IN RE: ROBERT B. CARMEL-MONTES

NO. BD-2019-046

S.J.C. Order of Term Suspension entered by Justice Cypher on August 19, 2019, with an effective date of September 18, 2019.[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.

EXHIBIT 1

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL,	)
Petitioner,	)
v.	)
ROBERT CARMEL-MONTES, ESQ.,	)
Respondent.	)

BOARD MEMORANDUM

A hearing committee concluded that the respondent knowingly misused payments received in advance on behalf of a client under a written hourly fee agreement, money that constituted a retainer as a matter of law and which should not have been withdrawn until the fee was earned. The committee characterized the misuse as a good faith mistake on the part of the lawyer, who claimed that the payment represented a flat fee, which he was entitled to draw down immediately. We do not agree that the respondent's misuse of client funds was merely a mistake. The terms of the fee agreement were – and should have been – clear to the respondent. Rather than accept the committee's recommendation of a six-month suspension with three months stayed, we recommend that the court suspend the respondent for the entirety of the six-month period and that the court require him to file a petition for reinstatement if in the future he seeks readmission to the bar.

FACTS

Unless otherwise indicated, we adopt the hearing committee's findings of fact, as they are not erroneous. BBO Rules, § 3.53.

Admitted to the bar in 1998, the respondent, Robert Carmel-Montes, has practiced on his own since 2001, focusing on immigration and criminal law.

On August 27, 2015, Juan Rosado approached Attorney Carmel-Montes about representing Juan's brother, Jorge Rosado, in a criminal case then pending in the Newburyport District Court. The authorities had charged Jorge Rosado with possession of more than 100 grams of cocaine with intent to distribute and conspiracy to violate a drug law. The defendant posted bail of $20,000 and was released.

Based on his experience, the respondent anticipated that the case would be prosecuted in superior court. Thus, he and the client entered into two separate but materially identical fee agreements: one for $13,000 for district court work and the other for $16,000 for superior court.[1] In relevant part, both agreements provided as follows:

> 1. The Client hereby agrees to reimburse the Firm [respondent] for all costs and disbursements incurred by it and to pay for all legal services performed on the Client's behalf at the hourly rates set forth herein below. This Agreement is *not* contingent upon the outcome of the above-referenced litigation.
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> 2. The Firm hereby acknowledges receipt of $ _____[2]) [sic] as an initial retainer deposit in this matter, and, in consideration of the payment thereof, agrees to provide legal services in connection therewith. In the event that the sum of money being held is insufficient, the client shall be charged $250.00 per each additional hour of labor (billed in increments of .25 hours).
>
> 3. In the event the money being held as a retainer is insufficient to satisfy any of the Firm's invoices, *the Client shall promptly pay such invoices*

[1] The district court agreement was signed by Juan Rosado, the defendant's brother, and the superior court agreement was signed by the defendant's girlfriend. There was no question that both fee agreements represented an enforceable contract by which Carmel-Montes would provide legal services to Jorge Rosado in connection with a single criminal matter. The respondent provided Juan Rosado and the girlfriend with English and Spanish versions of both agreements. They signed the Spanish versions, which also contained handwritten entries (not present in the English version) setting forth the amount paid for each case and identifying the specific case covered by the agreement.

[2] In the agreement for the district court case, the amount in this space was $13,000; for the superior court case, it was $16,000.

in full, and replenish the retainer in their [sic] totality. The Client understands that no precise estimate of costs and/or legal fees can be given. The total amount of attorneys' fees, costs, and disbursements may be substantially more, or less, than the retainers. The Firm's present estimate to complete this representation is not known.

4. Any invoice not paid after 30 days from a given date/deadline shall permit the Firm to charge 1.5% MONTHLY interest and/or will permit the Firm, after notice to the Client, to terminate the representation of the Client ...

...

7. Invoices will be submitted to the Client from time to time (generally monthly) and the outstanding sum of time charges and disbursements of the Firm will be deducted from the retainer. All interim billings shall be due and payable upon receipt unless otherwise stated. Failure to pay interim billings promptly, to make the payments as set forth herein or to promptly replenish the retainers, will permit the Firm, after notice to the Client, to terminate the representation of the Client to the extent permitted by applicable rules of Professional Conduct [sic] and/or the rules of the court. The Client agrees that the final bill submitted by the Firm for legal fees and costs will be due and payable at the conclusion of the matter or at the termination of the Attorney-Client relationship.

...

9. In the event that, upon either the completion of the within matter, or, the termination of the Firm's representation of the Client, the total cost of the legal services performed and disbursements made by the Firm shall be less than the amount of any retainers paid by the Client, the balance shall be refunded to the Client by the Firm.

...

10. It is understood and agreed that the hourly time charge for legal services includes, but is not limited to, the following: ...

(emphasis in original)

On August 28, 2015, Juan Rosado paid Carmel-Montes $13,000, which was deposited into his IOLTA account. By September 30, 2015, Carmel-Montes had withdrawn the entire

amount and deposited it in his operating account, where he used the money to pay firm expenses and himself.[3]

On September 30, 2015, Jorge Rosado was indicted in superior court and his bail was set at $100,000, an amount he could not afford. He remained in custody for the duration of the case. On October 5, 2015, the same day that Jorge Rosado's girlfriend signed the superior court fee agreement (which was identical to the district court agreement), she paid Carmel-Montes $16,000, which he deposited into his IOLTA account. As of October 14, 2015, all this money had been removed from the IOLTA account.[4]

Carmel-Montes continued to represent Rosado until March 31, 2016 when he was replaced by successor counsel. Represented by the new lawyer, Rosado entered a guilty plea and received a sentence of two and one half (2 ½) years in the house of correction. The respondent did not pay back any money to Rosado at the end of the case. However, the hearing committee found that he had earned all of the $29,000 paid to him in connection with the two engagement letters. As set forth in Appendix "B" to the hearing committee's report, Carmel-Montes performed 123.25 hours of work, which at $250 per hour totaled $30,812.50 of earned fees.[5]

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[3] The $13,000 was part of a total deposit of $20,450 on August 28, 2015. On the same day, the respondent wrote a check on the IOLTA account for $15,000. He testified at the hearing that half of the $15,000 check came from the $13,000 Rosado retainer. As of August 31, 2015, the IOLTA balance was $6,946.17. According to the respondent's billing records, he had performed only $2,000 worth of legal services on behalf of Rosado by that date. By September 30, 2015, the respondent had removed all of Rosado's $13,000 from his IOLTA account, even though he had worked the equivalent of only $5,000.

[4] After Carmel-Montes deposited the $16,000 check, the IOLTA balance was $28,615.80. He subsequently deposited $1,000 unrelated to the Rosado case, leading to a balance of $29,615.80. He then withdrew $29,000 from the account, leaving an IOLTA balance of $615.80. At this point, according to the respondent's time records (Appendix "B" to the Hearing Report), Carmel-Montes had performed $8,562.50 of work on behalf of his client in the district court and superior court. Yet, he had transferred out of the IOLTA account approximately $29,000 (the initial $13,000 from August and the second payment of $16,000 in October), meaning that he had paid himself at least $20,437.50 for work that he had not performed.

[5] Bar counsel did not question the accuracy or truthfulness of the respondent's hourly billing, nor did the hearing committee.

In a third matter, not directly relevant here, on September 5, 2015, Carmel-Montes agreed to represent Jorge Rosado in litigation to recover his car, which the authorities had seized as part of the narcotics case. The agreement for the third case called for a fee of $3,000, which was never paid even though Carmel-Montes and his associate spent time trying to recover the vehicle. Apparently, they billed for that work under the same file as the criminal case. There is no question that the total paid was $29,000, not $32,000.

As an issue of fact, the hearing committee found that, with the exception of personal injury cases, which he billed on a contingent fee basis, the respondent "always used what he referred to in his testimony before us as 'flat fees.'" (Hearing Report, ¶ 39). The committee accepted the respondent's testimony that it was not his practice to charge more than the advance fee, even though his standard agreement (the same one he used with Rosado) contemplated that the client would owe additional money if the work exceeded the amount of the initial retainer.

As a matter of contract interpretation, the hearing committee recognized that the respondent's engagement letter was obviously not a flat fee agreement. Nowhere in the document is a "flat fee" mentioned, nor is the client informed that the fee is earned as soon as it is paid regardless of how much work is performed. Instead, the agreement contains numerous elements of an arrangement based on billing only for work actually done. Among other things, the agreement: informed the client that he would be billed at an hourly rate; referred to the payment as an "initial retainer"; informed the client that, if the work exceeded the retainer, the client would be billed at $250 per hour; and expressly recognized that the money held as a retainer may not be enough to cover the work (or that the fee earned could be less than the amount of the retainer). None of these provisions would be relevant or necessary in a flat fee agreement, under which the entire fee is earned as soon as it is paid. Rather than a flat fee, the

$29,000 paid by the client was in the nature of a retainer, that is, legal fees paid in advance. Pursuant to Mass. R. Prof. C. 1.15(b)(3), advance retainers must be held in trust until earned.

The hearing committee credited the respondent's testimony that he assured his client's representatives that he would not charge them more than $29,000 for the entire case at the trial court level. (Hearing Committee Report, ¶ 43). This testimony is consistent with either a flat fee or a capped hourly fee arrangement. With a capped hourly fee, the client is billed hourly, and the lawyer agrees that the total billed for legal services will not exceed a certain amount ($29,000 in this case). Although the agreement's language could also be consistent with a flat fee arrangement, the hearing committee noted the absence of evidence that the respondent understood and explained to the client's representatives the difference between the two types of engagements, an hourly fee (whether or not capped) and a flat fee. Moreover, nowhere in the agreement is the client assured that the fee would be limited to the amount of the initial retainer. Fortuitously, the total amount of the bill was almost the same as the amount paid in advance. But nothing would have prevented Carmel-Montes from charging additional amounts if there had been additional work.

The distinctions among various types of fee agreements should not have been elusive to the respondent. In May, 2010, based on three complaints to the Office of Bar Counsel (all of which arose out of the respondent's neglect of client matters), the respondent entered into a diversion agreement, pursuant to which the complaints were dismissed in exchange for his agreement to consult with the Law Office Management Assistance Project ("LOMAP") to improve his office management. After working with the respondent, LOMAP issued an audit report, which addressed, among other things, the respondent's use of fee agreements. He was informed about the distinction between a flat fee and the payment of a retainer against which fees

would be billed. He was given examples of the different types of fee agreements, including a sample flat fee agreement. Thus, no later than 2010, there was no basis or reason for the respondent to use the agreements he signed with Rosado for a case in which he intended to charge a flat fee.

ANALYSIS

We affirm the hearing committee's conclusion that the engagement letters at issue in this case were not flat fee agreements. Instead, they provided that Carmel-Montes would charge Rosado an hourly fee for his legal services and that he would bill against the amounts paid in advance. The agreements do not refer to a "flat fee" or otherwise inform the client that the total payment ($13,000 and $16,000) would be charged regardless of the amount of work performed. The agreements provided the opposite, referring repeatedly to a "retainer." They stipulated billing at an hourly rate for work actually performed and provided for additional billings if the work exceeded the amount paid in advance (or a refund if the work were less than the total paid in advance).

Accordingly, the $29,000 payment was an advance fee retainer, which the attorney was required to hold in trust until earned. Mass. R. Prof. C. 1.15(b)(3) ("A lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or as expenses incurred"); Matter of Levy, 32 Mass. Att'y Disc. R. 334, 348 and fn. 13 (2016), *citing* Matter of Sharif, 459 Mass. 558, 564 (2011). As the Supreme Judicial Court has recognized, "[W]here a client pays an attorney a sum of money for legal fees before the legal fees have been earned, the fees advanced, often referred to as a retainer, belong to the client until earned by the attorney and must be held as trust funds in a client trust account." Sharif, 459 Mass. at 564. Failure to hold an unearned retainer in a trust

account is intentional misuse. Matter of Hopwood, 24 Mass. Att'y Disc. R. 354, 361 (2008) (Board Decision).

We agree with the committee that the respondent violated Rules 1.15(b) (hold trust funds separate from personal funds); 8.4(c) (dishonesty, deceit, misrepresentation, or fraud); and 8.4(h) (conduct adversely reflecting on fitness to practice) of the Massachusetts Rules of Professional Conduct. Specifically, we agree that the respondent intentionally (rather than mistakenly) used trust funds received on behalf of a client by withdrawing the money before it was earned for purposes unrelated to his representation of the client. He did not intend to deprive the client of the funds, nor did actual deprivation occur. As the hearing committee calculated, by the time Rosado terminated the engagement, Carmel-Montes had earned all of the $29,000 paid to him in advance.

We disagree with the hearing committee's indulgent characterization of the misconduct as the result of a "misunderstanding of the difference between a flat fee agreement and a fully-paid capped hourly fee agreement, ..." (Hearing Report, ¶ 56(d)). The hearing committee concluded that the respondent had violated Rule 8.4(c), but paradoxically portrayed the conduct as "grossly negligent 'dishonesty.'" (Hearing Report, ¶ 56). These conclusions are incompatible. A violation of Rule 8.4(c) requires that bar counsel prove intentional misconduct such as dishonesty, deceit, fraud or misrepresentation. There is no such thing as "negligent dishonesty," even where the dishonesty is "grossly negligent." The violation of Rule 8.4(c) necessarily implicates an intentional state of mind. The conclusion that there was a Rule 8.4(c) violation is consistent with the evidence. Under no reasonable interpretation of the agreements could they support the respondent's immediate transfer of the retainer out of his IOLTA account. These were not flat fee agreements. The respondent knew they were not flat fee agreements.

Indeed, he drafted them and used them throughout his practice. And if there were any basis for the respondent to excuse his conduct because of "confusion," that excuse is belied by his work with LOMAP in 2010. Rather than accept responsibility for his misconduct, Carmel-Montes attempted to shift the blame to LOMAP and the Office of Bar Counsel, claiming that they gave him incorrect information about flat fee agreements. As did the hearing committee, we reject this argument. The respondent provided no evidence that LOMAP or OBC instructed him to use an hourly fee agreement in flat fee cases.

The hearing committee credited the respondent's testimony, "as a statement of his own opinion and belief, that he did not commit any 'intentional' misconduct." (Hearing Committee Report, ¶ 40). While the hearing committee may be the sole judge of credibility, B.B.O. Rules, § 3.53, we need not accept credibility findings that are inconsistent with other findings. Matter of Haese, 468 Mass. 1002, 1007, 30 Mass. Att'y Disc. R. 205 (2014). Moreover, the committee's decision to "credit" the respondent's testimony is actually a conclusion on an ultimate question of law, which is not entitled to deference by the board. The statement that the respondent did not intentionally misuse the retainer is inconsistent with other findings as well as the committee's own conclusion that the respondent violated Rule 8.4(c) (*see* above). Substantial evidence exists in the record to support the conclusion that the respondent acted intentionally.

Specifically, the committee found that Carmel-Montes knowingly transferred Rosado's retainer out of his IOLTA account before the fees had been earned. This was not an accounting error. At the time of the transfer, the respondent knew he had not earned most of the fees. He had provided only about $8,000 worth of legal services by that time, yet he withdrew the entire $29,000 retainer. Nor could he genuinely be confused about the terms of his engagement letters. The respondent has been a member of the bar since 1998. The engagement letters he signed

clearly spelled out an hourly fee arrangement. He drafted them. He had received specific education about engagement letters four years earlier when personnel from LOMAP and the Office of Bar Counsel explained to him the distinction between flat fees and retainers. There is no way to reconcile those findings with the hearing committee's belief that the respondent simply made a mistake or was "grossly negligent."

To the extent the hearing committee believed that the respondent's ignorance of the rules was relevant to its analysis, the court has admonished that there "will be few cases of unethical conduct where we consider it relevant that an offending attorney was not aware of the disciplinary rules or their true import." Matter of Hrones, 457 Mass. 844, 855, 26 Mass. Att'y Disc. R. 252, 268 (2010), *quoting*, Matter of Discipline of an Attorney (Three Attorneys), 392 Mass. 827, 835, fn. 4, 4 Mass. Att'y Disc. R. 155, 165 (1984). This is not one of those "few cases." The respondent either intended to deceive his client about the terms of engagement or was so cavalier about the language of the contract that his conduct is tantamount to deception.

Lastly, we conclude – based in part on his admission – that the respondent violated Mass. R. Prof. C. 1.15(f)(1)(B), (C), (D), and (E). These rules set forth the record-keeping requirements for IOLTA accounts, including for example that the account be reconciled every sixty days, and that the respondent maintain a chronological check register. There is no question that the respondent failed to comply with these rules.

Factors in Mitigation and Aggravation

There are no factors in mitigation.

In aggravation, the respondent has a history of discipline, starting with a diversion agreement in 2010 (discussed above in connection with his fee agreement); an admonition in 2012 for allowing a personal injury claim to lapse and failing to inform his client; and a public

reprimand in 2015 for neglect of a criminal case. Matter of Carmel-Montes, 31 Mass. Att'y Disc. R. 50 (2015).

In addition to the above, we consider as an aggravating factor that the respondent has substantial experience in the practice of law. Matter of Luongo, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 230 (1993). This factor is particularly relevant to the respondent's argument that he did not understand the terms of his own fee agreements.

Lastly, we consider in aggravation a factor that the respondent apparently tried to argue in mitigation: the advice and assistance provided to him by LOMAP and the Office of Bar Counsel. Rather than accept responsibility for his conduct, the respondent attempted to blame LOMAP and bar counsel. He testified at the hearing that LOMAP and bar counsel caused him to believe that he could use his standard agreement (which clearly recited an hourly fee arrangement) for flat fee cases. The hearing committee credited the testimony of Jared Correia of LOMAP as well as Assistant Bar Counsel Alison Cloutier that they did not tell the respondent that he could use the hourly agreement for flat fee engagements. We adopt this finding, which finds ample support in the record. Failing to acknowledge the wrongfulness of one's conduct and attempting to blame others may be considered in aggravation, and we do so here. Matter of Cobb, 445 Mass. 452, 480, 21 Mass. Att'y Disc. R. 93, 126 (2005).

The Appropriate Sanction

The presumptive sanction for misuse of an unearned fee retainer without deprivation or intent to deprive is a term suspension. Matter of Sharif, 459 Mass. 558, 27 Mass. Att'y Disc. R. 809 (2011). In Sharif, the court distinguished the intentional misuse of funds held as a fee retainer from other client or trust funds cases, where the presumptive sanction would be disbarment or indefinite suspension. Sharif, 459 Mass. at 566. The court noted that there could

be some uncertainty as to the ownership of a fee retainer, therefore requiring a more nuanced analysis. The respondent in that case was suspended for three years. The court further discussed the Sharif distinction in Matter of Pudlo, 460 Mass. 400, 406, 27 Mass. Att'y Disc. R. 736, 747 (2011):

> Notwithstanding our reluctance to apply the same presumptive sanctions, we confirmed our view [in Sharif] that the intentional misuse of client funds of both types is serious attorney misconduct meriting severe sanctions from a term suspension to disbarment. Where in that range the misuse of funds advanced for the payment of services should be sanctioned will "depend on the facts of the case."

In Pudlo, the court affirmed the finding of the hearing committee that the lawyer's misuse of a retainer arose from negligence. The court accepted the board's recommendation of a one-year period of suspension, with six months stayed. There were no aggravating factors.

In Matter of Hopwood, *supra*, the respondent was suspended for one year for intentionally misusing a retainer, failing to refund the unearned part of the retainer, and failing to cooperate with bar counsel. Similarly, in Matter of Morgan, 17 Mass. Att'y Disc. R. 437 (2001), the respondent failed to return an unearned retainer, failed to return client files, neglected a case and failed to communicate with clients, failed to cooperate with bar counsel and was convicted of driving under the influence. The respondent received a suspension of one year plus one day.[6]

Here, the client was not deprived of his funds, nor did the respondent intend to deprive him of funds. By the end of the engagement, Carmel-Montes had earned the entire fee. That

[6] Matter of Farber, 27 Mass. Att'y Disc. R. 249 (2011), cited by the hearing committee, is not to the contrary. In that case the respondent was publicly reprimanded when he deposited directly into his operating account a $1,500 retainer and failed to send the client an itemized bill. Of significance, Attorney Farber had earned the fee at the time he deposited it. The client disputed the bill, and the respondent should have deposited the disputed portion into his IOLTA account.

fact is fortuitous, but relevant. While it does not excuse the misuse, it supports a less serious sanction than cases where clients were actually deprived of their money.

Based on the reasoning of Sharif and cases that follow, in consideration of the serious factors in aggravation, and taking into account the purpose of bar discipline to protect the public and deter others, *see, e.g.,* Pudlo, 27 Mass. Att'y Disc. R. at 748, we recommend that the court suspend the respondent for six months. Given his disciplinary history and his apparent unwillingness to abide by the guidance of LOMAP and bar counsel, we recommend that the court require the respondent to apply for reinstatement.

Conclusion

For all the foregoing reasons, we recommend that the Court suspend the respondent, Robert Carmel-Montes, for six months and require that the respondent file a petition for reinstatement if he seeks readmission to the bar. An information shall be filed in the county court recommending that the respondent, Robert Carmel-Montes, be suspended from the practice of law for six months.

Dated: 4/8/19

Respectfully submitted,

BOARD OF BAR OVERSEERS

Kevin P. Scanlon, Secretary