IN RE: ROBERT C. MORAN

NO. BD-2016-076

S.J.C. Order of Term Suspension entered by Justice Hines on May 4, 2017, with an Effective date of June 3, 2017.[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.

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SUPREME JUDICIAL COURT
THE COUNTY OF SUFFOLK

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. BD-2016-076

IN RE: ROBERT C. MORAN
CORRECTED MEMORANDUM OF DECISION[1]

The Board of Bar Overseers (board), has filed an information pursuant to S.J.C. Rule 4:01, § 8 (6), recommending that the respondent, Robert C. Moran, be suspended from the practice of law in the Commonwealth for nine months with the requirement that he be subject to a hearing on any petition for reinstatement. The board further recommends that the respondent be permitted to apply for reinstatement on or after the six month anniversary of his nine month suspension.

For the reasons set forth below, I conclude that the board's recommendation of a nine month suspension with the requirement of a reinstatement hearing is an appropriate sanction for the conduct established by substantial evidence in the record. However, I decline to adopt the recommendation that the respondent be permitted to apply for reinstatement after six months of suspension.

[1] Subsequent to the issuance of this court's memorandum of decision dated May 1, 2017, certain scrivener's errors in the May 1, 2017, memorandum of decision were corrected.

Background and procedural history. Bar counsel filed a five count petition for discipline against the respondent with the board on August 3, 2013. The petition was subsequently amended on March 4, 2014. Bar counsel alleged misconduct in handling the affairs of two elderly clients, Reta Wilcox and Catherine Stevens, for whom he acted under power of attorney, misconduct while serving as executor of their estates, and various IOLTA accounting violations. The respondent answered the petition on November 15, 2013, and then later, on March 13, 2014, filed an amended answer. Thereafter, on April 24, 2014, the respondent moved to compel discovery. On May 7, 2014, the hearing committee (committee) denied the motion, except to the extent that bar counsel had not already complied with certain specific requests. Following the denial, the respondent filed a motion for clarification of the May 7 order, which the committee denied.

In August, 2014, the respondent's counsel withdrew from representation, and the respondent proceeded pro se. The committee held hearings over a period of nine days throughout September and October of 2014, and on December 31, 2014, the parties filed their proposed findings and conclusions. The committee issued a report of its findings and conclusions on January 11, 2016. In addition to finding numerous violations of the Massachusetts Rules of Professional Conduct, the committee

found no mitigating factors. However, the committee found several aggravating factors: (1) the respondent's substantial experience as a lawyer; (2) his multiple acts of misconduct involving multiple clients; (3) the fact that both clients were elderly and without relatives in a position to watch over their interests; (4) his lack of awareness of the wrongful nature of his conduct; and (5) his failure to refund or restore fees from the clients or their estates.

Despite these violations and aggravating factors, the committee rejected the one year suspension and requirement of a reinstatement hearing as sought by bar counsel. Instead, the committee recommended that the respondent receive a public reprimand.

The respondent appealed, challenging the committee's findings and raising various other claims of error. Bar counsel cross-appealed the committee's finding of no violation of Mass. R. Prof. C. 1.8(c), as amended, 411 Mass. 1318 (1992), and recommendation for discipline. The board held a hearing on April 11, 2016. On June 13, 2016, the board adopted the majority of the committee's findings of fact and conclusions of law. However, the board found violations of rule 1.8(c), and declined to adopt the committee's proposed sanction, opting instead to adopt the sanction proposed by the committee's dissenting member.

Background facts. The following summary of the conduct that is the subject of this petition for discipline is drawn from the committee's findings of fact, which were adopted by the board. The respondent was duly admitted to the Bar of the Commonwealth on December 16, 1977. Since 1999, the respondent has been a sole practitioner in Winchester and has done work involving the estates of decedents, guardianships, conservatorships, wills and trusts preparation, purchase and sale of residential real estate, and has acted as a guardian ad litem.

1. Count one: Wilcox estate pre death misconduct. In 1993, the respondent began his representation of Wilcox and her husband. Following her husband's death in 1995, Wilcox's only known relative was an elderly cousin, Stevens; Wilcox and her husband had no children. Between 1995 and 2006, the respondent prepared a series of wills and durable powers of attorney (DPOA).

The final DPOA named the respondent Wilcox's attorney-in-fact. Notably, the DPOAs did not have a provision for payment to the attorney-in-fact for services rendered. The final will nominated the respondent as executor and bequeathed all of Wilcox's tangible personal property to him. While the will did not impose a trust in connection with the bequest, it included a request that the respondent distribute the items in accordance

with Wilcox's wishes or in accordance with any memorandum that she may later make subsequent to the will's execution.

In 2005, Wilcox's health began to fail, and she moved into an assisted living facility. The majority of Wilcox's personal property was sold for approximately $22,000. In 2007, the respondent attended the sale of Wilcox's Winchester house as her attorney-in-fact, and received $435,000 in net proceeds from the sale. The respondent maintained those funds both in Wilcox's personal bank account and in an interest-bearing account that he opened jointly with Wilcox. Neither account was a trust account, thus the respondent could remove funds from the account at will. Additionally, the respondent retained several items, with a collective value of at least $7,500 - $10,000.

According to the respondent, he rendered a variety of services for Wilcox from 2005 until her death.[2] Without informing Wilcox of the cost or rendering any itemized bills or other accounting, the respondent paid himself a total of $209,500, at his legal rate of $250 per hour, for all services rendered, both legal and nonlegal. Based on these facts, the committee concluded that the conduct of the respondent violated:

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[2] The respondent, Robert C. Moran, charged legal rates for the following nonlegal services: (1) taking care of the house, including snow removal and yard clean up; (2) selling the house and personal property; (3) selecting assisted living facilities for Wilcox; (4) conferring with doctors, nurses, and medical staff, and making medical appointments; (5) making social visits; and (6) making funeral and burial arrangements.

Mass. R. Prof. C. 1.15(b)(1), as appearing in 471 Mass. 1380 (2015) (holding and depositing trust funds of Wilcox in nontrust accounts); Mass. R. Prof. C. 1.5(a), as amended, 471 Mass. 1304 (2015) (charging and collecting clearly excessive fees); Mass. R. Prof. C. 1.15(d)(2) (failing to give timely written notice of all of respondent's fee withdrawals).

2. Count two: Misconduct as executor of Wilcox estate. Wilcox died on July 24, 2009, and as a result, the DPOA terminated. Nevertheless, the respondent continued to act pursuant to it. Specifically, the respondent closed the account that he held jointly with Wilcox and placed the funds into an IOLTA account that he maintained. Before the Probate Court appointed him as the executor of the estate, the respondent disbursed a total of $8,836.19 from estate funds to his IOLTA account to pay for funeral costs and estate expenses. On July 28, 2009, the respondent timely filed an uncontested petition in the Middlesex Probate and Family Court for the approval of Wilcox's will and his appointment as executor. On September 8, 2009, the Probate Court allowed the will and appointed the respondent as executor of the estate.

Although G. L. c. 195, § 5, as then in effect, required the probate inventory to be filed by December 8, 2009, the respondent did not file the inventory until September, 2014. The respondent was also years late in filing Federal tax returns

for the estate. Additionally, the respondent did not properly marshal Wilcox's assets and failed to hold estate funds in a separate, interest-bearing account with interest payable for the benefit of the estate. Nor did he pay bequests in a timely manner. As of the date of the 2014 petition for discipline, no distributions to any estate beneficiaries under the will had been made.

Consistent with his practice before Wilcox's death, the respondent continued to pay himself at his legal rate of $250 per hour for all of his services rendered, legal and nonlegal. Ultimately, following Wilcox's death, the respondent's time charges amounted to $27,900 for his services, and $10,310 for the services of his paralegal at a rate of one hundred dollars per hour. Accordingly, the committee concluded that the conduct of the respondent violated: Mass. R. Prof. C. 1.1, as appearing in 471 Mass. 1311 (2015), and Mass. R. Prof C. 8.4(d), as appearing in 471 Mass. 1483 (2015) (by making postdeath disbursements of Wilcox estate funds without authority and prior to respondent's appointment by the probate court as executor); Mass. R. Prof. C. 1.5(a) (charging and collecting clearly excessive fees); Mass. R. Prof. C. 1.15(b)(1), and Mass. R. Prof. C. 1.15(e)(5) (by withholding Wilcox estate funds in nontrust accounts and failing to place and retain all estate funds in a segregated trust account with interest payable for

benefit of estate); Mass. R. Prof. C. 1.2(a), as appearing in 471 Mass. 1313 (2015), Mass. R. Prof. C. 1.3, as appearing in 471 Mass. 1318 (2015), and Mass. R. Prof. C. 1.15(c) (failing to make timely distributions to Wilcox estate beneficiaries); and Mass. R. Prof. C. 1.1 and Mass. R. Prof. C. 1.3 (failing to render competent and diligent services in connection with the Wilcox estate); Mass. R. Prof. C. 1.1, Mass. R. Prof. C. 1.3, Mass. R. Prof. C. 1.15(d)(1), Mass. R. Prof. C. 3.4(c), as appearing in 471 Mass. 1425 (2015), and Mass. R. Prof. C. 8.4(d) (by failing to file a probate inventory and probate accounts for Wilcox estate and failing to render accountings to estate beneficiaries).

3. Count 3: Stevens estate pre-death misconduct. The respondent became acquainted with Stevens through Wilcox, her only known relative, and began to represent Stevens in March, 1994. As with Wilcox, the respondent prepared a series of wills and DPOAs for Stevens. The final DPOA appointed the respondent as the attorney-in-fact, and the will nominated the respondent as the executor. The will also gave the respondent all of Stevens' tangible personal property, with the request that he distribute the items in accordance with her wishes as she may later designate. The will also made thirteen bequests to individuals and charities and, left the remainder of her estate to Wilcox, should she survive Stevens. In the event that Wilcox

did not survive Stevens, the remainder of her estate was to be distributed to seven charities.

From 2005 until her death on April 29, 2010, the respondent assisted Stevens with her financial and personal affairs in a fashion similar to the services he provided Wilcox. For instance, the respondent withdrew $10,000 from an account in Stevens' name and opened a new, interest-bearing, non-trust joint account in Stevens' name and his own name. As with Wilcox, the respondent charged Stevens for his services, both legal and nonlegal,[3] at his legal rate of $250 per hour without ever providing any itemized bills or any form of accounting. From 2006 until her death in 2010, the respondent paid himself a total of $219,393.25 for his services. Therefore, the committee concluded that the respondent's conduct violated: Mass. R. Prof. C. 1.15(b)(1) (holding and depositing trust funds of Stevens in non-trust accounts); Mass. R. Prof. C. 1.5(a) (charging and collecting clearly excessive fees); and Mass. R. Prof. C. 1.15(d)(2) (failing to give timely written notice to Stevens of all of respondent's fee withdrawals).

[3] The respondent charged legal rates for the following nonlegal services: (1) picking up or checking the mail; (2) sending mail and faxes; (3) depositing and/or transferring money at the bank; (4) checking the house and making phone calls for maintenance; (5) shoveling the snow; (6) moving preparation and personally cleaning Stevens' house; (7) shopping and personal care activities; and (8) making funeral arrangements and attending the funeral.

4. Count four: Misconduct as executor of Stevens estate. The respondent's authority to act as attorney-in-fact pursuant to the DPOA terminated on April 29, 2010, when Stevens died. Nevertheless, he continued to act as attorney-in-fact. For example, the respondent represented himself as Stevens' power of attorney on a proceeds check made payable to Stevens, which he deposited in his IOLTA account. Additionally, the respondent disbursed and deposited other estate funds in his IOLTA account. Of the total disbursements made, the respondent paid a total of $36,893.25 for claimed predeath fees and expenses.

On June 15, 2010, the respondent filed an uncontested petition in the Norfolk Probate and Family Court for the allowance of Stevens' will and his appointment as executor. On September 9, 2010, the court allowed the will and appointed the respondent executor of the estate. As with the Wilcox estate, the respondent failed to hold all of the Stevens estate funds in a separate, interest-bearing trust account with interest payable for the benefit of the estate and he failed to timely file an inventory for the estate. The filing of the inventory delayed until 2011; it was also inaccurate. The respondent also failed to timely collect insurance proceeds and to promptly redeem savings bonds and initiate stock liquidation. Finally, the respondent failed to liquidate or distribute all of the estate's

tangible personal property and distributions of the Stevens estate also were not made in a timely manner.

On April 28, 2014, the respondent filed an amended first and final account for the estate, falsely reporting that he had made final distributions to beneficiaries and distributed all of the estate funds, and claiming entitlement to $43,692.50 in fees. During that same year, the Attorney General and counsel for one of the residuary legatees filed objection to both of the account and the amended account, challenging the respondent's claimed fees.

From November, 2010, through April, 2014, the respondent paid himself a total of $21,000 from the estate as fees for his postdeath services. At the hearing on the petition for discipline, the respondent claimed that he was still owed an additional $20,000 for his work on the estate. Thus, the committee determined that the respondent's conduct violated: Mass. R. Prof. C. 1.1, Mass. R. Prof. C. 3.4(c), and Mass. R. Prof. C. 8.4(d), (by making postdeath disbursements of Stevens estate funds without authority and prior to respondent's appointment by the probate court as executor); Mass. R. Prof. C. 1.5(a) (charging and collecting clearly excessive fees); Mass. R. Prof. C. 1.15(b)(1) and Mass. R. Prof. C. 1.15(e)(5) (by withholding Stevens estate funds in nontrust accounts and failing to place and retain all estate funds in a segregated

trust account with interest payable for the benefit of estate); Mass. R. Prof. C. 1.2(a), Mass. R. Prof. C. 1.3, and Mass. R. Prof. C. 1.15(c) (failing to make timely distributions to Stevens estate beneficiaries); Mass. R. Prof. C. 1.1, Mass. R. Prof. C. 1.3, Mass. R. Prof. C. 1.15(d)(1), Mass. R. Prof. C. 3.4(c), and Mass. R. Prof. C. 8.4(d) (by failing to file a probate inventory and probate accounts for Stevens estate and failing to render accountings to estate beneficiaries); and Mass. R. Prof. C. 1.3 (failing to render competent and diligent services in connection with Stevens estate).

5. Count five: Trust account and trust fund violations. In January, 1990, the respondent opened an IOLTA account, which between January, 1990, and July, 2013, he used for the deposit and disbursement of trust funds. Between at least July 1, 2004 and May 1, 2013, the respondent failed to prepare and maintain accurate records required for his IOLTA account and necessary for proper reconciliation. Also during that time period, the respondent failed to reconcile his IOLTA account.

On occasion between approximately 1990 and 2013, the respondent failed to promptly remit to clients or third parties all funds due to them from his IOLTA account, and failed to properly withdraw from his IOLTA account all of his earned fees and expense reimbursements. Last, at least between approximately 2009 and July, 2013, the respondent failed to

reconcile his conveyancing account. Based on these facts, the committee concluded that the conduct of the respondent violated: Mass. R. Prof. C. 1.15(b)(1) and Mass. R. Prof. C. 1.15(e)(5) (depositing and holding trust funds in respondent's nontrust conveyancing account); Mass. R. Prof. C. 1.15(c) (failing promptly to remit to all clients and third parties trust funds to which they were entitled); Mass. R. Prof. C. 1.15(b) (failing to withdraw promptly all earned fees and expense reimbursements from IOLTA account); and Mass. R. Prof. C. 1.15(f)(1)(B)-(E) (failing to reconcile adequately and maintain required records for IOLTA accounts).

Discussion. 1. Prehearing order regarding respondent's discovery request. The respondent argues that the committee's failure to enforce its prehearing discovery order constituted an abuse of discretion. The respondent's argument is unavailing. On February 24, 2014, following the prehearing conference, the committee issued a prehearing order mandating, in relevant part, that bar counsel provide to the respondent's counsel a copy of the spreadsheet that bar counsel compiled by April 15, 2014. On April 25, 2014, the respondent filed a motion to compel discovery, which the committee denied, except to the extent that bar counsel had not already complied with the previous order. Thereafter, the respondent filed a motion, seeking clarification as to whether the spreadsheets provided by bar counsel met the

discovery obligations outlined by the committee. The motion was denied on June 6, 2014.

As the board noted, the February, 2014, prehearing order required bar counsel to provide spreadsheets identifying the alleged excessive fees and explaining why such charges were excessive. The spreadsheets provided by bar counsel did just that. The respondent's argument that the spreadsheets failed to inform him of the charges against him is without merit. In a supplemental disclosure submitted as an exhibit to its opposition to the respondent's motion to compel, bar counsel further explained in detail why certain services were classified as "excessive." The board properly rejected this argument.

2. Admission of spreadsheets. The respondent next argues that the spreadsheets created by bar counsel should have been excluded in their entirety. Specifically, the respondent contends that columns B, M, N, O, and P[4] reflect bar counsel's

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[4] The spreadsheet compiled by bar counsel comprised fifteen substantive columns labeled: B, C, E, F, G, H, I, J, K, L, M, N, O, P, and Q. Column B reflects entries with a single time charge relating to multiple activities in the narrative from the respondent's handwritten client notes. Column M sets forth bar counsel's transcription of the respondent's narrative entries in his client notes, with omitted information reflected by ellipses. Column N reflects bar counsel's general classification of each entry in the respondent's client notes into either legal, care management, brokerage, administrative, labor, or social based on the contents of the narrative. Column O further classifies each entry by task, including, call, meeting, drafting, bill paying, packing, and cleaning, and Column P classifies each entry by type, including, but not

characterizations of the nature of the respondent's work, rather than a fair reflection of the contents of the underlying documents, the respondent's handwritten notes.

As a threshold matter, the columns regarding which the respondent claims error were admitted solely as "chalks," not as evidence. The admission was not error. Although the board determined portions of the spreadsheets admissible as chalks under Mass. G. Evid. § 1006, Mass. G. Evid. § 611(a) provides further support. As the Appeals Court correctly noted,

> "Massachusetts Guide to Evidence § 611(a) recognizes the trial court's common-law authority to 'control' the 'mode' of 'presenting evidence.' Trial judges have broad discretion to control the mode and order in which evidence is presented subject to proper balancing for risk of needless presentation of cumulative evidence and risk of unfair prejudice. Although the Massachusetts Guide to Evidence does not address the admissibility of 'chalks,' it is plain that'[a] judge . . . has considerable, but not unrestrained, discretion as to the degree to which chalks can be used'" (internal citations omitted).

Commonwealth v. Wood, 90 Mass. App. Ct. 271, 281 n.9 (2016). Here, columns B and M through P, were admitted as a "pedagogical device," not evidence. Id. at 279. While the portions of the chart at issue contained bar counsel's characterization of the respondent's work as reflected in his client notes, summary documents "may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and

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limited to, estate planning, health and services, housing, house maintenance.

conclusions drawn from the underlying evidence by the summary's proponent." Id. at 281 n.10, quoting United States v. Milkiewicz, 470 F.3d 390, 397-398 (1st Cir. 2006).

Even if the committee abused its discretion allowing columns B, and M through P to be used as chalks, the error was not prejudicial. See id. at 281-282, quoting Commonwealth v. Graham, 431 Mass. 282, 288 (2000) ("An error preserved by objection is nonprejudicial . . . [where] that error did not influence the jury, or had but very slight effect"). As the board noted, the committee conducted its own detailed calculations and categorizations that suggest that it carefully considered all of the evidence presented during the hearing. Moreover, contrary to the respondent's argument, the record clearly reflects bar counsel's expert witness, James R. DeGiacomo, who the committee determined to be credible, made his own determinations regarding whether the services provided by the respondent were legal or nonlegal. Where the expert relied on the information in column M (bar counsel's transcriptions of the respondent's client notes), he often cross-checked the transcriptions with the respondent's client notes. Accordingly, the committee did not abuse its discretion in admitting portions of the spreadsheets as chalks.

3. Expert witness qualifications and testimony. a. Qualifications. The respondent next challenges the committee's

ruling qualifying DeGiacomo as an expert witness. According to the respondent, the committee's decision to reverse its initial determination that DeGiacomo was not qualified as an expert in the administration of the personal and financial affairs of living clients was arbitrary and capricious. The committee, tasked with performing functions analogous to a trial judge, has wide discretion in evaluating an expert's qualifications, see Commonwealth v. Maltais, 387 Mass. 79, 93 (1982), and the "determination will not be upset on appeal if any reasonable basis appears for it." Commonwealth v. Mahoney, 406 Mass. 843, 852 (1990). "'The crucial issue' in determining whether a witness is qualified to give an expert opinion 'is whether the witness has sufficient "education, training, experience and familiarity" with the subject matter of the testimony.'" Commonwealth v. Rice, 441 Mass. 291, 298 (2004), quoting Commonwealth v. Richardson, 423 Mass. 180, 183 (1996). As the respondent points out, initially, the committee qualified DeGiacomo as an expert regarding probate practice and procedure, probate and administration of estates, and the charging of antemortem and postmortem fees, but declined to qualify DeGiacomo as to the administration of personal and financial affairs of living clients.

However, following further questioning by both bar counsel and the committee chair specifically focused on his experience

in the administration of the personal and financial affairs of living people and the financial affairs of people under guardianship or conservatorship, and his experience with matters involving durable power of attorney, the committee satisfied itself that the witness was qualified to testify as an expert, noting that the matters had "some blurred lines." The court has made clear, "[t]here is no requirement that testimony on a question of discrete knowledge come from an expert qualified in that subspecialty rather than from an expert more generally qualified." Mahoney, 406 Mass. at 852. Accordingly, the board properly rejected this argument.

b. Crediting the expert's testimony. The respondent also contends that the committee erred in crediting the expert's testimony where his opinions lacked an adequate factual basis. The committee credited DeGiacomo's testimony and his methodology in determining the percentage of the respondent's premortem services that constituted legal work and the percentage that constituted a mixture of legal services and fiduciary activities under the power of attorney or the health care proxy. Importantly, the committee credited DeGiacomo's testimony that reading every entry in the respondent's client notes was not necessary to render his opinion.

It is well established that "the hearing committee is 'the sole judge of credibility of the testimony presented at the

hearing,'" including expert testimony. Matter of an Attorney, 29 Mass. Att'y Disc. R. 727, 739 (2013). See S.J.C. Rule 4:01 (5), as appearing in 471 Mass. 1438 (2015). Because experts are not required to make an exhaustive review of the record, and because inadequacies with respect to preparation and errors in the expert's analysis go to the weight of the testimony, see Sullivan v. First Massachusetts Fin. Corp., 409 Mass. 783, 792 (1991) (judge not required to strike expert testimony, "errors [go to] the weight of that testimony"), the respondent's argument is unavailing. "Absent clear error or a finding that the determination is wholly inconsistent with other findings, a court cannot disturb the hearing committee's credibility determinations." Matter of an Attorney, 29 Mass. Att'y Disc. R. at 739. The committee made no such error, therefore, the board properly rejected the respondent's appeal on this ground.

4. Whether the respondent received a full and fair hearing. The crux of the respondent's next contention is that the committee abused its discretion in limiting his ability to refer to his client notes. According to the respondent, reference to his client notes was necessary to allow him to testify about the approximately 2,000 hours of work that he completed and his reasons for completing such work. For the reasons stated by the board, the respondent's arguments are without merit. General Laws c. 30A, § 11 (2), provides,

"[a]gencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses." The committee indicated to the respondent that because he was representing himself, he would be given "leeway" to "essentially narrate." The committee warned, however, that it would not allow the respondent to read through his notes or go through every page. Although the respondent frames the committee's warning as a prohibition against using his notes to refresh his recollection, the committee made clear that it would allow him to refer to his notes "for a particular point to be made." Such limitation was well within the committee's discretionary power under G. L. c. 30A, § 11(2) and B.B.O. Rules, § 3.30.

Similarly, the respondent's argument that the committee imposed an arbitrary time limit on the presentation of his case is unavailing. Scheduled to end on October 16, 2014, the committee allotted a total of nine days for the respondent's hearing. The respondent concedes that, although he could have commenced his testimony on the afternoon of the sixth day, by his request, he began his testimony on the seventh day of the hearing. He also concedes that he concluded his testimony on the eighth day "with time to spare." Under the committee's schedule, the respondent had ample time to present further testimony had he wished. Nevertheless, the respondent argues

that he was prevented from presenting his entire case because he was prohibited him from referring to his notes. For the reasons stated supra, this argument is without merit. Thus, the board properly concluded that the respondent was not deprived of a full and fair hearing.

5. Findings of fact and conclusions of law. Finally, the respondent asserts myriad errors in the board's factual findings and legal conclusions. First, it is well established that "although not binding on this court, the findings and recommendations of the board are entitled to great weight." Matter of Barrett, 447 Mass. 453, 459 (2006). We also have made clear that "subsidiary facts found by the [b]oard and contained in its report with the information shall be upheld if supported by substantial evidence, upon consideration of the record." Id., quoting S.J.C. Rule 4:01, § 8(4). I conclude that the challenged findings of fact are properly supported by substantial evidence.

Second, the respondent's argument that the board erred in applying certain Rules of Professional Conduct that were not introduced into evidence by bar counsel, as required by G. L. c. 30A, § 11 (5), is unavailing. General Laws c. 30A, § 11 (5), relates to facts judicially noticed by the court of which agencies may take notice, and has no bearing on whether the Rules of Professional Conduct are before the board in the cases

it hears. Similarly, the board's reliance on admissions in the respondent's answer was not inconsistent with G. L. c. 30A, § 11.

The remainder of the respondent's claimed errors constitute unsupported assertions that fail to rise to the level of appellate argument required by Mass. R. A. P. 16(a)(4), as amended, 367 Mass. 921 (1975). Thus, I decline to address them. See Matter of Abbott, 437 Mass. 384, 395 (2002).

6. Appropriate sanction. The respondent does not challenge the board's recommendation -- adopted from the dissent -- of suspension from the practice of law for nine months, with the requirement that he be subject to a hearing on any petition for reinstatement, and that he be allowed to apply for reinstatement after six months. Bar counsel, however, argues that, considering the respondent's "continued intransigence and lack of insight," an increased sanction to a suspension of eighteen months is warranted. In the alternative, bar counsel urges that I impose the nine month suspension recommended by the board, but reject the board's recommendation for an early reinstatement, and require a full reinstatement hearing.

The board's recommendation on the appropriate sanction is "entitled to great weight." Matter of Murray, 455 Mass. 872, 879 (2010). See Matter of Barrett, 447 Mass. at 464 ("the recommendation of the board 'is entitled to substantial

deference'"). "Review of the board's recommendation is guided by our rule that disciplinary action against an attorney should not be "markedly disparate from those ordinarily entered by the various single justices in similar cases." Matter of Alter, 389 Mass. 153, 156 (1983). See Matter of Goldberg, 434 Mass. 1022, 1023 (2001). However, it is well established that "[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 Murray, 445 Mass. at 883, quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984).

Here, the board first notes that the respondent filed false and misleading documents with the Probate Court,[5] and that the usual sanction for such misconduct is a suspension of one to two years. See Application for Admission to the Bar, 431 Mass. 678, 681 n.6 (2000) (noting "[g]enerally, in bar discipline cases, the filing of false documents before a court or an agency requires suspension" and, citing cases affirming one year suspensions); Matter of McCarthy, 416 Mass. 423, 431 (1993) (violation of obligation to be truthful to court "warrants and requires meaningful sanction;" "[a]bsent substantial mitigating

[5] Aside from his unsupported assertion to the contrary, the respondent provides no grounds or record support suggesting that this determination is not supported by substantial evidence. Thus, the respondent's argument warrants no further attention. See Mass. R. A. P. 16(a)(4), as amended, 367 Mass. 921 (1975)

factors . . . the minimum sanction for such conduct is one year suspension from the practice of law"); Matter of Diviacchi, ___ Mass. Att'y Disc. ___, BD-215-042, slip op. at 11-12 (Dec. 7, 2016), and cases cited (noting "usual and presumptive" sanction for giving false statement under oath is two years). However, as pointed out in the committee dissent, which the board adopted, here there is "some merit" in a downward departure from the usual sanction. In particular, the fact that the respondent corrected the documents containing the false statements -- although this was not done until after bar counsel raised the issue -- warrants a slight downward departure. See Matter of Griffith, 440 Mass. 500, 510 (2003) ("While we consider the length of time the respondent permitted his concealment . . . , we give some consideration to the respondent's eventual disclosure of the information" [citations omitted]).

Second, although the board correctly considered the remaining violations in the aggregate, the board points out that the lowest sanction warranted for the respondent's other violations, when considered individually, is a public reprimand. "The simultaneous consideration of separate violations . . . is an established part of the disciplinary system of this Commonwealth." Matter of Kerlinksy, 428 Mass. 656, 666 (1999), quoting Matter of Saab, 406 Mass. 315, 326 (1989).

Third, the board considered the aggravating factors, which included: (1) the respondent's misconduct took advantage of elderly clients without familial support; (2) the respondent's insistence that he was entitled to the fees that he charged and collected; (3) the respondent's failure to acknowledge his misconduct; and (4) the respondent's continuing failure to make or offer restitution. See Matter of Cobb, 445 Mass. 452, 480 (2005) (failure to acknowledge "nature, effects, and implication" of misconduct and vulnerability of client constitute factors in aggravation); Matter of Bailey, 439 Mass. 134, 152 (2003) ("failure to recognize or appreciate the wrongful nature" of serious misconduct constitutes an aggravating factor).

Based on the nature of the respondent's misconduct, I agree that a suspension of nine months with the requirement that the respondent be subject to a reinstatement hearing is appropriate. However, I disagree that allowing the respondent to apply for reinstatement after six months of suspension period is appropriate. Considering that the sanction for filing false or misleading documents before a court or agency generally requires a suspension of one to two years, the cumulative effect of the respondent's various violations, and the aggravating factors present, the full nine month suspension is more appropriate.

ORDER

ORDER

For the foregoing reasons, the respondent is hereby suspended from the practice of law for nine months, and may be reinstated only after a hearing. An order shall enter in accordance with this memorandum of decision.

Geraldine S. Hines

Associate Justice

Dated: May 5, 2017

Jennifer Branson

From: efilingmail@tylerhost.net
Sent: Friday, May 5, 2017 4:21 PM
To: Jennifer Branson
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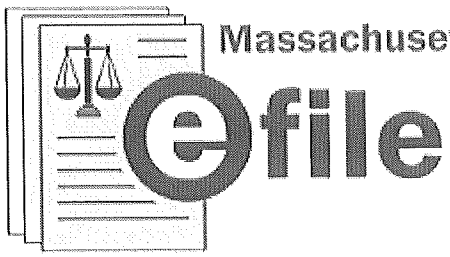

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