IN RE: BRIAN GERARD DOHERTY

NO. BD-2012-061

S.J.C. Order of Indefinite Suspension entered by Justice Botsford on August 2, 2013.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2012-0061

IN RE: BRIAN GERARD DOHERTY

MEMORANDUM OF DECISION

Brian Gerard Doherty, the respondent, is a member of the Massachusetts bar.[1] He was ordered disbarred by the Florida Supreme Court on January 17, 2012, effective thirty days from the date of the order. Before me is bar counsel's motion for reciprocal discipline; bar counsel seeks a judgment of disbarment. The respondent appears to argue that the appropriate reciprocal discipline in this case would be an admonition. For the reasons that follow, I conclude that the appropriate reciprocal discipline in this case is an indefinite suspension.

1. Background. The facts concerning the Florida disciplinary case can be summarized as follows. Since 2004, the respondent provided investment and financial services, and, later, legal services as well to a couple in Florida. In 2006, the husband died, and the wife (client) was diagnosed with cancer. At the time of the husband's death in June, the client owned six annuities and she wished to reduce the number to three. On July 16, the respondent submitted applications

[1] The respondent has been a member of the Massachusetts bar since 1978, although he is currently suspended from the practice of law in the Commonwealth. In particular, the respondent was ordered suspended for two years from the New Hampshire bar in 1997, see Doherty's Case, 703 A.2d 261 (N.H. 1997), reciprocally suspended for two years in Massachusetts in 1998, and in 2001 his reinstatement to the Massachusetts bar was denied.

to purchase three annuity products of the Conseco Insurance Company (Conseco) on behalf of the client, but on July 28, he withdrew these applications and submitted applications to purchase three annuities from Washington National Insurance Company (Washington National), a subsidiary of Conseco. At that time, the respondent owed Conseco approximately $86,370 as "chargebacks" relating to commissions that the respondent had earned selling Conseco products to other clients; the chargebacks arose because those clients had died within a year of the purchases. In March of 2006, the respondent entered into a settlement agreement with Conseco concerning this debt, which required the respondent, among other things, to pay Conseco 50% of any commissions he earned selling Conseco products to help pay off the debt. Both the Conseco annuities and the Washington National annuities for which the respondent had submitted applications in July, 2006, on behalf of the client qualified as "Conseco products" for purposes of the settlement agreement, but the Washington National annuities were not also subject to chargeback provisions if the client died within a year.[2] In any event, the client died on August 19, 2006, before any annuity purchases were finalized.

Earlier that August, the respondent had prepared a revised will and two new trusts for the client, all of which she executed. The revised will named the respondent as the client's personal representative and also as successor trustee of a trust established in the will with sole discretion over trust purchases. The respondent was also named as successor trustee in the two new trusts. After the client's death, her relatives successfully challenged the respondent's appointment as the

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[2] Accordingly, if the sales of the Washington National annuities had been completed, the respondent would have been required to pay 50% of the commissions to Conseco, but his right to the other 50% would have vested, and would not have been subject to chargeback regardless of when the client died.

client's personal representative and as successor trustee of the various trusts, and he was removed from these positions.

After evidentiary proceedings, the Florida Supreme Court's referee found that the respondent had assumed multiple roles in relation to the client – estate planner, trustee, financial products salesperson, personal representative and attorney – without consulting with the client and obtaining her consent. The referee suggested, and the Florida Supreme Court concluded, that the respondent's conduct violated Rule 3-1.7(a)(2) of the Florida professional conduct rules (lawyer shall not represent a client if there is substantial risk that the representation will be materially limited by the lawyer's responsibilities to others or by his own interests), and also rule 4-1.8(a) (lawyer shall not enter into a business transaction with a client unless it is fair and reasonable, the client is advised in writing of the desirability of seeking independent advice, and then gives informed, written consent to the essential terms of the transaction). In its decision, the Florida Supreme Court did not discuss the violation of its rule 3-1.7(a)(2), because the respondent did not contest the violation; the court 's decision focused on its rule 4-1.8(a). It concluded that the attempted purchase of the annuities was a "business transaction" within the meaning of the rule, and that clearly the respondent had neither advised the client in writing about seeking independent legal advice nor obtained her written consent. The court also found a number of aggravating factors to apply in the respondent's case: (1) the respondent's prior (New Hampshire) discipline, which had involved the respondent's refusal to disgorge a fee in a bankruptcy proceeding for four years after issuance of a court order that he do so; (2) the respondent's acting with a selfish motive; (3) his substantial experience as a lawyer; (4) his refusal to acknowledge the wrongful nature of his conduct in the disciplinary proceedings; and

(5) his making false statements about his disciplinary history in applications for insurance. The court ordered the respondent disbarred. Under Florida bar discipline rules, a disbarred attorney may apply for readmission to the bar after five years.

2. Discussion. Supreme Judicial Court Rule 4:01, § 16, which governs reciprocal discipline, provides in part as follows:

> "(3) . . . . The judgment of suspension or disbarment [in another jurisdiction] shall be conclusive evidence of the misconduct unless the bar counsel or the respondent-lawyer establishes, or the court concludes, that the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard or there was significant infirmity of proof establishing the misconduct. The court may impose the identical discipline unless (a) imposition of the same discipline would result in grave injustice; (b) the misconduct established does not justify the same discipline in this Commonwealth; or (c) the misconduct established is not adequately sanctioned by the same discipline in this Commonwealth."

The respondent argues that imposition of disbarment as a reciprocal sanction in this case would constitute error because although the Florida Supreme Court determined he had violated two disciplinary rules of that jurisdiction, under the Massachusetts Rules of Professional Discipline as in effect in 2006, he only violated one rule, Mass. R. Prof. C. 1.7, because Mass. R. Prof. C. 1.8(a) was not amended until 2008 to require that a lawyer engaged in a business transaction with a client advise the client in writing concerning the desirability of consulting with independent counsel. As bar counsel points out, the respondent is wrong. Rule 1.8(a), adopted in 1997 and effective in 1998, was not amended in 2008 or at any time to date, and in contrast to Florida's rules, the Massachusetts rule does not require that a lawyer advise his client in writing about consulting with independent counsel. But that does not mean that the respondent's conduct, as reflected in the findings of the Florida referee which were adopted by the Florida Supreme Court, stayed clear of violating our rule 1.8(a). There is nothing in the

record to indicate, for example, that the respondent ever disclosed to the client in writing, among other things, the fact that he would be earning commissions on the sale of the Conseco or Washington National annuities, see Mass. R. Prof. C. 1.8(a); and certainly nothing to indicate the client consented in writing, see id., rule 1.8(c).

The respondent also challenges the findings by the Florida referee, arguing that his conduct was negligent, and no more. In the context of reciprocal discipline, it is not the role of this court to scrutinize the factual findings made in the foreign jurisdiction. "The factual aspect of our inquiry . . . is generally limited to determining whether the attorney received a fair hearing at which sufficient evidence was presented to justify our taking reciprocal disciplinary action." Matter of Lebbos, 423 Mass. 753, 756 (1996).

The respondent's third claim is that because Florida permits a disbarred lawyer to seek readmission to the bar after five years, the corresponding Massachusetts discipline would be at most a term suspension of five years. I disagree; clearly, there is a significant distinction between a term suspension and disbarment. Nonetheless, the critical question posed by S.J.C. Rule 4:01, § 16(3) remains to be answered – that is, whether "(a) imposition of the same discipline [as the Florida Supreme Court imposed] would result in grave injustice; [or] (b) the misconduct established does not justify the same discipline in this Commonwealth." With respect to (b), I need to consider whether disbarment is nor is not "markedly disparate from what has been ordered in comparable cases in the Commonwealth." Matter of Tunney, No. BD-2011-091 (January 10, 2012) at 6 (quotation and citations omitted).

I conclude that disbarment in the circumstances would be disparate. Bar counsel has cited cases that in my view support this conclusion. In Matter of Mullen, 26 Mass. Att'y

Discipline Rep. 378 (2010), the lawyer received a six-month suspension for selling his client annuities that provided undisclosed commissions to him; the lawyer had received an admonition previously (aggravation), but had reversed the sales and refunded his fee (mitigation). See Matter of Pike 408 Mass. 740, 745 (1990) (attorney represented both landlord and tenant in lease transaction and received broker's commission in connection with transaction; six month suspension ordered). See also Matter of Eisenhauer, 426 Mass. 448, 452-453 (1998) (attorney drafted trust naming himself as trustee with extraordinary powers, took substantial trustee fees, and "engaged in dishonesty, fraud, deceit and misrepresentation" in connection with actions as trustee; sanction of indefinite suspension imposed).

Here, the respondent's misconduct in relation to the proposed sales of the annuities, while violating the Florida equivalent of Mass. R. Prof. C. 1.8(a), ultimately did not result in any improper benefit to him because the sales were not completed. And his speedy removal as personal representative and successor trustee of the various trusts he established, while not eliminating or mitigating his violation of the Florida equivalent of Mass. R. Prof. C. 1.7(2)(b), nonetheless ended the conflict and potential resulting harm to the client's beneficiaries. At the same time, however, there are important aggravating factors here, including the respondent's misrepresentations about his prior disciplinary history on insurance applications, and, most importantly, that prior disciplinary history – which includes the respondent's prior suspension from the practice of law in Massachusetts and the refusal by a single justice of this court in 2001 to reinstate him. In consideration of these aggravating factors, I conclude that an indefinite suspension would be the most appropriate level of discipline to impose in this case – a level of discipline that is sometimes posed as an alternative to disbarment. See, e.g., Matter of

Nickerson, 422 Mass. 333, 337 (1996). I further conclude that the respondent's reinstatement should be conditioned on his readmission in Florida, the jurisdiction in which the discipline at issue here originated. See Matter of Tunney, supra.

3. Conclusion. For the reasons stated, a judgment is to enter indefinitely suspending the respondent, Brian Gerard Doherty, from the practice of law, with reinstatement conditioned upon his prior readmission in Florida.

Margot Botsford
Associate Justice

DATED: July 24, 2013