



**IN RE: MARK DAVID MODEST**

**NO. BD-2016-005**

**S.J.C. Order of Term Suspension entered by Justice Lenk on May 16, 2016.<sup>1</sup>**

**Page Down to View Memorandum of Decision**

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<sup>1</sup> 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-2016-005

IN RE: MARK DAVID MODEST.

MEMORANDUM OF DECISION

This matter came before me on an information and recommendation of the Board of Bar Overseers (board) that the respondent be suspended from the practice of law in the Commonwealth for a period of three years for multiple instances of neglect of his clients by the respondent, causing harm to the clients, intentional misrepresentation to the clients, misappropriation (failure to return) unearned fees and unused expenses, and a failure to return his client's documents and account for the client's funds. See S.J.C. Rule 4:01, § 8(6). The respondent does not contest the findings of fact on which the board's recommendation is based. Therefore, the sole question before me is the appropriate sanction to be imposed. For the reasons explained below, I conclude that the appropriate sanction is a three-year suspension from the practice of law in the Commonwealth.

1. Facts. I summarize the findings of fact adopted by the board; as stated, the respondent does not contest them. The respondent was admitted to the Massachusetts bar on December 16, 1977. He was administratively suspended from the practice of law on October 2, 2013, for failing to respond to requests for information by the bar counsel. He was reinstated to practice on November 13, 2013. On October 1, 2014, the respondent was administratively suspended for failing to register and pay registration fees with the board of bar overseers, and he has not been reinstated to practice since that time.

The misconduct at issue involved the respondent's neglect of two client matters, in violation of Mass. R. Prof. C. 1.1, 1.2 (a), and 1.3; failure to communicate with two clients, in violation of Mass. R. Prof. C. 1.4 (a) and (b); misrepresentations to two clients, in violation of Mass. R. Prof. C. 8.4 (c); failure to return the unearned portion of his fee and unused expenses to the clients, in violation of Mass. R. Prof. C. 1.15 (b) (3), 1.15 (c); and 1.16 (d); failure to account upon the client's request for funds received and expended in connection with the representation, in violation of Mass, R. Prof, C. 1.4(a) and (b), and 1.15(d) (2); termination of the representation of the clients without giving them reasonable notice, in violation of Mass. R. Prof. C. 1.16 (d); failure to return one client's files upon termination of the representation

and upon the former client's request, and failure to safeguard the client's files, in violation of Mass. R. Prof. C. 1.16 (d) and (e); failure to maintain complete records of the receipt, maintenance, and disposition of client trust property, in violation of Mass. R. Prof. C. 1.15(1; unlawful obstruction of another party's access to evidence, knowing violation of obligations under the rules of civil procedure governing discovery, and failure to comply with court orders in the Superior Court action, in violation of Mass. R. Prof. C. 3.4(a) and (c), and 8.4(d); and failure to respond to bar counsel's requests for information in connection with an investigation and to comply with a subpoena requiring the respondent to produce records and to testify, in violation of Mass. R. Prof. C. 3.4 (c), 8.1 (b), 8.4 (g), and S.J.C. Rule 4:01, § 3(1) (a) and (b).

a. McGrath matter. With respect to the first matter, in July, 2012, the respondent was engaged by Patricia A. McGrath to represent her in a bankruptcy matter. McGrath paid the respondent a flat fee of \$2,500, and an additional \$500 for filing fees and costs. McGrath also provided the respondent with financial and other information that he requested in order to prepare her bankruptcy petition and related schedules.

In September, 2012, the respondent notified McGrath that he was in the process of completing her bankruptcy petition and

related schedules. The respondent agreed to notify McGrath when the petition was completed and ready for her review. The respondent did not provide McGrath any documentation to review, and did not ask McGrath to provide him with any additional information in order to complete the bankruptcy petition.

Between about September 2012 and July 2013, McGrath regularly asked the respondent to advise her about the status of the matter. The respondent did not promptly respond to a number of McGrath's requests for information about the matter. In December, 2012, the respondent informed McGrath that the bankruptcy petition was almost fully completed. The respondent did not send any documents to McGrath to review at that point, and did not ask McGrath to provide him with any additional information. The respondent did not file the petition for bankruptcy.

From approximately January, 2013, until July, 2013, on multiple occasions McGrath asked the respondent to notify her if he did not want to proceed with the petition, and to refund the \$3,000 that she had paid him, so that she could retain another attorney to represent her. The respondent did not advise McGrath that he was unable or unwilling to file the bankruptcy petition on her behalf, and did not advise her to seek other counsel to represent her in the matter. The respondent did not refund McGrath the \$3,000 unearned fee and \$500 in filing expenses.

In about March, 2013, McGrath notified the respondent that creditors had placed a lien on her condominium and were seeking to attach her paycheck. McGrath asked the respondent to file the bankruptcy petition as soon as possible. The respondent informed McGrath that he would file an emergency petition for bankruptcy on her behalf. The respondent did not prepare and file the bankruptcy petition for McGrath.

By an electronic mail message to the respondent, dated May 14, 2013, McGrath demanded that the respondent file the bankruptcy petition or refund the \$3,000 she had paid him. In an electronic mail message in response, sent the same day, the respondent intentionally misrepresented to McGrath that he would file the petition immediately. The respondent did not file a petition for bankruptcy on McGrath's behalf.

On May 23, 2013, McGrath notified the respondent in an electronic mail message that her salary was being attached, and demanded to know when he was going to file the bankruptcy petition. The respondent replied the same day, by an electronic mail message, intentionally misrepresenting to McGrath that he would file an emergency bankruptcy petition that day. The respondent did not file such a petition, nor did not notify McGrath that he had not done so.

By an email to the respondent dated June 27, 2013, McGrath requested information on the status of the case, and asked the

respondent to return her fee if he did not intend to file the bankruptcy petition for her. On June 30, 2013, the respondent intentionally misrepresented to McGrath that he would file the bankruptcy petition that week. The respondent did not file a petition for bankruptcy on McGrath's behalf and did not notify her that he had not done so. To date, the respondent has not returned to McGrath his unearned fee nor the unused advance for expenses.

In August, 2013, bar counsel began a disciplinary investigation after a request for investigation by McGrath. By letters dated August 16, 2013 and September 12, 2013, bar counsel requested that the respondent provide a written response to the request for investigation and provide documentation regarding the allegations of misconduct. The respondent knowingly failed without good cause to respond.

On October 2, 2013, the respondent was administratively suspended from the practice of law in the Commonwealth, in accordance with S.J.C. Rule 4:01, § 3(2), for failure to cooperate with bar counsel's investigation. On November 4, 2013, the respondent filed a response to bar counsel's correspondence concerning the McGrath matter. On November 13, 2013, the respondent's license to practice law in Massachusetts was reinstated.

On May 8, 2015, the Board of Bar Overseers (board) issued a subpoena directing the respondent to appear on May 28, 2015, before bar counsel with his files and records, to testify concerning his conduct. The respondent was served with a copy of the subpoena by first class and certified mail at his home address, and a copy was sent to him by electronic mail. To date, the respondent has not provided bar counsel with the subpoenaed records and has not appeared to testify.

b. BISCO matter. Beginning in 2007 until November, 2013, the respondent represented Boston Irrigation Supply Co., Inc. (BISCO) in various collection matters. In 2013, the respondent was representing BISCO in connection with the collection of approximately twenty-five unpaid customer accounts.

During the approximately six-year course of his representation, the respondent requested that BISCO pay him at least \$9,500 for anticipated court filing fees and other costs for specific collection cases that the respondent had agreed to file on BISCO's behalf. BISCO paid the respondent the amount requested for this purpose. The respondent did not file the collection cases in court, and did not return the unused filing fees to BISCO.

Sometime in 2013, BISCO requested that the respondent provide information concerning which collection actions had been filed and whether judgments or settlements had been reached, and



that he account for funds he had handled on BISCO's behalf. The respondent did not respond to BISCO's requests for information about the status of the collection matters, and did not account to BISCO for funds he had received and expended on BISCO's behalf.

In November, 2013, BISCO terminated the respondent's representation in all matters. By a letter dated November 26, 2013, Donna McDonough, the Controller of BISCO, notified the respondent that he should cease any further work on behalf of BISCO. McDonough requested that the respondent promptly send BISCO the complete files pertaining to any open matters that he had been handling for BISCO. The respondent did not deliver the files. By a letter dated December 10, 2013, another attorney representing BISCO requested that the respondent deliver BISCO's files to his Boston office by December 16, 2013, or contact him to arrange for delivery of the files. The respondent did not deliver the files. By a letter dated March 7, 2014, and an electronic mail message dated March 20, 2014, BISCO's counsel provided the respondent with a list of the specific files he was requesting. The respondent did not deliver the files.

On May 22, 2014, bar counsel began a disciplinary investigation after receiving a letter from the attorney who had been attempting to obtain the return of BISCO's files and an accounting by the respondent for any payments he had received or

expended on BISCO's behalf in any of the collection matters he was handling. Bar counsel sent the respondent letters on May 27, 2014 and June 24, 2014, requesting that he provide a written response to the request for investigation and provide documentation regarding the allegations of misconduct. Bar counsel also requested that the respondent provide copies of trust account records as set forth in Mass. R. Prof. C. 1.15(f).

In a letter dated July 20, 2014, the respondent submitted an answer to the request for investigation. The respondent did not provide the documentation requested, including any trust account records. The respondent reported that, one year previously, he had moved out of his office and placed BISCO's files in storage. He did not retrieve the files from storage and provide them to bar counsel, to BISCO, or to BISCO's successor counsel, and did not provide an account of the payments he had received on behalf of BISCO.

On October 20, 2014, BISCO filed a civil action in the Superior Court against the respondent alleging, inter alia, failure to safeguard BISCO's files, professional negligence, and failure to account. See *Boston Irrigation Supply Co. Inc. vs. Mark D. Modest*, Superior Court Docket No. 14-01429. On October 21, 2014, BISCO served the respondent with a request for production of documents pursuant to Mass. R. Civ. P. 34. Among other things, BISCO requested that the respondent produce.

BISCO's client files and all documents concerning his storage of the files; and all documents concerning the payment or receipt of any funds in connection with BISCO's legal matters. The respondent did not reply to BISCO's request for production. The respondent also failed to file an answer to the Superior Court action. On December 16, 2014, the respondent was defaulted pursuant to Mass. R. Civ. P. 55(a), for failure to answer.

On May 7, 2015, BISCO filed in the Superior Court a motion to compel production of documents and for sanctions against the respondent. On May 14, 2015, BISCO's motion to compel was allowed, and the respondent was ordered to produce the documents requested by BISCO by June 8, 2015. The motion for sanctions was deferred, subject to being raised again if the respondent failed to comply with the court order. The respondent did not produce the records. On July 3, 2015, BISCO filed an application for judgment by default and for sanctions.

On August 4, 2015, the respondent filed a motion to vacate and set aside the entry of default. On August 4, 2015, after a hearing, a Superior Court judge denied the respondent's motion to vacate, and continued the hearing on assessment of damages to November 12, 2015. The judge ordered the respondent to produce the documents set forth in BISCO's request for production that were within his immediate possession within fourteen days, and

to search the documents in storage and produce those documents to BISCO within thirty days.

To date, the respondent has failed to return any files to BISCO or to produce any documents sought by BISCO in the Superior Court action. The respondent also has failed to account to BISCO for any funds received or expended on its behalf, or to return to BISCO the approximately \$9,500 that BISCO paid the respondent for court fees and costs for collection actions never commenced by the respondent. To date, the respondent also has failed without good cause to provide bar counsel the documents requested in connection with bar counsel's investigation of the BISCO matter, including trust account records and the documents specified in the schedule of documents attached to the May 8, 2015 subpoena issued by the board. The respondent also did not appear at the hearing before me on February 17, 2015.

2. Discussion. Because the respondent did not appear before the board, he was defaulted and bar counsel's allegations are deemed admitted. See S.J.C. Rule 4:01, § 3(a). Accordingly, the sole question before me is the proper disciplinary sanction. Bar counsel's information, and the board after a hearing, each recommend that the respondent be suspended from the practice of law in the Commonwealth for a period of three years. By his failure to file an opposition or to appear

at the hearing before me, the respondent has waived any objection to the recommended sanction, as well as the opportunity to present any factors in mitigation.

a. Standard of review. "We generally afford substantial deference to the board's recommended disciplinary sanction." Matter of Griffith, 440 Mass. 500, 507 (2003). At the same time, the disciplinary sanction imposed should not be "markedly disparate from judgments in comparable cases." Matter of Foley, 439 Mass. 324, 333 (2003), quoting Matter of Finn, 433 Mass. 418, 422-423 (2001). The "primary concern in bar discipline cases is 'the effect upon, and perception of, the public and the bar,' and we must therefore consider, in reviewing the board's recommended sanction, 'what measure of discipline is necessary to protect the public and deter other attorneys from the same behavior.'" Matter of Lupo, 447 Mass. 345, 356 (2006), quoting Matter of Finnerty, 418 Mass. 821, 829 (1994) and Matter of Concemi, 422 Mass. 326, 329 (1996). Nonetheless, "each case must be decided on its own merits and every offending attorney must receive the discipline most appropriate in the circumstances, Matter of Foley, supra, quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984).

b. Appropriate sanction. This case presents a combination of different types of misconduct, in unrelated client matters. The respondent neglected two client matters, resulting in harm

to the clients, failed to communicate with the clients about the status of their matters, despite their requests that he do so, made material misrepresentations to the clients in an effort to conceal his neglect, failed to return the unearned portion of his fees and unused expenses to both clients, failed to return the client's documents to one client, and failed to comply with a subpoena to testify. Although, given the multiple types of misconduct, it is challenging to find a precisely comparable case, involving the same combination of misconduct, "[t]he court 'need not endeavor to find perfectly analogous cases, nor must we concern ourselves with anything less than marked disparity in the sanctions imposed.'" See Matter of Doyle, 429 Mass. 1019, 1014 (1999); quoting Matter of Hurley, 418 Mass. 649, 655 (1994). I turn to examination of roughly analogous cases; involving misappropriation of clients' funds and neglect of client matters, in combination with other misconduct.

In Matter of Cassidy, 29 Mass. Att'y Disc. R. 114 (2013), the respondent was disbarred for conversion of estate and settlement funds; failure to conduct work on the case, and failure to return the accepted retainer. In Matter of Pignone, 28 Mass. Att'y Disc. R. 704 (2012), the respondent was suspended for two years on three disciplinary counts, one of which involved failure to diligently represent his client, misappropriation of the fee paid for representation; failure to

return the client's file until a complaint was filed with bar counsel, and failure to respond to bar counsel's requests for information. In Matter of Harmon, 28 Mass. Att'y Disc. R. 409 (2012), the respondent was suspended for a period of one year and one day for failure to provide diligent and prompt representation to her clients, failure to return files to her clients, failure to return unearned advanced fees and unused advanced expenses, and failure to cooperate with bar counsel's investigations. In Matter of Raymond, 24 Mass. Att'y Disc. R. 597 (2008), the respondent was suspended for two years for neglect of three divorce cases, misrepresentations to a client concerning the case status, and resulting harm and potential harm to her clients (aggravated by a history of discipline for neglect and mitigated by the respondent's depression):

These cases demonstrate that, for what may appear to be similar violations of the same disciplinary rules, varying sanctions have been imposed depending on the specific circumstances, from disbarment, to suspension for two years, to suspension for one year and one day.

In the instant case, the respondent did not return the fees and expenses to his clients, and has harmed his clients. There is no indication in the record before me, however, that the respondent converted the fees and advances for expenses to his own use. Nor does the record contain any mention of what might

be mitigating circumstances. The record does indicate however, through the harm to multiple clients from the respondent's neglect, his failure to return the unearned advanced fees and unused expenses, his failure to comply with the Superior Court order to return documents to one of his clients, and his failure to cooperate with bar counsel's investigation, that the respondent's conduct forms a "persistent and extended pattern of improper and unethical behavior" over a number of years. See Matter of Saab, 406 Mass. 315, 325 (1989).

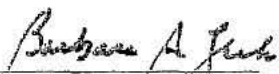
Taking into account all of the above, I conclude that a suspension from the practice of law in the Commonwealth for three years is the appropriate sanction. There is no indication here that the respondent intended to deprive his clients of their funds, either temporarily or permanently, or has used them for his own benefit, and the harm to his clients by the respondent's misconduct did not reach the magnitude appropriate for disbarment. Cf. Matter of Eisenhauer, 426 Mass. 448, 456 (1998), quoting Matter of Schoepfer, 426 Mass. 183, 188 (1997) ("[W]here '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'"): On the other hand, the harm that the clients have suffered, and the respondent's persistent pattern of misconduct, call for



imposition of a sanction that fulfills the purpose of protecting the public from further misconduct and ensuring public confidence in the members of the bar of the Commonwealth.

3. Conclusion. An order shall enter suspending the respondent from the practice of law in the Commonwealth for a period of three years.

By the Court

  
Barbara A. Lenk  
Associate Justice

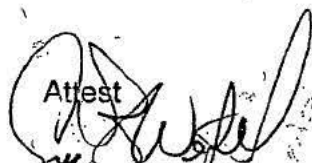
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Date

Attest

  
Assistant Clerk