<u>IN RE: KELLY A. YOUNG a/k/a/ KELLY A. FOLEY</u>

NO. BD-2014-027

S.J.C. Order of Indefinite Suspension entered by Justice Duffly on December 21, 2015.[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 THE COUNTY OF SUFFOLK
DOCKET NO. BD-2014-0027

IN RE: KELLEY A. YOUNG a/k/a KELLEY A. FOLEY

CORRECTED MEMORANDUM OF DECISION

This matter came before me on an information and record of proceedings, and a vote by the Board of Bar Overseers, recommending that the respondent be indefinitely suspended from the practice of law upon the respondent's default at a hearing before the board. The respondent was admitted to the practice of law in the Commonwealth in December, 2010. The petition for discipline was filed with the board in August, 2013. Bar counsel, who was aware of serious issues in the respondent's personal life, met with her in August, 2013, and in September, 2013, in an effort to arrange an agreed-upon resolution to this matter. The respondent was defaulted at a hearing on the petition for discipline on September 27, 2013, then sought to remove the default. Her motion to remove the default was allowed on October 16, 2013, but she thereafter again failed to respond to bar counsel, and, in February, 2014, she was sent a letter advising her of the board's recommendation that she be

indefinitely suspended from the practice of law. Bar counsel did not hear from the respondent until June, 2014, when she again sought to remove default and also sought additional time to make restitution to the three clients who were named in the petition for discipline before the hearing on the discipline to be imposed. In August, 2014, having obtained counsel, the respondent gave her attorney the funds necessary to make restitution. He deposited those funds in his IOLTA account, and paid two of the three former clients that August. The third apparently did not recognize the respondent's name when he received an electronic mail message from the respondent's counsel, because of a change from her married to her maiden name, and was not contacted further at that time. The respondent appeared at a hearing before this court on April 8, 2015. The matter was continued for one month so that the respondent's counsel could again attempt to contact the third client and pay that client the restitution due. On April 21, 2015, the respondent's counsel filed a letter stating that restitution to the last of her former clients had been made, with attachments showing the payments.

Because the respondent was defaulted, the allegations in the petition for discipline are deemed admitted, and the sole question before me is the appropriate sanction to be imposed. At the hearing before me, the respondent did not challenge that she

had engaged in the misconduct as alleged, but, rather, she focused on her personal circumstances at the time that she was failing to attend to those client matters, when she misused for her own financial benefit the funds those clients paid her as retainers, when she made misrepresentations to the clients concerning the status of their matters, and when she refused to refund certain funds due upon some of the clients' termination of her representation. The respondent's counsel did not file a written opposition to the board's recommended sanction, but, at the hearing, he suggested that a sanction of one year and one day, which would require the respondent to apply for reinstatement, would be more appropriate given the mitigating circumstances. Having heard both the respondent's and her counsel's representations concerning those circumstances, I conclude that the board's recommendation is appropriate, and the respondent shall be indefinitely suspended from the practice of law in the Commonwealth.

<u>Respondent's misconduct</u>. The petition for discipline contains six counts, four of them involving named clients; one count asserting violation of Mass. R. Prof. C. 1.15(e), by withdrawing funds in cash from her client trust account (IOLTA account); and one count involving the respondent's failure to cooperate in the disciplinary proceeding and intentional misrepresentations to bar counsel during the course of that

proceeding.

The misconduct involving the named clients took place throughout 2011, and into January, 2012. The misconduct involving bar counsel's investigation began in February, 2012, and lasted through August, 2014.

First matter. In the first matter, the respondent agreed to represent, on a contingent fee basis, a tenant in an action against her former landlord, who had evicted her. The respondent filed a claim in Small Claims Court, but did not serve notice upon the landlord; did not make any efforts to reschedule a hearing on the complaint after the client said she would be unable to attend the scheduled hearing date; misrepresented to the client that she had been able to obtain a continuance when, in reality, the "continued" date was the originally scheduled date and the respondent earlier had simply recorded an incorrect hearing date; failed to notify the client of the date of the trial; failed to appear at the trial; and failed to respond to the client's repeated efforts, over a period of months, to contact the respondent concerning the status of her case, until, in January, 2012, the client informed the court that her attorney had abandoned her and she wished to proceed pro se, a motion the court allowed.

The petition for discipline states that this conduct violated Mass. R. Prof. C. 1.1 (competence); 1.2(a) (failing to

pursue client's objectives through reasonably available and lawful means); 1.3 (failing to act with diligence and promptness in representing a client); 1.4(a) and (b) (failing to keep client reasonably informed); 1.16(d) (withdrawing from the representation without protecting the client's interests); and 8.4(c) (engaging in dishonesty, fraud, deceit, or misrepresentation) and (d) (conduct prejudicial to the administration of justice).

Second matter. In the second matter, in May, 2011, the respondent agreed to represent a client on an hourly basis in her divorce. The respondent received a retainer of $3,515.50, for work to be billed at $180 per hour, but erroneously recorded the amount of the retainer as $3,125.50. In June, 2011, the respondent filed in the Norfolk Probate and Family Court a complaint for divorce against the client's husband. She also filed a motion for an abuse prevention order; a temporary order was issued by agreement with the husband's attorney, valid through December 7, 2011. The court also ordered a pretrial hearing for that date.

On October 29, 2011, the respondent withdrew funds from the IOLTA account for fees for services rendered, but did not inform the client of the withdrawal, nor provide her a statement of the services and the amount of the retainer remaining in the IOLTA account.

When the respondent and the client appeared on December 7, the husband's attorney notified them that he would be late in arriving in court. The respondent suggested to the client that the hearing be rescheduled, and the judge allowed the motion, setting a date of March 12, 2012 for a pretrial hearing. The respondent filed a pretrial memorandum of law with respect to the divorce, but did not request an extension of the abuse prevention order, which expired that day. When the client asked the respondent if the order had been continued until the newly-scheduled pretrial hearing, the respondent said that it had, notwithstanding that she had not filed a motion that it be continued and had made no effort to determine whether the court had continued it sua sponte. On December 9, 2011, the client learned that the abuse prevention order had expired; she went to court herself, without the respondent, and obtained an extension until June 7, 2012.

The respondent performed no further work on the case, but, on December 9, 2011, she again withdrew funds for her legal fees from the client's retainer, including fees for her appearance at the pretrial hearing on December 7. She again did not inform the client, in writing, of the withdrawal, or provide a statement of services and a statement of the balance remaining in the account. At that point, the respondent had earned $3,209.14 for services she provided, but, due to her error in recording the amount of

the initial retainer, her records indicated that the client owed her $83.64, rather than reflecting the true state of affairs that she was holding $306.36 of the client's funds.

The client attempted unsuccessfully to contact the respondent, through telephone calls and electronic mail. On February 10, 2012, the client contacted the office of bar counsel and requested an investigation of the respondent's conduct. The respondent received a letter from bar counsel requesting that she explain her conduct, by no later than March 1, 2012. The respondent returned the client's file to her on February 27, 2012, but did not respond to the client's demands for the return of her remaining retainer, and did not place in escrow the $450 that she had paid herself for her appearance at the hearing on December 7, 2011, although the client had sent a letter stating that she would dispute any claim for fees for the respondent's appearance at the hearing. By April, 2012, the respondent had used the remaining amount of the retainer for her own personal and business expenses, unrelated to the client.

Bar counsel asserts that, by the above conduct, the respondent violated Mass. R. Prof. C. 1.1 (providing competent representation); 1.2(a) (failing to pursue client's objectives through reasonably available and lawful means); 1.3 (failing to act with diligence and promptness in representing a client); 1.4(a) and (b) (failing to keep client reasonably informed);

1.15(b), (c), (d), and (f) (failing promptly to pay client, properly to segregate and account for trust property, and to maintain client ledger accurately documenting receipt and disbursement of client funds); 1.16(d) (withdrawing from the representation without protecting the client's interests); and 8.4(c) (engaging in dishonesty, fraud, deceit, or misrepresentation) and (d) (conduct prejudicial to the administration of justice).

Third matter. In the third matter, in August, 2011, the respondent was hired to assist a client with a divorce proceeding that the client had been pursuing pro se, and to obtain payment on child support arrearages that the parties had agreed would be paid at a rate of $125 per week. At that point, the husband was $825 in arrears on his child support payments. The client told the respondent that her primary objective was to obtain payment of the $825 in arrears, and that future payments be made by payroll deduction from the husband's paycheck directly to the Department of Revenue (DOR) on behalf of the client. The client paid the respondent $1,000 as a retainer, for services to be rendered on an hourly basis at $180 per hour.

On September 10, 2011, the respondent completed a form that would allow payroll deduction from the husband's paycheck to the DOR, on behalf of the client, but failed to obtain the client's signature, which was required, on the form. DOR returned the

unsigned form to the client, who signed it and returned it to DOR. While DOR was processing the request, the husband failed to make any child support payments. On September 12, 2011, the respondent filed her notice of appearance in the divorce proceeding, and entered into a stipulation that the husband would make future child support payments through payroll deduction to DOR, and that the amount of his arrears in child support would be determined "at a later date." The court entered this stipulation as an order, and scheduled a pretrial hearing for November 21.

On September 13, 2011, the respondent withdrew $667.30 from her IOLTA account for services provided, and sent the client a statement of the withdrawal, the services provided, and the remaining balance of $332.70. The client immediately terminated the respondent's representation; the respondent did not perform any further work on the case, but, by April 1, 2012, she had withdrawn the remaining balance and had used it to pay unrelated personal and business expenses.

When the client contacted bar counsel seeking an investigation, the respondent did not respond to bar counsels' request for information. On June 30, 2012, the respondent was administratively suspended, in part based on her failure to respond to bar counsel. On July 12, 2012, the respondent sent the client a letter and a money order in the amount of $332.70. At a meeting with bar counsel in November, 2012, the respondent

falsely represented that she had used funds from her IOLTA account to pay the client the remainder of the retainer.

Bar counsel asserts that this misconduct violated Mass. R. Prof. C. 1.1 (providing competent representation); 1.3 (failing to act with diligence and promptness in representing a client); 1.15(c) (failing properly to segregate and account for trust property); 1.16(d) (withdrawing from the representation without protecting the client's interests); 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary matter); and 8.4(c) (engaging in dishonesty, fraud, deceit, or misrepresentation).

Fourth matter. In May, 2011, the respondent agreed to represent a client in his dispute over the purchase of a used automobile. A few days after the representation began, the respondent sent a demand letter to the company from whom the client had purchased the vehicle. The dealer responded with an offer that the client rejected; the client requested that the respondent proceed with a counter offer and also file a complaint in the District Court if the dealer rejected the counter offer.

At the end of June, 2011, the dealer verbally rejected the counter offer; the dealership went out of business sometime in the fall of 2011. Beginning in October, 2011, the client attempted to contact the respondent but she did not respond to his requests for information concerning his case. On November 1,

2011, the respondent filed a complaint in the Boston Municipal Court on the client's behalf, but did not inform him that she had done so, did not have the complaint served on the dealer, and did not perform any further work on the case or inform the client that she had withdrawn from the case. In March, 2012, the Boston Municipal Court sua sponte dismissed the complaint and entered judgment in favor of the automobile dealer.

Bar counsel asserts that this conduct violated Mass. R. Prof. C. 1.4(a) and (b) (failing to respond to client's requests for information and failing to inform the client that she had not served the complaint); and 1.16(d) (withdrawing from the representation without protecting the client's interests).

Appropriate sanction. The primary consideration in determining the appropriate sanction to be imposed in attorney disciplinary proceedings "is the effect upon, and perception of, the public and the bar." Matter of Crossen, 450 Mass. 533, 573 (2008), quoting Matter of Finnerty, 418 Mass. 831, 829 (1994). See Matter of Alter, 389 Mass. 153, 156 (1983). The sanction should be such as to deter other attorneys from the same type of conduct and to protect the public. See Matter of Foley, 439 Mass. 324, 333 (2003), citing Matter of Concemi, 422 Mass. 326, 329 (1996). Nonetheless, while the sanction imposed should not be "markedly disparate from what has been ordered in comparable cases," see Matter of Goldberg, 434 Mass. 1022, 1023 (2001),

"[e]ach case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of Pudlo, 460 Mass. 400, 404 (2011), quoting Matter of Crossen, supra.

Here, setting aside any of the other asserted misconduct, it is undisputed that the respondent intentionally misused three clients' funds for her own purposes, depriving them of the funds for a number of years, and failing to make any restitution until several years after the initiation of disciplinary proceedings. The presumptive sanction for intentional misuse of client funds, resulting in actual deprivation, is indefinite suspension or disbarment. Matter of McBride, 449 Mass. 154, 163-164 (2007); Matter of Schoepfer, 426 Mass. 183, 187 (1997). Whether restitution has been made is a critical factor in deciding whether disbarment or indefinite suspension is more appropriate. See Matter of LiBassi, 449 Mass. 1014, 1017 (2007). Where, as here, an attorney has made restitution, and in the absence of mitigating factors, an indefinite suspension is more likely to be appropriate. See id; Matter of McCarthy, 23 Att'y Discipline Rep. 469, 470 (2007). Making restitution as a result of court action, however, is not considered a factor in mitigation. See Matter of Bauer, 452 Mass. 56, 75 (2008).

The respondent asserted at the hearing before me that she had delayed in responding to bar counsel's requests for

information and to the notice of the disciplinary hearing to be scheduled in this court because she did not at that point have the money to make restitution and was attempting to gather it. An inability to make restitution at that point does not excuse the failure to respond to bar counsel or to participate in the disciplinary proceedings. I note also that the total amount to be reimbursed was less than $2,000, the respondent asserted at the hearing that she has been working, and there was no suggestion of any effort to enter into any type of payment arrangement. Even once the respondent had delivered the funds to her counsel in August, 2014, one of her former clients remained without reimbursement for another eight months.[1] Following the hearing before me, that client was located and paid within two weeks. Thus, I conclude that restitution was not made voluntarily as a sign of remorse, but in order to avoid a harsher disciplinary sanction, and little credit should be given for the ultimately paid restitution.

I turn to whether any mitigating factors exist which might lessen the presumptive sanction. "Our rule is not mandatory. If a disability caused a lawyer's conduct, the discipline should be

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[1] As noted, at the hearing before me, the respondent's counsel stated that he earlier had communicated via electronic-mail with the client, who stated that he had never been represented by the respondent; counsel later discovered that there had been some confusion between the respondent's married and maiden names.

moderated, and, if that disability can be treated, special terms and considerations may be appropriate." Matter of Schoepfer, 426 Mass. 183, 188 (1997).

The respondent and her counsel both asserted at the hearing before me that the respondent had been experiencing difficult personal circumstances that affected her conduct in these cases. Bar counsel acknowledged in response that bar counsel had taken those circumstances into consideration when attempting to reach an agreed upon resolution in August and September of 2013, and in allowing the respondent's requests for additional time in which to make reimbursement. The respondent's counsel stated that she had been involved in a contentious divorce with a husband against whom she had taken out a restraining order, that he had been stalking her, and that the situation had resulted in her suffering from depression. The respondent herself said (not under oath) that she had been taking antidepressants, which she no longer was doing, and that she continued to be treated through counseling. She also said that the divorce was finalized sometime in 2012. Bar counsel acknowledged in response that bar counsel had taken those circumstances into consideration when attempting to reach an agreed upon resolution in August and September of 2013, and in allowing the respondent's requests for additional time in which to make reimbursement.

Both depression and domestic violence have been deemed, in

some circumstances, to be mitigating circumstances justifying a less severe sanction than the presumptive sanction for the particular misconduct. See, e.g., Matter of Balliro, 453 Mass. 75, 87-89 (2009) (evidence of domestic violence respondent had suffered supported reduction in presumptive suspension of two years to six months for testifying falsely under oath in criminal trial); Matter of MacDonald, 23 Mass. Att'y Disc. R. 411, 417 (2007) (court "weigh[ed] heavily" mitigating circumstances, including attorney's depression, inexperience, remorse, family circumstances, and belief that he had been working in the best interests of his clients in reducing presumptive sanction of at least one year suspension to six months for repeated misrepresentations under oath in conjunction with other misconduct).

The circumstances here, however, are quite different and readily distinguishable. I take note of the respondent's inexperience (having practiced for less than a year at the time of much of her misconduct), and consider that misconduct such as failing to seek an extension of the abuse prevention order might be mitigated by inexperience. Nonetheless, even a highly inexperienced attorney reasonably should know that it is important to record accurately addresses provided by clients and hearing dates set by a trial court, and that lying to a client about having taken actions that were not taken is inappropriate.

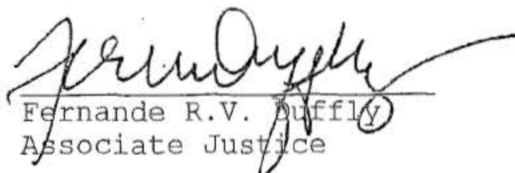
And certainly even inexperienced counsel should know after a basic course in legal ethics that funds held on retainer for work not performed, and that will never be performed, must be returned to the client.

As to the circumstances surrounding the divorce, and the respondent's asserted depression, at the hearing her attorney described her as having gone through a "terrible time." Neither the respondent nor her counsel, however, explained the timeframes during which she was suffering from depression, or the severity of that depression, and there were no affidavits from any mental health treatment provider as to the effect of that depression on the respondent's ability to conduct her affairs. In addition, according to the respondent's own statement, the divorce was finalized before the disciplinary proceedings commenced. I consider the respondent's personal circumstances to the extent that, while her late payment of restitution, in response to disciplinary proceedings, does not mitigate in her favor, her personal circumstances and emotional distress tip the balance towards an indefinite suspension rather than disbarment.

An order shall enter indefinitely suspending the respondent from the practice of law in the Commonwealth, nunc pro tunc to April 21, 2015, the date that the court was informed that restitution had been paid to the last of the respondent's former clients named in bar counsel's petition for discipline. The

respondent shall be eligible to apply for reinstatement five years after the date of her suspension.

By the Court



Fernande R.V. Duffly
Associate Justice

Entered: December 30, 2015