IN RE: BARRY D. GREENE

NO. BD-2015-106

S.J.C. Order of Term Suspension entered by Justice Duffly on June 1, 2016, with an effective date of July 1, 2016.[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-2015-106

IN RE: BARRY D. GREENE

AMENDED MEMORANDUM OF DECISION

This matter came before me on an information and record of proceedings, and a vote by the Board of Bar Overseers (board), recommending that the respondent be suspended from the practice of law for a period of two years for his actions with respect to his business practices involving seven clients[1] who were facing foreclosure. The petition for discipline was filed with the board in August, 2012. In March, 2015, a hearing committee recommended that the respondent be suspended from the practice of law in the Commonwealth for a period of two years. In June, 2015, the respondent appealed to the board, and bar counsel filed an opposition. In August, 2015, the respondent's son, who engaged in the foreclosure practice with him, but, unlike the respondent (who was not charged with any crime) was convicted of twelve criminal offenses for his role in the matter, was indefinitely suspended from the practice of law in the

[1] The respondent clearly treated the individuals involved in the transactions as ones with whom he had an ongoing business relationship, and to whom he provided ongoing services. Accordingly, this memorandum refers to the individuals as "clients" and not as "sellers" (of the houses that they owned before the sales to the respondent). Bar counsel's petition for discipline was not based on any assertion that the individuals received legal advice from the respondent.

Commonwealth. See Matter of Greene, Docket No. BD-2014-0107 (2015). In September, 2015, oral argument was held before the board, and in October, 2015, the board voted to recommend that the respondent be suspended from the practice of law in the Commonwealth for a period of two years. On November 16, 2015, bar counsel filed an information with this court requesting that the respondent for two years from the practice of law in the Commonwealth.

The respondent appeared at a hearing before me on February 10, 2016, where he represented himself. He did not contest any of the factual findings made by the board, or that his conduct violated particular rules of profession conduct, as found, and did not contend that the recommended sanction of a two-year suspension is vastly disparate from the sanctions imposed on other attorneys for similar misconduct. The respondent conceded that, in 2010, he had entered into a settlement agreement with the Attorney General with respect to the misconduct at issue here, which allowed him to avoid further litigation. Under the terms of that agreement, the respondent paid $160,000 to the Attorney General, $10,000 of which was to cover the Attorney General's costs, and $150,000 of which was put into a fund and distributed as partial restitution to the clients. The respondent did note, as to one matter, see Matter of Foley, 26 Mass. Att'y Disc. Rep. 199 (2010), that his misconduct involved seven clients, whereas that attorney had been suspended from the

practice of law for eighteen months for similar misconduct involving twenty-four transactions (albeit that all of respondent Foley's misconduct occurred on one day).

Respondent's conduct. The essence of the respondent's misconduct involved what bar counsel termed a "scheme" (the respondent challenged the use of this word) in which the respondent and his son obtained clients at imminent risk of foreclosure by referrals from mortgage brokers who knew the clients were unable to refinance their homes due to their financial circumstances. In each case, although the clients had defaulted on payments, they all had substantial equity, from $60,000 to $160,000, in their homes. The respondent and his son arranged to stop the foreclosure proceedings and purchase the houses, with new mortgages, giving the clients a one-year lease and an option to repurchase the house. The amount of the lease payment was based on the carrying costs of the house, essentially the amount of the mortgage the respondent had obtained on the appraised fair market value of the house, and was generally much higher than the amount of the mortgage payments that the clients had proved unable to pay. The option to repurchase was dependent on the clients obtaining refinancing, which the respondent knew was unlikely given their financial condition and previous default. A clause in the lease agreement invalidated the option in the event a client defaulted on the terms of the lease. The price of obtaining the option was the amount of equity remaining

in the house after all outstanding mortgages were discharged. In other words, the clients entered the closing with a house in foreclosure, in which they had substantial equity, and left the closing with no cash and a lease they would be unlikely to be able to pay.

The respondent (and his son) obtained the purchase money mortgages for the houses from lenders who were themselves the respondent's clients. They did not disclose this conflict of interest to the lenders, and did not disclose the true terms of the transaction. The HUD-1 settlement statements were drafted to appear as though the clients obtained substantial cash as a result of the sale, and that the respondent brought money to the sale, neither of which happened. The settlement statements also did not disclose, even in cases where the lender's instructions to the closing attorney required that this information be set forth in the HUD-1, the existence and amount of the substantial brokers' fees that the respondent paid the brokers who referred the clients knowing that they were not in a condition to refinance. In some cases, the respondent (and his son) completed the falsified HUD-1 settlement statements themselves, and in other cases they directed employees of the respondent's law firm to do so.

In addition to the misrepresentations on the HUD-1 statements, the respondent did not communicate adequately with

the clients, and did not provide competent and diligent representation to them. The respondent, who had an extensive practice in real estate law, and lengthy experience in the field, did not explain to the vulnerable clients the terms of the documents they were signing, or the terms of the buy back option, did not allow the clients time to read the documents, and, in one case, the client left the closing not aware that she had sold her house. See 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); and 8.4(c) (engaging in dishonesty, fraud, deceit, or misrepresentation). The respondent also commingled funds in his IOLTA account by depositing the money from the lease payments in that account. See R. Prof. C. 1.15.

Appropriate sanction. As the conduct is admitted, the sole issue before me is the appropriate sanction. The primary consideration in determining the appropriate sanction to be imposed "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 sufficient 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 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.

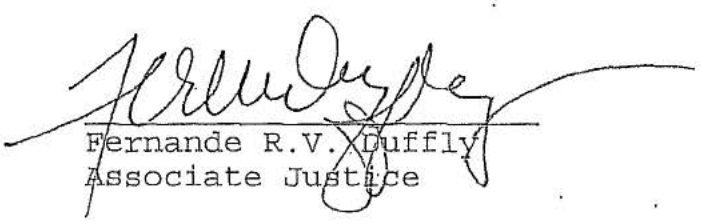
The respondent's only argument (made orally during the hearing before me) was that I should consider mitigating circumstances in his case. "Our rule is not mandatory. If a disability caused a lawyer's conduct, the discipline should be moderated, and, if that disability can be treated, special terms and considerations may be appropriate." Matter of Schoepfer, 426 Mass. 183, 188 (1997). The respondent pointed to his age (69), the absence of prior discipline, that he wanted to help the clients stay in their homes, and that some of the clients actually were helped -- by repairs he made to their houses, forbearance from evicting them when they were unable to pay the lease amount, assistance with moving and rental expenses to an apartment for one client who became ill -- and noted that, in one case, the clients were able to obtain a new loan and buy back their house. He argued also that, whether wittingly or not, his

payment to the Attorney General's fund may have done "some good" for some of the clients, who at least received some money back.

The absence of prior discipline is a "typical" mitigating factor on which I place no weight in determining the appropriate sanction in this case, see Matter of Alter, 389 Mass. 153, 156-157 (1983), and obtaining the clients' lawful objectives, such as staying in their home (for the one case where that was possible), is not mitigating, but, rather, an ordinary result expected of a reasonably competent attorney. Making restitution after disciplinary proceedings have begun, rather than on one's own initiative, also does not indicate remorse and does not constitute. See Matter of Bauer, 452 Mass. 56, 75 (2008); Matter of LiBassi, 449 Mass. 1014, 1017 (2007). And any benefit the vulnerable and financially struggling clients may have had in sharing the $150,000 in restitution the respondent paid does not approach the amount of the equity that, in total, they paid the respondent for the buy-back option that the respondent knew his clients were highly unlikely to be able to use.

An order shall enter suspending the respondent from the practice of law in the Commonwealth, for a period of two years.

By the Court,



Fernande R.V. Duffly
Associate Justice

Entered: June 30, 2016