COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2019-063

IN RE: STEVEN A. ABLITT

MEMORANDUM OF DECISION AND ORDER

In the underlying proceeding, the Board of Bar Overseers (board) unanimously adopted the hearing committee's recommendation and voted to disbar Attorney Steven A. Ablitt (respondent). The hearing committee presented two counts: the first charging intentional misuse of client funds; and the second relating to misconduct in connection with a fee factoring agreement. The respondent now appeals the board's decision arguing that he was denied due process when the board denied his requests for prehearing discovery and that the report of the hearing committee is not supported by substantial evidence. After a hearing and review of the parties' submissions, I agree with the board that the appropriate disciplinary sanction for respondent's misconduct is disbarment.

1. Background. After being admitted to the Massachusetts bar in 1998, and working as a paralegal for a foreclosure law firm, in 1999, the respondent opened his own law practice in Massachusetts focusing on default services work. In 2010, the respondent entered into a partnership with Lawrence Scofield, and the firm was renamed Ablitt & Scofield, P.C. (firm), with the respondent retaining ownership of ninety-nine shares and Scofield owning the remaining share. The respondent also owned or held interests in several ancillary businesses,

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some of which provided services to the firm, including a title company and a service of process company. The respondent developed his default services practice over time, and eventually opened offices in Florida and Puerto Rico. The nature of the practice required the firm to advance costs, including filing fees, title searches, publication, and auctions for lender clients. Despite the financial success of prior years, the cash advances, in combination with poor billing practices and clients who were slow to pay, began to create a financial burden for the firm.

The following is a summary of the hearing committee's findings of fact and conclusions of law adopted by the board with regard to each count.

a. Count one. In 2010, both the respondent and Scofield learned that the firm's operating account had insufficient funds. In order to make payroll, the respondent authorized the accounting department to not pay certain vendors, including Summit (the respondent's title company). In 2010, Scofield learned that the firm's chief financial officer, Alfred Moss, was covering the firm's operating expenses with funds from the firm's IOLTA accounts. Scofield instructed Moss to stop relying on the IOLTA accounts, and after learning that Moss had continued to use IOLTA funds, Scofield fired him in February 2011.

The respondent hired Robert Feige on a consulting basis in December 2010 to advise on the firm's financial troubles and, in mid-2011, Feige became the firm's chief financial officer. After Moss' termination, Mary Donovan, a member of the accounting department, was asked to reconcile the IOLTA accounts. Both Scofield and the respondent learned from Feige that Moss had misappropriated "a pretty big number" from the IOLTA accounts. Feige presented the attorneys with his assessment of the firm's finances and recommendations. Both Scofield and the respondent adopted Feige's recommendations to replenish the IOLTA accounts with new funds received on behalf of clients.

Although the respondent denied knowing that Moss misappropriated funds, the hearing committee did not credit this testimony and cited to several sources, including testimony from Scofield, Donovan, and Feige. Specifically, testimony at the hearing established that the respondent discussed the IOLTA deficit with Feige and Scofield. Starting on February 28, 2011, Feige provided the respondent and Scofield with a weekly summary of the firm's finances which showed that the firm's accounts payable significantly exceeded the accounts receivable, sometimes by as much as three-fold. Testimony at the hearing, corroborated by email correspondence, demonstrates that the respondent was actively involved in the firm's financial decisions.[1] The respondent was involved in deciding which vendors to pay, the amount to be paid, and the timing of the payments, including payments made to ancillary businesses in which the respondent had an ownership interest.

On the basis of this evidence, the board found that the respondent took a "hands on approach" to the firm's fiscal matters. The board did not find it credible that the respondent was not aware of the firm's financial situation as he retained 99% ownership of the firm and had ownership interests in several ancillary businesses that received payments from the firm. Moreover, the respondent hired Feige as a financial consultant to help make the firm profitable again. The hiring of Feige as a financial consultant confirmed that the respondent was not ignorant of the financial situation. Although the respondent testified that he did not have direct knowledge of Moss' use of IOLTA funds, he did not present any evidence to support his testimony. Therefore, the board affirmed and adopted the hearing committee's finding that by

[1] On April 20, 2011, the respondent instructed Feige and Scofield via email: "On a go forward basis, I do not want any meeting with creditors, lenders or vendors that have to deal with my money without my direct involvement."

fall of 2011, the respondent had actual or constructive knowledge of Moss's misuse of IOLTA funds.

As the firm's new chief financial officer, Feige continued and expanded the firm's misuse of IOLTA funds. In 2011, the financial pressures on the firm grew after this court issued its decision in U.S. Nat'l Bank v. Ibanez, 458 Mass. 637 (2011), requiring that a lender have possession of the promissory note prior to commencing a foreclosure action. As a result of the Ibanez decision, pending foreclosure cases were unable to move forward, but the firm continued to incur expenses. For several months after the decision, the firm did not receive any new foreclosure work and began to operate at a loss.

The respondent also denied being aware of the further misuse of IOLTA funds once Feige became CFO. However, the hearing committee declined to credit the respondent's denial, and the board adopted the committee's finding. The board focused its analysis on the clear deterioration of the firm's financial situation in 2011 and 2012. The firm owed millions of dollars to vendors, including the respondent's ancillary businesses. Unable to keep up with the operating expenses, the accounting department began to use business credit cards to "buy extra time" to cover expense charges, including the firm's payroll. By November 2011, the accounting department was relying on transfers from IOLTA accounts to pay the firms' credit card invoices.

In August 2011, as a result of five bounced checks drawn on the firm's IOLTA accounts, bar counsel opened an investigation. Bar counsel requested an explanation and supporting financial documents. Earlier in the summer of 2011, the respondent, Scofield, Feige, and Donovan met to review Donovan's preliminary findings on the extent of the misuse of client funds under Moss. Nevertheless, by the time bar counsel opened the investigation, this analysis remained ongoing and the firm's financial records were still not in compliance. Knowing the

poor state of the firm's financial records, Feige and Donovan both expressed concerns over bar counsel's requests. The respondent hired a legal ethics attorney, who taught Donovan how to perform three-way reconciliations, as required by Mass. R. Prof. C. 1.15. However, Donovan was unable to reconcile the accounts and bring the accounts current due to a lack of funds. To comply with the request from bar counsel, Donovan created a second set of Quick Books which were submitted to bar counsel. On the basis of the false records, bar counsel closed the investigation on May 1, 2012.

Despite bar counsel's warning that the firm needed to comply with rule 1.15, the hearing committee found, and the board affirmed, that the respondent did not take any action to ensure that the firm was complying with rule 1.15. While the respondent testified that in February 2010 the firm established an IOLTA committee, neither Scofield nor Donovan, who assumed the role of accounting department manager, were aware of such a committee. Moreover, the hearing committee did not credit the respondent's testimony that he did not participate in reviewing the firm's financial records in preparation for the firm's response to bar counsel. The board found the hearing committee's findings to be "consistent with the respondent's own self-interest" given that a portion of the firm's operating expenses covered with the IOLTA funds directly benefited the respondent, including personal charges on the firm's credit card and payments to ancillary businesses in which the respondent had an ownership interest.

The firm's financial problems continued. On December 14, 2011, Feige informed the respondent that there was a "cash challenge" and asked him for funds to cover filing fees. On January 12, 2012, the respondent emailed Feige and Donovan instructing them to pay immediately the American Express credit card which had a negative balance.

The firm was again investigated by bar counsel. On August 2012, after a check for $370,000 drawn on an IOLTA account was returned for insufficient funds, bar counsel opened a second investigation of the respondent and Scofield. This investigation was also closed on the basis of false statements made by Feige to bar counsel. The hearing committee subsequently found that these statements were not truthful during the current investigation. Although Feige reported to bar counsel that the check was an accounting error, a review of financial records showed otherwise. The check was returned because the firm did not have sufficient funds in the operating account to cover a Middlesex Superior Court order in connection with a lawsuit from a former vendor. The current investigation also revealed that by the time of the second investigation, the firm had yet to replenish the IOLTA accounts that were misused under Moss.

In November 2012, the firm began receiving funds on behalf of Ocwen Loan Servicing LLC (Ocwen), including bidding deposits from Ocwen and proceeds from foreclosures. By May 2013, the firm had received more than $2 million on behalf of Ocwen. However, despite the firm not making any payments to Ocwen or advising Ocwen that it was retaining funds to cover fees owed to the firm, by May 24, 2013, the balance of the IOLTA accounts where Ocwen's funds were deposited was less than $188,000. A review of the records shows that between February 11, 2013, and May 22, 2013, the firm's operating account had a negative balance eleven times and a total of $591,000 was transferred from the IOLTA account to the firm's operating account.

During this time, the respondent was using the firm's money to cover personal expenses. He used the firm's American Express credit card to pay for expenses associated with his wife's business, including the mortgage payment for her storefront, inventory, and renovation expenses.

Based on this evidence, the hearing committee found that the respondent either knew of or was willfully blind to the misuse of client funds.

On April 1, 2013, the firm acquired the law firms of John Connolly, Jr., and Kevin Geaney. Connolly and Geaney were allowed to operate their firm within the respondent's firm. The partners were interested in obtaining approval to handle Fannie Mae loans. In 2008, due to the respondent's issue with senior management at Fannie Mae, the firm lost its approval to process Fannie Mae loans. At the time, Fannie Mae controlled approximately 40% of all foreclosure business. In order to obtain reapproval, the partners began to consider restructuring the firm to give Fannie Mae the impression that the respondent was no longer managing the firm.

In May 2013, Connolly informed Fannie Mae that the firm was under new management. In reality, the respondent retained management authority over the firm. In October 2013, the firm's partners signed documents titled "Ablitt Scofield Restructuring Memorandum of Agreement" along with a "Consulting Services Agreement." Although signed in October 2013, these documents listed May 16, 2013, as the effective date in order to reflect the earlier representations made to Fannie that the respondent was no longer managing the firm.

On August 28, 2013, after learning that the firm would not be able to issue an IOLTA check, Geaney also learned that more than $3 million was missing from the IOLTA accounts. Geaney called a meeting with the respondent, Scofield, and Connolly. At the meeting, Donovan and another member of the accounting department informed the partners that they had used IOLTA funds to cover firm expenses per instructions from Feige.

The partners discussed options on how to proceed, including firing Feige. The respondent testified that he wanted to fire Feige but did not have the authority. The hearing committee did not credit this testimony, as all the other partners testified that the respondent had

the authority to fire Feige. Nor did the hearing committee credit respondent's argument that the firm's restructuring, including the respondent's purported resignation on May 16, 2013, left the respondent without the authority to fire Feige.

To prove his lack of authority, the respondent points to documents regarding the restructuring that were not finalized and signed until October 2013, well after Feige's misconduct was made public. The hearing committee reviewed these documents and found that the documents "had no real significance beyond cosmetics for the purpose of enticing Fannie Mae." Furthermore, on March 24, 2014, the respondent emailed the firm that he was resigning effective the following day. Thus, the hearing committee did not credit the respondent's testimony regarding his lack of authority to fire Feige in August 2013. In addition, the hearing committee found that by not terminating Feige after his misconduct was uncovered, the respondent ratified Feige's misconduct.

The respondent did not inform clients that the IOLTA accounts had been misappropriated. In June 2014, Ocwen learned about the misappropriation when it visited the firm to conduct an audit and found a skeleton crew as the firm was already closing.

Despite the firm's financial issues, as well as the financial challenges of the ancillary businesses, during this time the respondent continued to collect a salary from multiple sources, including the firm, Summit Title, and Liberty Auctions. For instance, despite the firm's outstanding debt to Summit Title, the respondent collected $257,126.55 in salary payments between 2009 and 2014.[2] In addition, during the same period of time, the respondent collected

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[2] The respondent collected $30,000 from Summit Title in 2009; $30,000 in 2010; $51,923.06 in 2011; $59,999.94 in 2012; $70,384.65 in 2013; and $14,818.90 in 2014.

$1,157,627.69 in salary payments from Liberty Auctions for serving as their General Counsel.[3] Given the firm's repeated misuse of IOLTA funds to pay operating expenses, including payments to Liberty Auctions and Summit Title, the hearing committee found, and the board affirmed, that the respondent benefited directly from the misuse of trust funds in the form of his salaries.

On September 3, 2014, the respondent filed a Chapter 7 involuntary bankruptcy petition against the firm, listing himself and his ancillary businesses as creditors. Ocwen filed a proof of claim alleging that more than $2 million of its IOLTA accounts had been misappropriated.

In count one, bar counsel charged the respondent with violating several rules of professional conduct including: (1) failing to make reasonable efforts to ensure that the firm had measures in place so that nonlawyer employees complied with professional obligations, despite his managerial capacity (see Mass. R. Prof. C. 5.3 [a]); (2) ensuring that the conduct of nonlawyer employees under his supervision adhered to professional obligations (see Mass. R. Prof. C. 5.3 [b]); (3) ratifying the misconduct of a nonlawyer employee (see Mass. R. Prof. C. 5.3 [c] [1]) ; (4) knowingly misusing client funds or permitting intentional misuse of client funds (see Mass. R. Prof. C. 1.15 [b] and 8.4 [c]); (5) failing to maintain individual client matter ledgers (see Mass. R. Prof. C. 1.15 [f] [1] [C]); (6) failing to perform and retain a three-way reconciliation of the IOLTA accounts (see Mass. R. Prof. C. 1.15 [f] [1] [E]); (7) failing to ensure that only trust funds were deposited in the IOLTA accounts (see Mass. R. Prof. C. 1.15 [b] [2]); and (8) failing to keep clients reasonably informed about their cases (see Mass. R. Prof. C. 1.4 [a] and [b]).

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[3] The respondent collected $250,320 from Liberty Auctions in 2009; $250,000 in 2010; $245,000 in 2011; $245,000 in 2012; $150,000 in 2013; and $17,307.69 in 2014.

b. Count two. On November 8, 2012, the firm entered into a factoring agreement with Durham Commercial Capital Corp. (Durham) under which the firm agreed to sell its accounts receivable to Durham. The respondent signed the agreement, which included a statement confirming that the firm was solvent. The agreement granted Durham a security interest in the firm's accounts receivable; however, the firm previously had granted the same assets to a creditor as collateral. Although the respondent testified that he believed the firm was solvent at the time that he entered into the agreement with Durham, the hearing committee did not credit his testimony as the respondent knew that on multiple occasions the firm was unable to cover payroll and outstanding debts including as of October 2012 .

The respondent further violated the rules of professional conduct as, pursuant to the factoring agreement, the firm granted Durham access to confidential client information prior to seeking and securing permission from those clients to disclose the information.[4] Further, the firm failed to inform clients that it granted Durham sole possession of all records and computer servers containing confidential client information as collateral.

The hearing committee also found that the firm did not fully comply with the factoring agreement. Starting in January 2013, one client, Select Portfolio Servicing, Inc. (SPS), sent payments directly to Durham, as required by the agreement. However, in November 2013, the respondent asked SPS to send some of the required payments to a bank account in Puerto Rico controlled by the respondent. Per the respondent's request, SPS wired twelve payments totaling more than $1 million. On June 27, 2014, Durham learned about this payment arrangement. A

[4] On February 14, 2013, among other clients, the respondent assigned Ocwen to Durham for factoring despite the fact that pursuant to Ocwen's contract with the firm (signed by respondent) Ocwen did not allow for any assignments without its written consent. In 2015, Durham filed suit against Ocwen for failure to pay as required by the factoring agreement.

Durham representative emailed the respondent informing him that the unauthorized instructions to SPS "constitute[d] both a breach of our factoring agreement and criminal theft of Durham's property." Durham sued SPS directly to recover the payments that SPS made to the Puerto Rican account.

The respondent argued that the Puerto Rico office was a standalone company and that it was not included in the factoring agreement, and that the SPS payments directed to the Puerto Rican account in were due to the office in Puerto Rico for services performed by that office on behalf of SPS. However, the hearing committee found otherwise based on substantial evidence including the fact that the firm secured loans for expansion of the Puerto Rico office, it controlled the books and all of the billing for the Puerto Rico office, and it included the Puerto Rico office in the firm's lender audits. We note that the respondent did not challenge this finding in his appeal to the board.

Thus, in count two, bar counsel charged the respondent with multiple ethical violations, including disclosing confidential information to Durham pursuant to the factoring agreement (see Mass. R. Prof. C. 1.6 [a]); failing to obtain informed consent from clients prior to entering into a factoring agreement that materially limited his ability to represent clients as it was motivated by his own interests and created responsibilities to Durham (see Mass R. Prof. C. 1.7 [b]); using clients' confidential information to clients' disadvantage and for respondent's own advantage (see Mass R. Prof. C. 1.8 [b]); and representing to Durham that the firm was solvent, despite it not being solvent, and that the firm was paying its debts in a timely manner, which it was not doing (see Mass R. Prof. C. 8.4 [c]). The hearing committee found that bar counsel proved all of these charges.

2. Discussion. The respondent argues that the hearing committee and board's denial of his prehearing discovery requests deprived him of due process. The respondent contends that he had a substantial need for prehearing discovery, and the board's denial of such requests limited his ability to prepare a defense. He further argues that bar counsel's investigation was improperly narrow as it did not consider all relevant evidence.

a. Due process. Because bar discipline proceedings are civil in nature, respondents are not entitled to all of the procedures and processes afforded to criminal defendants. Matter of Abbott, 437 Mass. 384, 391 (2002). Attorney respondents do not have a constitutional right to pretrial discovery unless they can show that a denial of such discovery would be prejudicial and result in a denial of due process. Matter of Tobin, 417 Mass. 81, 87 (1994). More specifically, under the Board of Bar Overseers (BBO) rules, discovery depositions are not available in disciplinary proceedings unless the respondent can show substantial need. See BBO Rules, Subchapter D: Subpoenas, § 4.9(a)(2).[5] The respondent failed to meet this standard.

The respondent requested depositions of three witnesses: Feige, Donovan, and Scofield, contending that substantial need was established with regard to each essentially because it would have allowed for a more effective and efficient cross-examination. Here, where each of these individuals testified at the respondent's disciplinary hearing, giving the respondent ample opportunity to cross-examine of them and call their credibility into question, the respondent's

[5] Under 4.9(a)(2), "[a] motion to take a discovery deposition shall be allowed only upon a showing of a substantial need for the deposition in the preparation of the applicant's case, taking into consideration: (A) The nature and complexity of the case and the need to assure an expeditious, economical and fair proceeding. (B) Whether the information sought or its substantial equivalent has been provided or was available by other means, taking into consideration the formal or informal discovery that has already occurred. (C) The prevention of embarrassment, oppression, or undue burden, including economic burden, that the deposition may cause the deponent."

ability to present an effective defense was not impaired by the denial of his deposition requests. There was no due process violation.

b. Substantial evidence. The respondent also argues that the board's conclusions are not supported by substantial evidence. See Matter of Strauss, 479 Mass. 294, 296 (2018) (findings of fact adopted by board are upheld if supported by substantial evidence). Although he contends that the board did not fully consider his testimony and documentary evidence, and improperly relied on witnesses that the respondent did not believe to be credible, the hearing committee is the "sole judge of the credibility of the testimony presented at the hearing." See S.J.C. Rule 4.01, § 8 (5). If the hearing committee provides its reasoning and points to substantial evidence in the record, the hearing committee may reject a witness's testimony. Matter of Strauss, supra at 296.

The respondent primarily argues that the board incorrectly rejected his testimony and corroborating documentary evidence confirming that he forfeited his management authority as of May 2013[6]; that the board ignored substantial evidence contradicting the finding that the respondent operated the firm for his personal gain[7]; and that the board failed to consider substantial evidence showing that the respondent did not know of Feige's misconduct.[8]

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[6] The restructuring documents referenced by the respondent were drafted for the purposes of obtaining recredentialing with Fannie Mae.

[7] The respondent claims that despite the salaries he collected from the firm and ancillary businesses, the board failed to consider the fact that he injected personal funds into the firm and that he routinely used his personal credit card to cover firm expenses. I note that this argument undercuts the respondent's claim that he was unaware that the firm was in bleak financial condition.

[8] For example, in one instance, the respondent ordered Feige to pay the respondent's personal American Express credit card balance of $350,000. In order to do so, Feige had to transfer funds from IOLTA accounts to the operating account.

However, a review of the record shows that the hearing committee properly resolved issues of credibility and, in the instances where it decided to not credit testimony, the hearing committee presented its reasoning for doing so. See Matter of Saab, 406 Mass. 315, 328 (1989). The board credited the hearing committee's finding in this regard and there is no basis upon which to disturb it.

4. Appropriate sanction. Having concluded that substantial evidence supported the board's findings, I turn to the recommended sanction. The hearing committee and the board recommended disbarment. "Where, as here, an attorney has intentionally misused client funds with the intent to deprive the client of those funds, or where the client actually was deprived of the funds, regardless of the attorney's intent, the presumptive sanction is indefinite suspension or disbarment." Matter of Strauss, supra at 300. The presumptive sanction applies where there is minimal risk, as is the case here, that the misuse occurred due to a misunderstanding. Id. at 301.

This court will consider mitigating and aggravating factors to determine if a departure is warranted. Matter of McBride, 449 Mass. 154, 164 (2007). The respondent has the burden of justifying a departure from the presumptive sanction. Matter of Corbett, 478 Mass. 1004, 1005 (2017).

To support its recommendation of disbarment, the board cites several aggravating factors, including: the respondent's violation of multiple rules of professional conduct; his operating the firm for his personal gain; the respondent's lack of candor; the harm that resulted to clients due to the respondent's misconduct; and the respondent's lack of appreciation for basic ethical obligations.

The respondent argues that the board's findings regarding the aggravating factors are not supported by substantial evidence. The respondent contends that he "loaned his entire wealth to

the firm, only to never see any of it again," thus it is "illogical" that he managed the firm for his personal gain. However, I fail to see how this argument supports a lesser sanction. The argument is premised on the respondent making countless loans to the firm, thus suggesting, despite respondent's statements to the contrary, that he was fully aware that the firm continued to struggle financially. The firm's financial situation became so dire that basic operating expenses, such as the firm's payroll, were routinely covered with the firm's and the respondent's credit card, and yet the respondent continued to collect salary payments and use the firm's funds to cover personal expenses and his wife's business expenses. In continuing to use firm monies despite his knowledge that the firm was struggling financially, the respondent had actual knowledge, if not constructive, of the misappropriation of IOLTA funds. The misuse of client funds was not a misunderstanding warranting a lesser sanction.

Moreover, regardless of the respondent's motive, whether he was operating the firm for his personal gain or attempting to keep the firm afloat for the benefit of its employees and clients, it does not change the fact that IOLTA funds were misappropriated and the respondent did not, as a supervising attorney, take the necessary steps to ensure that the firm properly managed the IOLTA accounts. The respondent's failure to establish effective measures to ensure that the IOLTA accounts were managed properly is especially egregious given that the office of bar counsel investigated his firm for the same offense on two prior occasions.

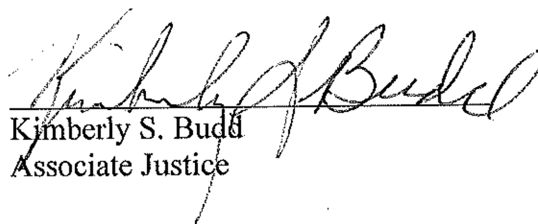
The respondent also takes issue with the board's reliance on lack of restitution as an aggravating factor. However, the absence of restitution is a factor in determining whether indefinite suspension or disbarment is the appropriate sanction for the intentional use of client funds. Matter of Bryan, 411 Mass. 288, 291-292 (1991). Moreover, even when an offending attorney makes prompt restitution to her client, this court has found that disbarment is the

appropriate sanction where the offending attorney also "engages in more and wider misconduct." Matter of Haese, 468 Mass. 1002, 1008 (2014).

In addition, the respondent takes issue with the board finding that he gave false testimony as an aggravating factor. The respondent argues that such a finding penalizes him for defending himself against the charges. I disagree. Although the respondent is certainly within his rights to defend himself against the charges, he is not allowed to do so by presenting false testimony. Therefore, the board correctly viewed this as an aggravating factor.

Last, the respondent also disagrees with the board finding that he demonstrated a lack of appreciation for basic ethical obligations and a lack of remorse. The respondent maintains that he did not engage in unethical conduct despite the hearing committee's substantial evidence to the contrary. The board properly characterized the respondent's "lack of remorse and insincerity with regard to acceptance of responsibility" as an aggravating factor. See Matter of Corbett, supra at 1007.

Conclusion. For the reasons stated above, I affirm the board's decision and order the respondent disbarred.



Kimberly S. Budd
Associate Justice

ENTERED: March 31, 2020