar counsel's investigation, and that he "probably did" receive the

[4] As justification for his actions, the respondent testified that he was unfamiliar with discount stockbrokers and believed employing his daughter was the most efficient and cost-effective way to sell the stock.

letter around that time. The respondent nevertheless further testified that, upon receiving the April letter, he again immediately called N.Z., and she once again changed her mind about her request that the respondent reconvey title. The respondent did not memorialize the details of either call.

N.Z. sent the respondent another letter dated May 15, 2020, asking for a copy of the fee agreement along with all real estate documents the respondent had prepared under it. The respondent promptly sent N.Z. a copy of the agreement along with copies of real estate documents he had prepared for her. The respondent did not immediately send N.Z. the quitclaim deed transferring ownership of her home back to her, waiting until June 22, 2020, to do so. After sending N.Z. the deed, he understood his representation of N.Z. to be over.

2. Disciplinary proceedings. On February 17, 2022, in response to a complaint filed by N.Z. with bar counsel, the respondent was charged with a single count of violating the disciplinary rules of Massachusetts.

In the petition for discipline, bar counsel alleged that the respondent, throughout the duration of his representation of N.Z., provided incompetent representation in violation of Mass. R. Prof. C. 1.1; failed to seek his client's lawful goals though reasonably available means, in violation of rule 1.2 (a); lacked reasonable diligence and promptness in violation of rule 1.3;

failed to communicate with his client on her matter and how to best achieve her goals in violation of rules 1.4 (a) (2) and 1.4 (a) (3); charged a clearly excessive fee in violation of rule 1.5 (a); failed to provide a fee agreement setting out the scope of his representation in violation of rule 1.5 (b); engaged in a conflict of interest that materially limited his ability to represent his client's interests in violation of rule 1.7 (a) (2); failed to provide contemporaneous written invoices for withdrawals from his client's trust account in violation of rule 1.15 (d); and engaged in conduct that reflected adversely on his fitness to practice law in violation of rule 8.4 (h).

The respondent, represented by counsel, filed his revised answer to the petition in August 2022.[5]

a. Hearing committee. The committee held a hearing over two days in March 2023. Twenty exhibits were admitted, and three witnesses testified: the respondent; his daughter, Lindsay Dupuy; and Brian Barreira, whom the respondent called to testify as an expert in estate planning, elder law, and probate matters. On June 26, 2023, the parties filed their proposed findings of fact and conclusions of law.

[5] The respondent's initial answer contained N.Z.'s unredacted medical records. Given the public nature of the bar discipline docket, the committee asked the respondent to file a revised answer redacting confidential medical information, which he did.

i. Rule violations. The committee issued its written findings on September 11, 2023. Regarding the respondent's fee agreement, the Committee found that the respondent failed to provide his client with a writing outlining the services that he would provide in violation of rule 1.5 (b). Of particular concern to the committee was the respondent's description of his services as "elder abuse representation[,]" which, according to the committee, was "off the mark from the beginning" and "never corrected or clarified."

Turning to the respondent's fees, the committee found that the services provided to N.Z. were "largely non-legal in nature," yet charged at his legal rate in violation of rule 1.5 (a). The committee found that the only "concrete legal services" the respondent provided were "speaking to his client occasionally" and drafting the durable power of attorney, real estate trust, and deed transferring the title of her home into the trust -- for the latter of which the respondent did not bill N.Z., but which the committee valued at $700. The difference ($22,131.25) was charged for performing distinctly non-legal services, such as "speaking with [a] contractor and [a] plumber; buying a refrigerator; speaking to someone at the post office; picking up mail; speaking with the handyman; writing checks; and ordering non-alcoholic wine."

The committee rejected the respondent's argument that his services were "legal" in the sense that they were undertaken in furtherance of N.Z.'s goals of remaining in her home and staving off a possible guardianship or conservatorship from the Council on Aging or Elder Services. The committee found that the respondent's argument, if accepted, threatened to blur the "real and meaningful difference between legal and non-legal services" as provided under case law,[6] and that, in any event, the respondent presented "no credible evidence" of any actual threat of N.Z. being placed under a guardianship or conservatorship.

The committee next found that the respondent's sale of his client's PSE&G stock violated rules 1.4 (a) (2) and (3), because the respondent failed to consult N.Z. prior to liquidating the stock, and subsequently did not inform N.Z. of the sale within a reasonable time. The committee did not credit the respondent's claim that he had consulted with -- and obtained the approval of -- N.Z. prior to facilitating the sale.

The committee next found that the respondent repeatedly failed to provide N.Z. with contemporaneous receipts of work he

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[6] See, e.g., Matter of Moran, 479 Mass. 1016, 1021 (2018) ("[S]ervices such as snow shoveling, moving and house cleaning, shopping, and making funeral arrangements are not legal services"); Matter of Moore, 29 Mass. Att'y Discipline Rep. 461, 462 (2013) (recognizing services such as "hiring various contractors and supervising their work, and making arrangements with brokers" as "non-legal tasks").

had performed or fees charged in violation of rules 1.4 (a) (3) and 1.14 (d). In so finding, the committee noted that the absence of receipts was "particularly problematic" because "the respondent had complete control" over N.Z.'s finances and was able to "help[] himself repeatedly to her money" without oversight or review by his client.

The committee next found that, by hiring his daughter to sell N.Z.'s stock, the respondent provided incompetent representation by engaging in a "flagrant conflict of interest" in violation of rules 1.1 and 1.7 (a) (2). Additionally, the committee found that the respondent's failure to acknowledge the obvious conflict of interest inherent in hiring his daughter to sell a client's stock reflected adversely on his ability to practice law in violation of rule 8.4 (h).[7]

Finally, the committee concluded that the time taken by the respondent to reconvey title to the home -- approximately one

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[7] One member of the committee dissented from the finding of these rules violations, on the ground that the respondent's employment of "an experienced stockbroker" to "quickly and efficiently" sell N.Z.'s stock was "not unreasonable from a financial standpoint." The dissenting member did note, however, that "to avoid the appearance of impropriety, the respondent should have disclosed to the client this intra-familial business transaction and received her permission to proceed." The dissenting member further noted that he would have found violations of rules 1.1 and 8.4 (h) on alternative grounds if charged, based on (1) the respondent's sale of the stock without N.Z.'s prior knowledge and demonstrable assent and (2) his use of the proceeds to pay his own invoices without providing an accounting to N.Z.

month -- was reasonable and did not run afoul of either rule 1.2 (a) or 1.3. This conclusion, the committee reasoned, "follow[ed] logically" from their factual finding that N.Z. had "twice changed her mind about [] re-conveyance after she and the respondent spoke."[8]

ii. Rule 1.14 defense. In a post-hearing memorandum, the respondent claimed his conduct was justified by or in furtherance of his obligations under Mass. R. Prof. C. 1.14, which governs the representation of clients with diminished capacity. He argued that rule 1.14 endows a lawyer with broad latitude to determine "if diminished capacity exists" and, if so, to take "reasonably necessary protective action" to alleviate such perceived incapacities. B.B.O. No. C5-20-00265844, Tr. Vol. I at *49, quoting Mass. R. Prof. C. 1.14 comment [5], as amended 471 Mass. 1305 (2015).

The committee rejected this argument. The committee noted that, under this rule, when a client has diminished capacity,

[8] One member of the committee dissented and would have found violations of rules 1.2 (a) and 1.3. The dissenting member did not find credible the respondent's testimony that N.Z. had twice changed her mind about reconveying the house, noting that the respondent had "testified inconsistently about when he received [the February and April] letters, he did not produce a writing in support of his position, and his bills do not support his testimony." The dissenting member would therefore have found that the respondent "did not seek [N.Z.'s] lawful objectives" nor act diligently in response to her February 2020 request to reconvey title to her home.

"the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." The committee found that the respondent "did not do this," and, "with rare exceptions, did not meaningfully communicate with [N.Z.] or solicit her input or approval." The committee found that the respondent's "paternalistic" and "heavy-handed approach" to representing N.Z. was "completely antithetical to the dictates of [r]ule 1.14."

iii. Mitigation and aggravation. The respondent did not raise any facts in mitigation in his answer to bar counsel's petition and thus, the committee noted, waived any such arguments under B.B.O. Rules § 3.15 (f). The committee nonetheless discussed the mitigation claims raised at hearing by the respondent. He contended that his "amazingly successful" results for N.Z., along with his forgiveness of $2,012.31 in unpaid legal fees and refund of $5,204 of collected fees, should be considered mitigating. The committee rejected these arguments, noting that a favorable outcome is "expected of a reasonably competent attorney," not a factor to be considered in mitigation, see Matter of Corbett, 478 Mass. 1004, 1006 (2017), and that restitution made after bar counsel begins its investigation is not mitigating, see Matter of Pasterczyk, 29 Mass. Att'y Disc. R. 507, 520 (2013).

The committee found three factors to be aggravating: N.Z.'s vulnerability at the time of the representation, the respondent's status as an experienced attorney who had been practicing for three decades, and his previous admonishment for similar professional misconduct. The prior admonishment, in 2017, was in part for failing to communicate with his elderly client, whom he incorrectly and unreasonably assumed to be of diminished capacity. See Admonition No. 17-06, 33 Mass. Att'y Discipline Rep. 557 (2017). In violation of rule 1.4 (a) (2) and (3), the respondent communicated exclusively with his client's daughter on a range of topics, including the client's financial status. Noting "troubling" similarities between the respondent's deficient communications in the two matters, the committee determined that the respondent had "failed to learn from his earlier admonition the basic and cardinal importance of communicating with a client and determining her wishes."

A majority of the committee declined, however, to consider as aggravating factors an unwillingness to acknowledge misconduct,[9] failure to understand the ethical duties owed to

[9] The committee recognized that the respondent was "entitled to make a case in his defense"; simply because the committee "ha[d] rejected some or even most of [his] arguments" did not reflect unwillingness on the respondent's part to recognize his wrongdoing. And the committee noted that "the respondent admitted a good part of the charged conduct."

vulnerable clients,[10] and the financial harm inflicted upon his client.[11] The committee also did not find the respondent's violation of multiple rules of professional conduct to be an aggravating factor. In the committee's view, the respondent's violations were "not so numerous that it would be appropriate to apply this factor."

iv. Recommended sanction. Rejecting bar counsel's suggestion of a term suspension, the committee recommended that the respondent be publicly reprimanded, reasoning that none of the respondent's misconduct was "serious enough . . . to warrant even a short suspension." Addressing the respondent's 2017 admonition for similar misconduct, the committee noted that a public reprimand constituted the "appropriate escalation of discipline." In dissent, one committee member stated that he

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[10] A majority of the committee agreed that "the respondent was wrong about many aspects" of how to represent a client like N.Z. but did not find these mistakes to rise to the level of demonstrating a lack of understanding of his ethical duties. One member of the committee disagreed, viewing the "potential for significant harm" inherent in N.Z.'s return home to be an aggravating factor; in this member's view, "the respondent did [N.Z.] a disservice by not urging her more forcefully to remain" at her assisted living facility. The majority noted in response that the respondent had organized "round-the-clock" care to mitigate the risk of such harm.

[11] The committee reasoned that, because the financial harm (i.e., charging excessive fees) was "central to [its] conclusion" that the respondent violated rule 1.5 (a), considering the same conduct as a factor in aggravation would be excessively punitive.

would have placed greater weight on the respondent's past discipline and imposed a term suspension.

b. The board. Bar counsel appealed the sanction to the board, arguing that, in calibrating discipline, the committee committed a series of "conceptual errors" that led to the adoption of a "markedly" lenient sanction. The respondent urged the board to adopt the sanction proposed by the committee.

The board, in turn, adopted nearly all of the committee's legal conclusions. The board disagreed, however, with the committee's finding that the respondent's conduct violated rule 8.4 (h), and concluded that bar counsel had failed to produce evidence, other than the respondent's multiple rule violations, that his conduct reflected adversely on his fitness to practice law. The board also disagreed with the committee's decision not to consider the respondent's multiple rules violations as aggravating. Given "the sheer number and variety" of the respondent's transgressions, the board reasoned that, when taken collectively, the respondent's "multifaceted wrongdoing" must factor into the proposed sanction. See Matter of Saab, 406 Mass. 315, 326-27 (1989). Ultimately, the board filed an information with this court recommending that the respondent be suspended from the practice of law in Massachusetts for three months.

c. Information and record of proceedings. The board filed an information and record of proceedings before this court pursuant to S.J.C. Rule 4:01 § 8 (6) on April 18, 2024. The court held a hearing on May 30, 2024.

3. Discussion. a. Standard of review. When reviewing the board's recommendation, the subsidiary facts found by the committee must be upheld "'if supported by substantial evidence' in the record." Matter of Williams, 491 Mass. 1021, 1024 (2023), quoting Matter of Zankowski, 487 Mass. 140, 144 (2021). See S.J.C. Rule 4:01 § 8 (6), as appearing in 453 Mass. 1310 (2009). The committee holds "the position of the sole judge of . . . credibility," Matter of Zankowski, supra; accordingly, its "credibility determinations will not be rejected unless [they are] wholly inconsistent with another implicit finding." Matter of Haese, 468 Mass. 1002, 1007 (2014). See S.J.C. Rule 4:01 § 8 (5) (a). The committee's "ultimate 'findings and recommendations, as adopted by the board, are entitled to deference, although they are not binding on this court.'" Matter of Weiss, 474 Mass. 1001, 1001 n.1 (2016), quoting Matter of Ellis, 457 Mass. 413, 415 (2010).

b. Rule violations. The respondent does not challenge the hearing committee's factual findings or its determination that his conduct violated various ethical rules; nor does the respondent challenge the board's decision in these respects.

Rather, the respondent challenges only the severity of the board's sanction. This court nevertheless begins by confirming that the committee's findings are supported by substantial evidence. See S.J.C. Rule 4:01, § 8 (6).

i. Scope of representation. Rule 1.5 (b) requires that "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing [] representation." The record supports the committee's conclusion that the respondent violated rule 1.5 (b) by failing to communicate to N.Z. the actual legal services he was going to provide. Indeed, the respondent conceded at hearing that he "should [have] gone back and changed the fee agreement" -- which he styled as "Elder Abuse Representation" -- when it became apparent that "there was no need to . . . look into elder abuse." See Matter of Mparaganda, 26 Mass. Att'y Discipline Rep. 374, 375 (fee agreement violates rule 1.5 [b] when attorney and client have materially "differing understandings" of "work to be performed" by attorney).

ii. Excessive fees. Rule 1.5 (a) provides, in relevant part, that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." The record supports the committee's conclusion that the respondent violated rule 1.5 (a) by charging his client $375 per hour for

services that were clearly non-legal in nature, such as making or arranging for repairs to N.Z.'s home, reviewing her mail, and paying her bills. See, e.g., Matter of Moran, 479 Mass. 1016, 1021 (2018).

iii. Deficient communication. Rules 1.4 (a) (2) and (3) require a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and to "keep the client reasonably informed about the status of the matter." The record supports the committee's conclusion that the respondent violated rules 1.4 (a) (2) and (3) by failing to consult with N.Z. or obtain her permission before selling her PSE&G stock. The committee could reasonably infer that the respondent never discussed the sale of the stock with his client based on the respondent's "vague and inconsistent" testimony regarding whether he received permission from his client to sell the stock, the absence of any contemporaneous notes in the respondent's records memorializing such a conversation, and N.Z.'s evident attachment to the stock.

iv. Failure to invoice. Rule 1.15 (d) (2) prescribes the procedure a lawyer must follow when withdrawing funds from a client's trust account to pay fees due to the lawyer. The rule requires that:

> "[o]n or before the date on which a withdrawal from a trust account is made for the purpose of paying fees due to a lawyer, the lawyer shall deliver to the

> client in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a statement of the balance of the client's funds in the trust account after the withdrawal."

The record amply supports the committee's conclusion that, by using N.Z.'s assets to pay his firm's fees and expenses without providing her with contemporaneous written invoices, the respondent violated this rule as well as his duty to keep the client reasonably informed under rule 1.4 (a) (3). That the respondent "helped himself repeatedly" to his client's money without notice or itemized bills is undisputed, as the respondent conceded before the committee.

v. Conflict of interest. Rule 1.7 (a) (2) forbids a lawyer from representing a client when "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." See Matter of Driscoll, 447 Mass. 678, 686 (2006), quoting Mass. R. Prof. C. 1.7 comment [4], as appearing in 426 Mass. 1301, 1332 (1997) ("[T]he critical inquiry is whether the lawyer has a competing interest or responsibility that 'will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client'"). Relatedly here, rule 1.1 states that "[a] lawyer shall provide competent representation to a client," and rule 8.4 (h)

residually provides that it is professional misconduct for a lawyer to "engage in any other conduct that adversely reflects on his or her fitness to practice law."

The record supports the committee's finding of a rule 1.7 violation. The record reflects that the respondent's personal interest in referring business to his daughter not only risked but also actually did foreclose inquiry by the respondent into alternative means of selling N.Z.'s stock. The committee rejected as "not believable" the respondent's testimony that, as of 2019, he was ignorant of the existence of discount stockbrokers. In any case, however, it is undisputed that, because of his relationship with his daughter, the respondent did not take steps to investigate any alternate means of carrying out the stock sale, and there is at least some evidence in the record that this failure to investigate may have inflicted hundreds of dollars in additional cost on his client as compared with using a discount brokerage.[12] It is further undisputed that the respondent never disclosed to N.Z. that he

[12] As the board noted, "engaging the daughter may not have caused appreciable monetary harm to the client," but "neither [r]ule 1.1 nor 1.7 requires a showing of harm"; "[t]he conflict of interest stands on its own." See Commonwealth v. Patterson, 432 Mass. 767, 780 n.18 (2000) ("The very problem with an attorney's conflict of interest is that the attorney's judgment about strategic choices is clouded by conflict"). Cf. Mass. R. Prof. C. 1.8 (c) (prohibiting lawyers from soliciting substantial gifts from clients for "closely related" family members such as child, unless lawyer closely related to client).

was using the services of his daughter to sell her stock and thus never obtained N.Z.'s informed consent pursuant to rule 1.7 (b) (4). (Indeed, the committee found he did not inform her at all of his intent to sell the stock to pay his fees.)

The record similarly supports the committee's finding, adopted by the board, that this conduct fell short of the respondent's duty to provide competent representation under rule 1.1. The respondent failed to investigate using a discount brokerage or indeed any other alternative to turning to his own daughter's services to sell his client's stock. See Mass. R. Prof. C. 1.1 comment [5], as amended 490 Mass. 1302 (2022) ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem" [emphasis added]). The court recognizes that such investigation may have itself carried costs, such as the cost of the respondent's own time; however, if the respondent wished to forgo that investigation, he should have consulted with his client and sought her informed consent pursuant to rule 1.7 (b) (4).

The board and the committee disagreed, however, regarding whether this conduct also amounted to a violation of rule 8.4 (h). As discussed above, the committee found that bar counsel proved a violation of rule 8.4 (h) based on the respondent's "flagrant conflict of interest" in engaging his daughter's

services to liquidate the stock and subsequent "insist[ence]" that it was "a good business practice." The board disagreed, reasoning that bar counsel failed to produce evidence that the respondent was unfit to practice law other than the existence of the "conflict itself"; in the board's view, the conflict-of-interest allegations forming the predicate conduct for violations of rules 1.1 and 1.7 (a) (2) cannot, "without more," also serve as a basis for a violation of rule 8.4 (h).

In deciding whether a violation of rule 8.4 (h) has occurred, the operative question is whether the challenged conduct "adversely reflects on [the attorney's] fitness to practice law." Mass. R. Prof. C. 8.4 (h), as appearing in 471 Mass. 1483 (2015). If so, that attorney has violated rule 8.4 (h), along with any other rules implicated by the conduct. See, e.g., Matter of Lupo, 447 Mass. 345, 356 (2006) (attorney's filing of retributive lawsuit against daughter of former client who filed grievance against him violated rules 8.4 [d] and [h]); Matter of Zankowski, 487 Mass. at 141 (attorney's intentional billing for services not rendered violated rule 1.5 [a] as well as 8.4 [c] and [h]); Matter of Broderick, 20 Mass. Att'y Discipline Rep. 53, 54-56 (2004) (two-year suspension for refusal to return unearned portion of advance fee and generating false billing records to justify fee, in violation of rules 1.5 [a], and 8.4 [c], [d], and [h]).

The record supports the committee's determination that the respondent's conduct violated rule 8.4 (h). The respondent's failure to perceive a conflict of interest in the circumstances here -- engaging his own daughter's services to sell his client's stock, at the client's own cost of nearly one thousand dollars, without consulting or seeking his client's consent, to pay his own fees -- reflects adversely on his ability to practice law. Cf. Matter of Martinian, 26 Mass. Att'y Discipline Rep. 342, 343 (2010) (attorney violated rules 1.7 [a] and 8.4 [h] by attempting to represent both parties in contested divorce hearing).

vi. Diligent pursuit of client's goals. Rule 1.2 (a) provides, in relevant part, that "[a] lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these Rules." Rule 1.3 requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The record supports the committee's finding, adopted by the board, that the respondent did not violate either rule 1.2 (a) or 1.3 through unreasonable delay in reconveying title to his client's home. This conclusion is supported by the respondent's testimony, credited by a majority of the committee, that in the months after N.Z.'s initial request, she twice withdrew her demand that

the respondent reconvey title to her home. See Matter of Haese, 468 Mass. at 1007.

c. Rule 1.14 defense. Rule 1.14 commands a lawyer representing a client with diminished capacity to "maintain a normal client-lawyer relationship" as far as "reasonably possible." Mass. R. Prof. C. 1.14 (a), as amended 471 Mass. 1305 (2015). While recognizing and seeking to address the challenges inherent in representing a client with diminished capacity, the rule is not "carte blanche" for a lawyer to supplant the client's will. See Restatement (Third) of the Law Governing Lawyers § 24 comment [c] (2000) ("A client with diminished capacity is entitled to make decisions normally made by clients to the extent that the client is able to do so"). Rather, rule 1.14 reflects the understanding that "[d]isabilities in making decisions vary from mild to totally incapacitating; they may impair a client's ability to decide matters generally or only with respect to some decisions at some times." Id. Thus, the extent of a lawyer's role in making decisions on behalf of his or her client will depend on "the extent a client is incapable of doing so" for themselves. Id. at comment [b].

The record supports the committee's conclusion that the respondent's misconduct was not justified as appropriate adherence to rule 1.14. As part of "maintain[ing] a normal

client-lawyer relationship" as far as "reasonably possible," rule 1.14 required the respondent to consult and inform N.Z. regarding important decisions about her financial and personal well-being when possible. Cf. Mass. R. Prof. C. 1.14 comment [1], as amended 471 Mass. 1305 (2015) ("[A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the[ir] own well-being"). The record supports the committee's findings that, while the respondent did have a number of conversations with N.Z., the respondent fell short of his obligation to maintain a normal lawyer-client relationship as much as reasonably possible, including failing to keep N.Z. informed or consult with her regarding the sale of her stock to pay the respondent's own fees. As the committee noted, the neuropsychologist's report describing a degree of diminished capacity on N.Z.'s part and advising the respondent to "just make decisions on [N.Z.'s] behalf" did not provide the respondent with a basis for abdicating his professional obligations to his client. And the record supports the committee's finding, based in part on letters in the record written by N.Z., that N.Z. retained considerable ability to consult on and be informed of matters. Indeed, the respondent himself described her as a "smart woman," who "continued to get better" from the time he began representing her.

d. Aggravating factors. The committee concluded that the respondent's case involved three factors in aggravation: his extensive experience as an attorney for three decades, his client's vulnerability, and his past admonishment for similar misconduct. See Matter of Crossen, 450 Mass. 533, 574 (2008), citing, Matter of Luongo, 416 Mass. 308, 312 (1993) ("[The respondent's] substantial experience was properly weighed in aggravation"); Matter of Lupo, 447 Mass. at 354 (factor in aggravation to take advantage of "elderly, unsophisticated, [or] vulnerable clients"); Matter of Dawkins, 412 Mass. 90, 96 (1992) ("The existence of prior discipline . . . is a substantial factor in selecting the level of discipline" [internal quotation omitted]). Additionally, the board determined that the respondent's violation of multiple rules was also a factor in aggravation. See Matter of Palmer, 413 Mass. 33, 38 (1992), citing, Matter of Saab, 406 Mass. at 326-27 ("[I]t is appropriate for us to consider the cumulative effect of the several violations committed by the respondent"). This court concurs with the board in full, as all of these aggravating factors find support in the record.

e. Mitigating factors. The court agrees with the committee's conclusion, adopted by the board, that the respondent did not present evidence of any cognizable mitigating factors. Even if properly raised, neither the respondent's

success in expeditiously returning his client to her home as she wished, nor his refund once disciplinary proceedings began, would be mitigating factors. See Matter of Corbett, 478 Mass. at 1004 ("[G]ood work is to be expected of attorneys; it is not a factor ordinarily considered in mitigation"); Matter of Pasterczyk, 29 Mass. Att'y Disc. R. at 520 (restitution made after bar complaint filed not mitigating).

f. Appropriate sanction. The purpose of the disciplinary rules "is to protect the public and maintain its confidence in the integrity of the bar and the fairness and impartiality of our legal system." Matter of Curry, 450 Mass. 503, 520-21 (2008), citing Matter of Alter, 389 Mass. 153, 156 (1983). Accordingly, the "primary factor" in determining an appropriate sanction is "the effect upon, and perception of, the public and the bar." Matter of Foster, 492 Mass. 724, 770 (2023), quoting, Matter of Zak, 476 Mass. 1034, 1041 (2017). In coming to an appropriate sanction, "the board's recommendation is entitled to substantial deference." Matter of Zankowski, 487 Mass. at 153, quoting Matter of Tobin, 417 Mass. 81, 88 (1994). This court, however, "decide[s] [each case] on its own merits," affording "every offending attorney . . . the disposition most appropriate in the circumstances." Matter of Foster, 492 Mass. at 746, quoting Matter of Murray, 455 Mass. 872, 883 (2010). See, e.g., Matter of Foley, 439 Mass. 324, 333 (2003), citing Matter of

Finn, 433 Mass. 418, 422-423 (2001) (sanctions must not be "markedly disparate from judgments in comparable cases"). At bottom, "[t]he appropriate level of discipline is that which is necessary to deter other attorneys and to protect the public." Matter of Zak, 476 Mass. at 1038, quoting Matter of Curry, 450 Mass. at 530.

The court agrees with the board's recommendation that a three-month term suspension is the "disposition most appropriate in the circumstances." Matter of Foster, 492 Mass. at 746, quoting Matter of Murray, 455 Mass. at 883. In recommending this sanction, the board rejected the respondent's characterization of his actions as limited to a single instance of misconduct. Instead, the board appropriately took account of each transgression committed by the respondent during the course of his representation of N.Z. Failing to consider the "numerous and disparate violations," in the board's view, would understate "significant and varied misbehavior." Cf. Matter of Zak, supra. The court agrees. See Matter of Grayer, 483 Mass. 1013, 1018 (2019) (attorney's violation of multiple rules of professional conduct must be viewed collectively). Indeed, as the committee noted, several of the respondent's violations

would each likely warrant either an admonition or a public reprimand even if standing alone.[13]

To arrive at a three-month suspension, the board distinguished the respondent's conduct from the somewhat similar set of violations at issue in Matter of Chignola, 25 Mass. Att'y Discipline Rep. 112 (2009). There, the board issued a public reprimand to an attorney who had violated several ethical rules throughout his representation of an elderly client undergoing treatment for alcoholism. Id. at 112-13. That conduct included charging and collecting $43,000 for non-legal services in violation of rule 1.5 (a); failing to provide his client with an accounting of fees withdrawn from a trust account in violation of rule 1.15 (d); and various other IOLTA-related violations of rules 1.15 (b) (2) and (f) (1) (B)-(F). Id. at 113. In

[13] See, e.g., Admonition No. 21-16, 37 Mass. Att'y Discipline Rep. at 600-01 (admonition for engaging in "a legal matter without fully ascertaining the facts" in violation of rules 1.1 and 8.4 [h]); Admonition No. 17-19, 33 Mass. Att'y Discipline Rep. 578, 578-79 (2017) (admonition for "failing to keep the clients reasonably informed" in violation of rule 1.4 [a]); Admonition No. 17-25, 33 Mass. Att'y Discipline Rep. 590, 590 (2017) (admonition for failing to communicate the basis of hourly fee in three separate representations violated rule 1.5 [b]); Admonition No. 10-11, 26 Mass. Att'y Discipline Rep. 781, 781 (2010) (admonition for withdrawing earned fees from retainer without providing client written notice in violation of rule 1.15 [d]); Matter of Fordham, 423 Mass. at 495 (noting that "a public reprimand [is] the appropriate sanction for charging a clearly excessive fee"); Matter of Carnahan, 449 Mass. at 1005 (noting that a public reprimand was the appropriate sanction for a conflict of interest not motivated by "selfish motive or self-interest").

mitigation there, the board credited the attorney's "health problems and severe depression" at the time of the representation and referenced his lack of prior professional discipline as well as his refund of "the difference between legal and non-legal rates for his services." Id. at 113. With no factors present in aggravation, the board voted to accept the parties' stipulation of a public reprimand. Id. at 114.

This court agrees that the circumstances in Chignola present the closest factual comparator to the circumstances here and further agrees with the board that the comparison with Chignola suggests a three-month suspension is more appropriate. The misconduct in Chignola does resemble a subset of the misconduct in this matter. Notably, however, in Chignola, there was no conflict of interest or additional competency violation; there were mitigating factors present, unlike here; and there were no factors in aggravation, again unlike here. Most significantly, the respondent here received an admonition two years prior to the instant misconduct for a similar failure to communicate with an elderly client seemingly based on an unreasonable assessment of the extent of her diminished capacity, and the admonition also noted that he had failed to recognize the conflict of interest inherent in his also representing his client's children in petitioning for the appointment of a conservator over his client. See Admonition

No. 17-06, 33 Mass. Att'y Discipline Rep. at 558-559. The court therefore agrees with the board that the violations here call for a more severe sanction than the public reprimand in Chignola, and that a public reprimand would indeed be "markedly disparate in [] leniency." Matter of Palmer, 413 Mass. at 38.

The respondent makes two additional arguments in favor of a public reprimand rather than the three-month suspension recommended by the board. First, he cites the principle that, "in the absence of mitigating factors, discipline should proceed in increments of escalating severity." See Matter of Chambers, 421 Mass. 256, 260 (1995). Since he previously received an admonition, he contends a public reprimand represents the next increment in severity. However, the court must, above all, consider the nature of the misconduct here and the sanction necessary to protect the public and deter similar misconduct. See Matter of Zak, 476 Mass. at 1038. Given that the attorney in Chignola received a public reprimand for somewhat similar conduct, despite the absence of prior discipline or other aggravating factors and the presence of mitigating factors, the court believes the board's recommendation of a three-month suspension is more appropriate here.

Second, the respondent urges the court to take into account the relatively lesser amount of his excessive fee as compared with other excessive fee cases. He notes that attorneys in the

past have received public reprimands for overcharging clients upwards of $43,000, such as in Chignola, 25 Mass. Att'y Discipline Rep. at 113, whereas he overcharged, by his own calculation, $4,270.95.[14] The respondent correctly points out that this court has in the past considered the amount overcharged when evaluating whether bar counsel has proven that a fee was clearly excessive. See, e.g., Matter of Fordham, 423 Mass. 481, 490 (1996) (attorney's $50,000 fee in OUI case excessive when "the usual fee [for an OUI] is less than one-third of that amount"). However, rule 1.5 (a) categorically prohibits the practice of charging legal fees for non-legal services, regardless of the precise amount overcharged. See, e.g., Matter of Moran, 479 Mass. at 1021, citing Matter of Harbeck, 23 Mass. Att'y Discipline Rep. 262, 262-63 (2007) ("[C]harging for nonlegal work at legal rates constitutes excessive fee"). And the sanction for an attorney who violates rule 1.5 (a) by charging his legal rate for non-legal services

[14] The court does not necessarily agree that the method the respondent used to reach this figure -- accounting not only for the unbilled legal work by the respondent that the committee valued at $700 but also considerable alleged unbilled paralegal time as well as asserted rates N.Z. would have paid for non-legal tasks -- represents the best yardstick for measuring the amount by which the respondent overcharged N.Z. The court nevertheless understands the respondent's point that the amount N.Z. was overcharged was tens of thousands of dollars less than some other disciplinary matters where attorneys received only a public reprimand.

must "deter other attorneys" from collecting legal fees for nonlegal work and "protect the public" from such improper billing practices. Matter of Zak, 476 Mass. at 1038. Applying this criterion, and considering the full range of the respondent's misconduct[15] as well as the aggravating factors present here, a three-month suspension is not a markedly disparate sanction.

4. Conclusion. Based on the foregoing, the board's recommended sanction of a three-month suspension from the practice of law in the Commonwealth is appropriate. Accordingly, an order shall enter suspending the respondent from the practice of law in the Commonwealth for a period of three months.

/s/ Elizabeth N. Dewar
Elizabeth N. Dewar
Associate Justice

Dated: August 16, 2024

[15] Notably, unlike some of the cases relied on by the respondent, this is not a case where the attorney's misconduct was limited to charging clearly excessive fees. Contrast, e.g., Admonition No. 04-05, 20 Mass. Att'y Discipline Rep. 668, 668 (2004) (attorney admonished for violating rule 1.5 [a] by collecting portion of client's insurance payout pursuant to contingent fee agreement); Admonition No. 00-78, 16 Mass. Att'y Discipline Rep. 563, 563 (2000) (inexperienced attorney admonished for charging elderly client legal rate for non-legal services in single violation of rule 1.5 [a]).