IN RE: CARL N. DONALDSON

NO. BD-2012-045

S.J.C. Judgment of Disbarment entered by Justice Lenk on September 5, 2012.[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-2012-045

IN RE: CARL N. DONALDSON

MEMORANDUM OF DECISION

This matter came before me on an information and record of proceedings, together with a unanimous vote of the board of bar overseers (board) recommending that the respondent be disbarred from the practice of law. Bar counsel filed a two-count petition for discipline against the respondent on February 15, 2011. The respondent filed an answer to the petition for discipline on March 31, 2011. On December 28, 2011, after an evidentiary hearing, the hearing committee's report recommending disbarment was filed with the board. The respondent appealed, and, on May 14, 2012, the board voted unanimously to recommend disbarment. A hearing was held before me on July 19, 2012.

The respondent challenges the standard applicable to attorney discipline matters in which disbarment is recommended, as well as the credibility determinations made by the hearing committee. In addition, he objects to the recommended sanction. As discussed, infra, I conclude that the board's findings are supported by the record, the sanction is appropriate, and the respondent shall be disbarred from the practice of law.

1. Background. I summarize the hearing committee's findings and conclusions as adopted by the board. The respondent was admitted to the practice of law in the Commonwealth on December 31, 1999.

a. Count one. Around July, 2004, Ana Soto, the mother of Anacely Soto,[1] retained the law firm of Crowe & Mulvey LLP (Crowe & Mulvey), to represent herself and Anacely in a medical malpractice action relating to injuries Anacely sustained at birth.[2] Crowe & Mulvey filed a lawsuit on behalf of both Anacely, through Ana, and Ana personally, seeking damages for Anacely's personal injuries and for Ana's loss of consortium.[3] Trial was scheduled for December 7, 2009.

In late 2009, settlement negotiations began in which Attorney Philip Crowe represented Ana and Anacely. As settlement drew closer, and she became confused about the recommendations concerning the structure of the settlement, Ana sought advice from the respondent. Ana's first language is Spanish, and she

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[1] Because they share a last name, I refer to mother and daughter by their first names.

[2] The contingent fee agreement between Ana and Crowe & Mulvey LLP, dated July 16, 2004, was at least ambiguous concerning whether the firm represented Ana solely in her capacity as representative for her daughter or personally. The agreement describes the party represented as "Ana Lidia Soto for Anacely Matos Soto" and allows Crowe & Mulvey LLP to work on claims arising out of the "care and treatment of myself and my daughter Anacely."

[3] There is no dispute that Anacely is severely disabled.

does not speak fluent English. The respondent has a working familiarity with Spanish. The respondent told Ana that he was not representing her and would not charge for his services.

Around November 16, 2009, Crowe received a settlement offer of $4,000,000, which he communicated to Ana. The next day, the respondent and Ana met with Crowe, who explained the settlement and recommended that Ana accept the offer. During this meeting, the respondent repeatedly stated that he was working pro bono and would not charge Ana. The respondent agreed on Ana's behalf to accept the offer, including $400,000 for the loss of consortium claim.[4] Around November 19, 2009, Crowe reported to the Superior Court that the case had settled for $4,000,000.

Ana was advised by attorneys at Crowe & Mulvey that she should not receive her share of the settlement relative to her consortium claim while Anacely was awaiting admission to the Kaleigh Mulligan Home Care for Disabled Children Program (Mulligan program), a MassHealth home care program for severely disabled children in which parent income or assets are not

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[4] The hearing committee did not credit the respondent's claim that he continued to negotiate Ana's loss of consortium settlement through early December (and thus, the contingency of any payment remained through that time). According to the hearing committee, Ana's ten per cent consortium share had been established at least since early November, 2009 during earlier settlement discussions.

counted in determining eligibility.[5] At the time, Attorney Chris Milne, whom Crowe & Mulvey had recommended to act as trustee, understood that Crowe & Mulvey would hold Ana's money in escrow pending Anacely's admission to the Mulligan program.

On December 7, 2009, a hearing was held on the petition for approval of settlement on behalf of a minor at the Suffolk Superior Court. The petition divided the $4,000,000 settlement as follows:

> Supplemental Needs Trust to receive $1,803,354.68 as part of a structured settlement.
>
> Ana Soto to receive $400,000 for loss of consortium claim.
>
> Commonwealth of Massachusetts to receive $722,410.73 for a lien.
>
> Crowe & Mulvey LLP to receive $1,045,000 for legal fees.[6]
>
> Crowe & Mulvey LLP to receive $29,234.59 for expenses.

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[5] Leaving the payment for the consortium claim in a trust, Crowe & Mulvey believed, would preserve Anacely's eligibility for Supplemental Security Income (SSI) and MassHealth benefits pending her acceptance into the program. In a similar vein, Crowe & Mulvey recommended to Ana that she accept her consortium payment in a structured settlement to delay her receipt of the funds so as to avoid a negative impact on Anacely's eligibility for these benefits.

[6] Applying the statutory fee structure under G. L. c. 231, § 60I, to the full $4,000,000 settlement, the maximum permissible contingent fee was $1,045,000 -- the same amount as that sought by Crowe & Mulvey. Applying this fee structure to the malpractice settlement ($3,600,000) and consortium settlement ($400,000) separately, the total fee permitted by statute rises to $1,085,000 -- $40,000 more than the fee for which Crowe & Mulvey sought court approval. The respondent's eventual demand for $67,500 thus pushed the fee sought beyond even the more generously interpreted statutory fee cap by $27,500.

The petition made no provision for any legal fees to be paid to the respondent.

Immediately before Ana entered the courtroom, the respondent gave her a contingent fee agreement to sign respecting her loss of consortium claim. Ana signed the agreement at the respondent's insistence, without understanding its meaning (which the respondent had not explained).[7] The respondent later backdated this agreement to December 1, 2009.[8] During the hearing, which occurred just after the signing of this agreement, the respondent announced that he was appearing on Ana's behalf, but did not disclose to the court that he would be receiving a fee. The judge approved the settlement as specified in the petition and set forth above.

On December 10, 2009, Milne, the trustee for Anacely's trust, applied for Anacely's admission to the Mulligan program. On December 18, 2009, the respondent and Ana came to the office of Crowe & Mulvey, where Ana signed the settlement agreement and

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[7] This contingent fee agreement provided that the respondent would receive tweny per cent of the first $150,000, fifteen per cent of the next $150,000, fifteen per cent of the next 100,000, ten per cent of the next $100,000, and five per cent of any amount exceeding $500,000. Applying this formula to the amount Ana received ($400,000), the respondent would be due $67,500, the amount he eventually claimed was owed to him.

[8] The hearing committee did not credit the respondent's testimony that he signed the contingent fee agreement with Ana on December 1, 2009, and presented it to her around that day and not on the day of the hearing.

the settlement distribution sheet.

Sometime between the signing of these documents and the receipt of the settlement check on January 19, 2010, the respondent represented that Ana wanted him, not Crowe & Mulvey, to hold her settlement funds in escrow pending approval of Anacely's application for the Mulligan program. Ana and the respondent signed a document, prepared by Crowe & Mulvey, authorizing the firm to release to the respondent the $400,000 in settlement funds due to Ana and providing that the funds would be held in escrow pending approval of Anacely's application to the Mulligan program.[9] Accompanied by a cover letter dated January 19, 2010, Crowe delivered a check for $400,000 to the respondent.

On February 19, 2010, the respondent opened an IOLTA checking account for the settlement funds at Citizens Bank and deposited the $400,000. The account did not specify Ana as having any interest in the funds, and the interest was not payable to Ana. At the time he deposited the funds, the respondent understood that it might take up to five months before the money could be disbursed.

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[9] The escrow agreement stated: "I, Ana Soto, hereby authorize Crowe & Mulvey, LLP to release the settlement money due to me in the amount of $400,000.00 to Carl Donaldson, my personal counsel. Settlement Money is to be held by Carl Donaldson in an escrow account pending the approval of the Kaleigh Mulligan application on behalf of my daughter, Anacely Matos Soto." The respondent wrote a notation in the margin of the typed release, inserting, next to the phrase "escrow account," the word "IOLTA."

Between February 24, 2010, and April 16, 2010, the respondent withdrew, in five separate checks, a total of $17,000 from the IOLTA account. The checks were identified as "fees" and "advances" on fees concerning Ana.[10] This money was withdrawn with neither Ana's knowledge nor permission, and she was never provided with an itemized bill or other accounting.[11]

On April 14, 2010, Milne informed Ana and the respondent in writing that Anacely would not be eligible for the Mulligan program while she received SSI benefits, and, having informed the Social Security Administration about the settlement, Anacely would be ineligible for the benefits starting in May, 2010. Milne reported that Anacely would be placed in the Mulligan program on April 29, 2010. The hearing committee credited Milne's testimony that, as of April 14, 2010, there no longer remained any reason for the respondent to hold Ana's consortium funds in escrow. The respondent knew this, as did the parties to the escrow arrangement -- Anacely (through her trustee, Milne)

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[10] The respondent told bar counsel that these withdrawals constituted fees for other legal services provided to Ana. Portions of his testimony before the hearing committee also indicated that they were early draws against his contingent fee to provide cash flow during the time that he was assisting Ana with other legal issues. The hearing committee found that, regardless of his reasons, the respondent had no basis to take any of the money without informing or having reached an agreement with Ana.

[11] The hearing committee did not credit the respondent's claim that he discussed each withdrawal with Ana.

and Ana.

On April 24, 2010, and April 26, 2010, Ana requested that the respondent pay her the settlement fees. The respondent refused, unless she agreed to pay him $67,500 as a fee. The respondent gave Ana a new fee agreement to sign (under which the amount due to him was identical to that owed pursuant to the earlier agreement), which she declined to sign, demanding her $400,000.

By letter dated April 26, 2010, Milne informed the respondent that MassHealth benefits were in place through the Mulligan program, and thus "there [was] no longer any reason for [the respondent] to hold Ana's funds." Milne again echoed Ana's request for the funds, and included in the letter the account information where the respondent could wire the money. The respondent did not respond to this request.

Milne then referred Ana to Attorney Daniel T.S. Heffernan, who on April 28, 2010, filed a complaint in the Superior Court on Ana's behalf against the respondent and Citizens Bank of Massachusetts seeking trustee process, a declaratory judgment, and damages for conversion.[12] By letter dated April 30, 2010, Heffernan demanded that the respondent "immediately wire the $400,000" to Ana's account. The respondent again did not answer.

At a May 3, 2010 hearing, the respondent's counsel

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[12] Attorney Daniel T.S. Heffernan represented Ana for a fee.

represented to the court that the respondent had withdrawn about $12,000 from the IOLTA account with Ana's permission "to perform other matters unconnected with this suit or with the underlying medical malpractice suit," mainly involving an immigration matter. On that date, however, the balance in the IOLTA account reflected that about $17,000 had been withdrawn, all without Ana's permission or knowledge. The respondent never corrected his attorney's statements on the record. The respondent agreed at the hearing to give $332,500 to Ana's attorney immediately, and provided a check to Heffernan in that amount after the hearing. The entire disputed amount of $67,500 was not in the IOLTA account at that time.

By order dated May 4, 2010, a Superior Court judge allowed trustee process and ordered the respondent to replace, within ten days, the (purportedly $12,000) amount that he had withdrawn from the IOLTA account. The respondent failed to comply.

On May 27, 2010, Heffernan filed a complaint for contempt in the Superior Court against the respondent. A show cause hearing was scheduled for June 14, 2010. On that date, the respondent deposited $17,149 in the IOLTA account. At a hearing on the complaint for contempt, the judge declined to sanction the respondent for non-compliance with the earlier order. At the time of the disciplinary hearing in this matter, Ana had not yet received the balance of the $400,000. She has since received the

full $400,000 balance.

On the basis of the preceding facts, the hearing committee ruled that the respondent's conduct violated eight provisions of the Massachusetts Rules of Professional Conduct.

Chiefly, the hearing committee concluded that the respondent violated Mass. R. Prof. C. 1.5(a) (clearly excessive or illegal fees) by (i) obtaining Ana's signature on an unexplained and untranslated contingent fee agreement immediately before the settlement hearing; (ii) attempting to obtain her signature on another fee document presented in late April, 2010; and (iii) telling her that she would not receive her funds for the consortium settlement unless she agreed to pay him $67,500. In addition, the hearing committee concluded that the respondent violated Mass. R. Prof. C. 1.15(b)(1) (trust property to be held separately from attorney's) and 8.4(c) (dishonesty, deceit, fraud, or misrepresentation) by converting $17,000 from the escrow funds to his own use.[13]

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[13] The hearing committee also concluded that the respondent violated Mass. R. Prof. C. 8.4(c) (dishonesty, deceit, fraud, or misrepresentation), 8.4(d) (conduct prejudicial to the administration of justice), and 8.4(h) (conduct otherwise reflecting adversely on fitness to practice) by failing to disclose to the Superior Court his intention to collect a contingent fee from Ana during the settlement approval hearing. The hearing committee determined that the respondent violated Mass. R. Prof. C. 1.15(e)(5) (trust funds to be held in individual account with interest payable as directed by client) by failing to keep the funds in an interest-bearing trust account for the benefit of the client. Finally, the hearing committee concluded that the respondent violated Mass. R. Prof. C.

b. Count two. In May, 2009, the respondent retained the services of an expert -- Dr. Michael O'Laughlin -- to translate and analyze four Spanish language wiretapped telephone conversations that included individuals the respondent was representing in criminal matters. The respondent orally agreed to pay O'Laughlin $100 per hour; O'Laughlin estimated that his overall charge would be about $2,000.

After O'Laughlin provided the translation, which revealed the conversations to be incriminatory, the respondent refused to pay him the agreed amount. O'Laughlin had sent the respondent a bill in the amount of $2,250. On various occasions in September and October of 2009, O'Laughlin contacted the respondent and requested payment. After the respondent continued to refuse payment, O'Laughlin filed a statement of small claims in the Concord District Court. The respondent defaulted on the day of trial, and a judgment entered against him in the amount of $2,065.64, which he failed to pay. A default then issued against the respondent and a capias was issued for his arrest. Thereafter, the respondent and O'Laughlin signed an agreement for judgment and payment order, which provided that, beginning October 15, 2010, the respondent agreed to pay O'Laughlin $500

1.15(d)(2) (itemized bill, notice of amount and date of withdrawal, and balance, at or before withdrawal from trust account) by purporting to pay his unrelated legal fees from the settlement funds without the client's authorization, and without written notice of services rendered or an accounting.

per week for a total of $2,331.64. The respondent failed to make any payments. After the respondent did not appear in court for a payment review hearing, a capias was issued for his arrest. The day before the hearing began before the hearing committee, the respondent paid O'Laughlin $2,300.

The hearing committee concluded that the respondent violated Mass. R. Prof. C. 3.4(c) (knowing disobedience under rules of tribunal) for failing to comply with orders of the court.

c. Sanction to be imposed. The hearing committee recommended that the respondent be disbarred. The committee considered in aggravation the respondent's history of discipline: (i) in 2006, the respondent received a two-month suspension for neglect of a client matter with misrepresentation to the client about its status and failure to turn over the file, neglect of civil litigation resulting in dismissal of the client's action, again with misrepresentation to the client, neglect of post-trial matters in a criminal case followed by a failure to turn over unearned fees, and neglect of a criminal matter followed by a failure to return unearned fees[14]; (ii) in 2010, the respondent received a six-month suspension for negligent misuse of client funds without deprivation, failure to comply with the terms of the 2006 suspension, non-compliance with a payment order issued

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[14] See Matter of Donaldson, 22 Mass. Att'y Disc. R. 278 (2006).

in a small claims matter in favor of an expert witness, failure to comply with record keeping and accounting requirements concerning retainers, and failures of diligence, client communication, obligations on termination, and cooperation with bar counsel.[15] The committee also considered in aggravation Ana's status as a vulnerable client.[16] Finally, the committee considered the respondent's failure to pay restitution to Ana.

On February 21, 2012, the respondent appealed to the board from the hearing committee's report. In his appeal, the respondent raised two legal arguments. First, the respondent claimed that, in a case where bar counsel recommends disbarment and the hearing committee agrees, the committee should be required to base its findings on clear and convincing evidence rather than a preponderance of the evidence. Second, the respondent argued that the committee's credibility determinations were flawed because they were unsupported by reasoned explanation. See Herridge v. Board of Registration in Medicine, 420 Mass. 154 (1995), S.C., 424 Mass. 201 (1997) (Herridge). The respondent requested a new hearing and, in the alternative, disputed the appropriateness of disbarment as his sanction.

The board unanimously voted to disbar the respondent. The

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[15] See Matter of Donaldson, SJC No. BD-2010-110 (April 4, 2011).

[16] The respondent offered no mitigating factors.

board rejected all of the respondent's arguments on the merits, and adopted, in full, the findings, conclusions, and recommendation of the hearing committee.

The parties appeared before me at a hearing on July 19, 2012. They reiterated the arguments made before the board.

2. Discussion. I first consider the respondent's legal arguments with regard to the hearing committee's report, and then address the recommended sanction.

a. Preponderance of the evidence standard. The respondent argues that "[g]iven the importance of a lawyer's right to practice law . . . both the [S]tate and [F]ederal constitutions should be read to require" that misconduct be established by "at least clear and convincing evidence,"[17] rather than a preponderance of the evidence,[18] when bar counsel seeks, and the hearing committee recommends, the most severe sanction of disbarment.

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[17] The "clear and convincing evidence" standard has been defined as: "evidence which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." Cruzan v. Director, Mo. Dep't. of Health, 497 U.S. 261, 285 n.11 (1990) (citation omitted).

[18] The "preponderance of the evidence" standard has been defined as evidence that makes a fact "appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Sargent v. Mass. Accident Co., 307 Mass. 246, 250 (1940).

In attorney disciplinary proceedings, bar counsel bears the burden of proving misconduct by a preponderance of the evidence. See Mass. R. B.B.O. § 3.28 ("[i]n all disciplinary proceedings Bar Counsel shall have the burden of proof by a preponderance of the evidence").[19] This standard does not vary depending on the sanction recommended by bar counsel. As the board described, the applicability of this standard was first established in Matter of Mayberry, 295 Mass. 155, 167 (1936),[20] and was codified in the board's rules in 1975. See Mass. R. B.B.O. § 3.28. See also Matter of Budnitz, 425 Mass. 1018, 1018 n.1 (1997). Despite attempts by attorneys subject to discipline to require a more exacting standard, see Matter of Ruby, 328 Mass. 542, 547 (1952), this standard has not been changed, and the United States Court of Appeals for the First Circuit recently upheld the use of this standard against constitutional challenge. See In re Barach, 540 F.3d 82 (1st Cir. 2008) ("the use of a preponderance standard is not so arbitrary or irrational as to render state disciplinary proceedings that use it fundamentally unfair"). See also Matter

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[19] Respondents bear the same burden of proof with respect to affirmative defenses and matters in mitigation. See Mass. R. B.B.O. § 3.28.

[20] In that decision, the court specifically rejected any intermediate standard of proof, such as the "clear and convincing evidence" standard now proposed by the respondent, because "such terms are too vague to serve generally as a practical guide in the trial of cases." Matter of Mayberry, 295 Mass. 155, 167 (1936).

of Kerlinsky, 428 Mass. 656, 664 n.10 (1999) (rejecting identical constitutional claim).

The respondent presents no persuasive reasons, or, indeed, any reasons at all (other than the importance of his right to practice his profession) for me to depart from that standard here.[21]

b. Credibility determinations. The only argument that the respondent makes as to why the burden of proof has not been met is that the hearing committee did not sufficiently support its credibility determinations. According to the respondent, the hearing committee "failed to address important credibility issues," and made credibility determinations "without any explanation of how it chose to believe any given witness on any given point." The respondent cites Herridge, supra, for the principle that such an explanation as to credibility

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[21] The respondent cites only one supporting authority for his argument. See In the Matter of Jeffrey Auerhahn, M.B.D. No. 09-10206-RWZ-WGY-GAO (D. Mass. 2011) (concluding, in disciplinary matters before the United States District Court for the District of Massachusetts, that misconduct must be established by clear and convincing evidence). In that decision, the court established its standard as a matter of first impression, because its local rules were silent on the subject. We, on the other hand, have a long-standing rule establishing a preponderance of the evidence standard. Further, the court hinged its decision on the fact that since reinstatement requires proof by clear and convincing evidence, disbarment should use the same standard. Again, in Massachusetts disciplinary proceedings, the petitioner for reinstatement bears the same burden as that borne by bar counsel -- proof by a preponderance of the evidence. See Mass. R. B.B.O. § 3.65.

determinations is required. That case dealt with credibility determinations in physician disciplinary proceedings, but the respondent argues that the same standard should apply here.

The single justice previously considered -- and rejected -- this argument in the respondent's last disciplinary proceeding. See Matter of Donaldson, SJC No. BD-2012-045 (April 4, 2011). See also Matter of McCabe, 13 Mass. Att'y Disc. R. 501, 506-507 (1997). I, too, reject this argument. Supreme Judicial Court Rule 4:01, § 8(5)(a), recognizes the hearing committee as the "sole judge of the credibility of the testimony presented at the hearing." The hearing committee is thus entitled, like any finder of fact, to believe some portions of the respondent's testimony and disbelieve others. "The hearing committee's credibility determinations will not be rejected unless it can be said with certainty that [a] finding was wholly inconsistent with another implicit finding." Matter of Murray, 455 Mass. 872, 880 (2010). See also Matter of McCabe, supra ("[w]e may not disturb these findings absent clear error"). "The hearing committee . . . is the sole judge of credibility, and arguments hinging on such determinations generally fall outside the proper scope of our review." Matter of McBride, 449 Mass. 154, 161-162 (2007).

Having reviewed the hearing committee's report, as well as the hearing transcript, I conclude that the committee's factual

findings have adequate bases in the record, and that the committee's credibility determinations were not inconsistent or contradictory.

c. Appropriate sanction. I turn to the appropriateness of the board's recommended sanction of disbarment. The appropriate disciplinary sanction to be imposed is one which is necessary to deter other attorneys and to protect the public. Matter of Foley, 439 Mass. 324, 333 (2003), quoting Matter of Concemi, 422 Mass. 326, 329 (1996). "If comparable cases exist in Massachusetts, [I] apply the markedly disparate standard in imposing a sanction." Matter of Griffith, supra, citing Matter of Finn, 433 Mass. 418, 423, 742 N.E.2d 1075 (2001). In other words, I must ensure that the board's recommended sanction is not "markedly disparate" from sanctions imposed on attorneys found to have committed comparable violations. See Matter of Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited.

Here, the board found that the respondent made repeated withdrawals from his IOLTA account from funds he was holding for his client, totaling approximately $17,000, without his client's knowledge or permission.[22] When asked to justify these

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[22] Whether these withdrawals were made with Ana's permission was a key credibility determination. The hearing committee found Ana's testimony credible and did not credit that of the respondent. I will not second guess the hearing committee in this regard. See Matter of McBride, 449 Mass. 154, 161-162 (2007).

withdrawals, the respondent gave inconsistent explanations. See supra, n.11. When his client asked for her money to be released, the respondent told her that she could only receive the funds if she either signed a fee agreement or filed suit against him. She opted for the latter, but when she obtained a court order requiring the respondent to replace the funds in the account, the respondent failed to comply.

The respondent's actions, in misusing his client's funds and thereby depriving her of those funds because he had withdrawn them from the IOLTA account and was unable to pay her, would alone merit either disbarment or indefinite suspension. See Matter of Schoepfer, 426 Mass. 183, 187 (1997) (when an attorney "intended to deprive the client of funds, permanently or temporarily, or if the client was deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension"). In choosing between these two sanctions, "the court generally considers whether restitution has been made." Matter of LiBassi, 449 Mass. 1014, 1017 (2007).

Here, the respondent has repaid the funds, but only after his client filed a lawsuit to get him to do so. He also waited until the eleventh hour to satisfy the judgment, replacing the missing funds on the day of the contempt hearing. See id. ("[r]ecovery obtained through court action is not restitution for purposes of choosing an appropriate sanction") (citations

omitted). As a result, I will not consider this repayment as mitigating conduct, and thus, the deprivation of client funds alone would likely merit disbarment. See Matter of McBride, 449 Mass. 154, 163-164 (2007) (deprivation of client funds alone merits disbarment because "standard discipline" is either disbarment or indefinite suspension, and thus "sanction of disbarment is not markedly disparate"); Matter of Dasent, 446 Mass. 1010, 1012-1013 (2006) (imposing sanction of disbarment where attorney failed to repay client full amount owed after intentionally misusing client funds, committed multiple other violations, and showed no mitigating factors); Matter of Dragon, 440 Mass. 1023, 1023-1024 (2003) (disbarring attorney for intentional deprivation of client funds).

Considered with the other violations found by the board, Matter of Palmer, 413 Mass. 33, 38 (1992) (we consider "the cumulative effect of the several violations committed by the respondent") -- which include the respondent's repeated failure to provide accountings for withdrawals, failing to disclose to the court his intention to pursue a fee during the settlement hearing, and failing to comply with a court order -- I have little doubt that disbarment is the appropriate sanction.

That sanction is particularly appropriate in light of the respondent's prior misconduct, much of which is similar to the conduct that occurred here. The respondent's past misconduct

includes repeated neglect of client matters, failing to communicate adequately with clients, making false representations to clients to cover his neglect, and failing to maintain proper billing and trust account records. Such similar misconduct "is an especially weighty aggravating factor." Matter of Ryan, 24 Mass. Att'y R. 632, 641 (2008). Furthermore, the respondent's failure to cooperate with bar counsel in at least one prior investigation "reflects adversely on the attorney's fitness to practice law." Matter of Garabedian, 416 Mass. 20, 25 (1993).

The respondent has identified no mitigating factors that might justify reducing the proposed sanction. Further, although the respondent has disputed the appropriateness of the sanction imposed, he has not cited a single analogous case in which a lesser sanction was imposed. This is with good reason: there apparently are no such cases. Indeed, this case is almost identical to that of Matter of McBride, 449 Mass. 154, 163-164 (2007). In that case, the attorney intentionally misappropriated client funds, taking over $30,000. The full court held that this conduct alone merited disbarment as the "presumptive sanction." In addition, the court noted aggravating factors weighing in favor of imposing a severe sanction -- including numerous other violations and similar past misconduct -- as well as the absence of any mitigating factors that would warrant lessening the sanction.

Accordingly, there is no basis for me to conclude that disbarment would be "markedly disparate" from the sanction imposed in prior cases. See Matter of Goldberg, supra. The respondent's deprivation of client funds, considered with the cumulative effect of the multiple violations present here, his record of prior discipline, and the absence of any mitigating factors, supports a judgment of disbarment. Accordingly, I impose that sanction recommended by the hearing committee and unanimously agreed to by the board.

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

By the Court

Barbara A. Lenk
Associate Justice

Entered: August 27, 2012