

IN RE: DOUGLAS F. TRACIA

NO. BD-2014-056

S.J.C. Judgment of Disbarment entered by Justice Duffly on January 16, 2015.¹

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¹ The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: .BD-2014-056

IN RE: DOUGLAS F. TRACIA

MEMORANDUM OF DECISION

This matter came before me on an information and record of proceedings, together with a unanimous vote of the board of bar overseers (board) recommending that the respondent be disbarred from the practice of law. On September 10, 2012, bar counsel filed a petition for discipline against the respondent, asserting that, while acting as trustee and attorney-in-fact for his father, he had mishandled his father's funds, intentionally depriving his father and his father's estate of those funds for his own use. The respondent filed an answer on September 27, 2012; bar counsel thereafter filed an amended petition and the respondent filed an amended answer on December 12, 2012. Following additional proceedings to compel discovery, a public hearing was conducted over five days in June and July of 2013. Eight witnesses testified, including the respondent's two siblings, and eighty-one numbered exhibits were introduced in

vidence.. The respondent testified on his own behalf. On March 14, 2014, the hearing committee filed a report with the board recommending that the respondent be disbarred. On April 28, 2014, the board voted to adopt the findings of fact, conclusions of law, and sanction recommended by the hearing committee.

After the board's recommendation was filed in the county court, the respondent filed a motion to show cause, alleging that the disciplinary proceeding itself was an "improper persecution" and a "witch hunt" based on "spurious and specious" lies and perjured testimony arising from the personal animosity of the respondent's sister, who filed the original complaint with bar counsel, knowingly and improperly introduced at the hearing by bar counsel. The respondent maintained also that the disciplinary proceeding was pursued in part due to bar counsel's personal bias and under a conflict of interest, in retaliation for a prior incident when the respondent and bar counsel both worked at the office of bar counsel in 1991. A hearing was conducted before me on June 26, 2014. Thereafter, bar counsel filed a motion to strike the respondent's filing, or, in the alternative, to submit a reply, which was attached. I declined to strike the respondent's filing, but allowed bar counsel's response to be filed. Several affidavits from attorneys employed at the office of bar counsel in 1991 were also filed in response to the respondent's allegations.

Petition for discipline. The petition for discipline asserts that the respondent 1) misused his father's funds to buy a house, purportedly for his father but in which his father never lived or intended to live, where the respondent, his girl friend, and her adult children lived rent-free; 2) gave gifts of \$13,000 each from his father's funds to thirteen individuals without his father's knowledge or consent, and without authority to do so under the springing power of attorney, and, in many cases, asked to have the amount of the "gift" checks returned to him in cash; 3) deliberately misused trust funds for his own benefit, including paying the costs of defending against the disciplinary action from his father's funds; and 4) charged excessive and inappropriate fees for personal services that were not services to the trust, such as taking his father to lunch and to run errands, watching ball games, driving him to doctor's appointments, and picking up his dry cleaning. Bar counsel contends that this misconduct violated Mass. R. Prof. C. 8.4(c) (dishonesty, deceit, fraud, or misrepresentation) and Mass. R. Prof. C. 8.4(h) (conduct reflecting adversely on fitness to practice law). The hearing committee found that the respondent's misconduct violated Mass. R. Prof. C. 8.4 as alleged, and also noted that the fees charged for personal services were excessive under the terms of Mass. R. Prof. C. 1.5(a) as then in effect.

The respondent challenges the sufficiency of the evidence

before the board and a variety of the board's evidentiary determinations and factual findings, as well as the severity of the sanction, asserting that he should receive at most a suspended term of suspension. The respondent maintains, inter alia, that he did not convert any of the funds, but acted appropriately according to his authority under the springing power of attorney; that his sister lied to bar counsel in bringing her complaint due to personal animosity after he refused to give her free of charge a truck that belonged to his father's estate and bar counsel was aware of those lies; and that he acted in his personal capacity and not as his father's attorney, and thus that bar counsel had no jurisdiction to file a petition for discipline for actions not undertaken as an attorney.

As discussed, infra, I conclude that bar counsel had jurisdiction to bring the petition for discipline, the board's findings are supported by the record, the sanction is appropriate, and the respondent shall be disbarred from the practice of law in the Commonwealth.

1. Background. As a preliminary matter, I note that bar counsel has authority to investigate misconduct by a lawyer regardless whether that misconduct occurred in the course of an attorney-client relationship. S.J.C. Rule 4:01, § 3(1). See, e.g., Matter of Long, 29 Mass. Att'y Discipline Rep. __, BD-2013-047 (2013) (nine-month suspension for misuse of trust funds while

acting as fiduciary and not as attorney). Accordingly, I do not further address the respondent's arguments as to a lack of jurisdiction and venue.

I summarize the hearing committee's findings and conclusions, adopted in full by the board. The respondent was admitted to the practice of law in the Commonwealth on December 17, 1993. The respondent maintained a solo law practice, and also worked intermittently as a financial advisor. His father, Frederick G. Tracia, had three children.¹ The respondent was the oldest, and he had siblings Dorothy Zerwekh and Donald Tracia, both of whom live in Massachusetts. In December, 2005, Fred was living in a house on Everit Avenue in Framingham where he had lived for thirty-eight years with Shirley Antobenedetto.² Shirley had owned the house and raised her five children there before Fred moved in; at some point, Shirley conveyed a fifty per cent interest in the house to Fred.

Springing durable power of attorney. As part of estate planning that he undertook at that time, Fred, then seventy-five years old, retained attorney Deborah Nelson to create a springing durable power of attorney, which Fred executed on December 19,

¹ For clarity, I refer to the respondent's family members by their first names. As did the hearing committee, I refer to Frederick G. Tracia by the nickname "Fred."

² For consistency, I also refer to Shirley Antobenedetto by her first name.

2005. The springing durable power of attorney appointed the respondent to be Fred's attorney-in-fact in the event that Fred were determined to "lack capacity to make or to communicate decisions for [himself]"; the appointment became effective only "if, when and for so long as a determination [of incapacity] shall be made in writing by [Fred's] attending physician with a concurring second opinion according to accepted medical standards of judgment and the requirements of Chapter 201D of the General Laws of Massachusetts." The springing durable power of attorney gave broad authority to the respondent, among those powers authorizing him to sell, transfer and deliver any of Fred's real and personal property, including stocks and bonds; to purchase stocks and bonds or other securities in Fred's name and for his benefit; to collect dividends, profits or other income; to endorse checks; to withdrew funds from Fred's banks; and to collect claims and demands on Fred's behalf. The power of attorney also included a "general powers" provision authorizing the respondent

"generally to do all acts and take all steps which in his judgment are necessary, convenient or expedient in the management of my property and affairs, although if the matter should require more special authority than is herein contained, hereby giving my said authority full power to act for me and in relation to my affairs, business and property as full and with like effect as I could act if present."

On its face, the springing durable power of attorney did not contain any provisions authorizing the respondent to make gifts,

to create or fund trusts, or to receive compensation for his services. Based on expert testimony at the hearing, the hearing committee concluded, contrary to the respondent's argument and to the testimony of his expert, that the general powers provision did not operate to expand the other powers of attorney and did not give the respondent authority to create trusts. The committee noted that the respondent's expert's argument was unsupported by case law, and also that, as a fiduciary, the respondent had a duty to act in the best interests of his principal, and not to elevate the interests of others (such as his heirs) over the principal's own interests.

Respondent's financial difficulties. In 2009 and 2010, the respondent was experiencing serious financial difficulties; he asked Fred for a "Fred Tracia Economic Bailout" or for an advance on his anticipated inheritance, but Fred declined to give the respondent a loan or an advance. During that period, Fred also declined to give Dorothy a requested loan for her own purposes. The hearing committee found, based on testimony from all of Fred's children, that Fred did not have a history of giving loans or making large gifts to his children. In February, 2009, the respondent's credit cards were cancelled. In March, 2009, the respondent was forced to sell his condominium in a short sale, and in April, 2009, he began living in a rented basement apartment in Danvers. At the respondent's request, in November,

2009, Fred applied for and obtained a credit card in his name, for the respondent's use, because the respondent was unable to obtain a credit card in his own name; the respondent agreed to pay Fred each month for the amount charged.

In January, 2010, Fred suffered a series of strokes and was hospitalized. On January 17, 2010, the respondent assumed control over Fred's finances, although the springing durable power of attorney was not then in effect. On January 27, 2010, a physician treating Fred certified in writing that Fred lacked the capacity to make or to communicate health care decisions. On March 9, 2010, a second physician gave a written medical opinion that Fred lacked the capacity to make or to communicate health care decisions; at that point, the springing durable power of attorney came into effect.

Gift checks. On January 29, 2010, two days after the first certification of incapacity but before the springing durable power of attorney had come into effect, the respondent wrote "gift" checks to himself, his two younger siblings, his girl friend, and his landlord (five checks in the amount of \$13,000 each), signed in Fred's name. Along with the checks, the respondent issued "gift letters" signed in Fred's name, purportedly for tax purposes. In addition to concluding that the durable power of attorney did not authorize the respondent to make gifts, the hearing committee found that these gifts were

made without Fred's prior knowledge or consent, and did not convey any benefit to Fred. The hearing committee explicitly discredited the respondent's testimony that on January 27, 2010, Fred authorized him to make gifts to "strangers who could be trusted." Along with other testimony at the hearing, the hearing committee pointed to the respondent's earlier, contradictory statement in the office of bar counsel concerning when Fred purportedly authorized making gifts, and to the respondent's testimony and reports from the nursing home where Fred was being treated stating that Fred was unable to speak, to articulate his wishes, or to formulate his thoughts coherently on January 27, 2010. Fred was able to communicate to some extent, but had problems formulating words and thoughts, difficulty walking, could not write, and would get very frustrated with his inability to communicate his wishes.

Donald testified that on January 29, 2010, when he showed Fred his "gift letter," Fred became "absolutely ballistic" and said he did not authorize the respondent to write the gift check. Donald also testified that the respondent later told Donald and Dorothy not to mention the gifts or to talk about finances with Fred, due to a concern that Fred would "overturn" everything. At subsequent points, the respondent repeatedly told Dorothy and Donald not to discuss financial information with Fred, and did not want Fred to learn of the other "gifts" the respondent made,

the pending sale of the Everit Avenue home, or the respondent's purchase of another home in Framingham. The respondent also sent email messages to Dorothy and Donald generally reiterating the instruction not to discuss financial matters with Fred; Dorothy and Donald followed these instructions, because the respondent was an attorney, had financial expertise, and was their elder sibling. Fred nonetheless continued to complain to all three of his children about the gift checks.

On February 4, 2010, the respondent filed for personal bankruptcy. His debts were discharged by the United States Bankruptcy Court on June 1, 2010. At some point in February, the respondent asked his girl friend to return the \$13,000 gift to him because Fred was going to enter a nursing home. Within two weeks, she returned the \$13,000 to the respondent in cash. The hearing committee did not credit the respondent's testimony that the gifts were intended to reduce Fred's estate for Medicaid or tax planning purposes, and credited the testimony of both the respondent's and bar counsel's experts that a gift which has been returned forms part of the estate and does not reduce the estate for planning or tax purposes. The committee also declined to credit the respondent's testimony that he made the gifts on the advice of counsel. The respondent's counsel testified at the hearing that he did not advise the respondent that the respondent permissibly could issue gift checks and take the money back in

cash; to the contrary, counsel testified that he told the respondent a returned gift was not a completed gift. The hearing committee credited counsel's testimony.

In total, from February 2010 through early 2011, the respondent made fifteen unauthorized gifts of \$13,000 each from Fred's funds to the respondent's girl friend, her adult children, the respondent's landlord and her adult children, the respondent's secretary, and other friends of the respondent, as well as to Donald's three year old daughter and a family friend. The respondent then requested and received these gifts back in cash. The hearing committee determined that all of the gifts were made without Fred's knowledge or consent; did not assist Fred by reducing the estate for tax planning purposes because the gifts were returned; did not benefit Fred in any way; and were intentional misuse by the respondent of Fred's funds for the respondent's own purposes, in breach of the respondent's fiduciary duty to Fred. Moreover, by requesting the gifts be returned in cash, the respondent deliberately concealed the money to avoid having it available to pay any of his bankruptcy creditors.

The respondent testified that, rather than place the returned gifts into one of the trust accounts, he kept \$181,000 of the money in a safe in his garage to have on hand to pay Fred's nursing home expenses. The committee did not credit this

testimony and found that the gifts were part of an "overall plan to syphon money out of Fred's estate" for the respondent's use. The "gift" money was returned to Fred's accounts in 2011, after Dorothy demanded an accounting.

Bank accounts and trusts. On March 10, 2010, the day after the second written opinion of incapacity, the respondent opened a bank account in the name of the "Frederick G. Tracia Durable Power of Attorney Account."

On April 1, 2010, the respondent, acting as attorney-in-fact for Fred, executed two trusts, the Frederick G. Tracia Irrevocable Trust and the Frederick G. Tracia Irrevocable Gifting Trusts, which had been drafted by counsel that the respondent selected and retained. The respondent was the trustee of each trust, and the beneficiaries were the respondent, Donald, and Dorothy.

The irrevocable trust was designed to hold Fred's assets and to purchase a house for him. It gave Fred the "personal, non-assignable right" to use and occupy any real property purchased during the period that the trust held the property. The respondent's powers, as trustee, "were to be exercised in the best interests of the beneficiaries."

The irrevocable gifting trust was designed for "Medicaid planning." The respondent, as trustee, was authorized to "hold, administer and dispose of all trust property . . . for the

benefit of [the trust beneficiaries, e.g., the respondent, Donald, and Dorothy]."

In each case, the hearing committee concluded that the respondent lacked authority under the springing durable power of attorney to create the trust. The respondent told Dorothy and Donald that they could be disinherited if they challenged either of the trusts and the respondent enforced the "no contest" clause contained in each trust. The hearing committee found, based on testimony of witnesses, that the respondent had the no contest clauses drafted in order to conceal his misuse of Fred's assets for his own benefit, and to protect himself from challenges to that misuse by his siblings.

The Framingham house. By February, 2010, it was evident that Fred would be unable to return to live with Shirley in the Everit Avenue house, because of the level of care he required and because Shirley, too, then needed help with her own care. She moved into her daughter's house in May, 2010.

On September 30, 2010, the respondent purchased a five-bedroom house in Framingham for \$655,000 in the name of the Frederick G. Tracia Irrevocable Trust. The hearing committee found that, as Donald had warned him, at least by June, 2010, the respondent was well aware that Fred did not want to buy "a big, [five-bedroom] home and live with people he doesn't know," a reference to the respondent's girl friend and her three adult

children. On June 9, 2010, the respondent wrote to counsel who had drafted the trusts, stating,

"My Dad is refusing to live with strangers. If we were to buy the house under the trust, it would involve someone in my life and her children. My Dad is refusing to do that, so I guess that part of the picture does not come into focus . . . Please tell me if I am missing anything. I would love to purchase a home in the name of the trust, but without Fred living there, it would not (or would it) be wise . . . Also is there any other way to protect this large sum of money notwithstanding his protestations about the house?"

Counsel replied, in writing, that the respondent could put the liquid assets which he intended to use to purchase a house into the trust, and leave them there for five years, but would need to retain sufficient assets outside the trust to pay for his father's care and living arrangements during that period.

The hearing committee discredited the respondent's testimony that he purchased the house hoping that his father would recover sufficiently to live there with him for two years and one day in order to take advantage of the Medicaid planning provision. The hearing committee found that the respondent purchased the house with the express intent of living there with his girl friend and her adult children, and never intended his father to live in the house. The respondent, who had bad credit and was unable to purchase a home in his own name, moved from a one-bedroom basement apartment into a five-bedroom, \$655,000 home for which none of the occupants paid any rent. The respondent communicated with his siblings prior to the purchase that it was not a good

idea for any of them to live with their father, both for Fred's safety and their "sanity," and made it clear that Fred would do better in a medical care facility of some sort, where he would be fed, given medication, and watched over. The respondent did not tell Fred that he had purchased the house, did not bring Fred to see the house, and told Dorothy and Donald not to tell Fred about the house.

The committee found, based on the respondent's own testimony, that the average rent in the area was \$2,500 per month, and that the respondent intentionally deprived the trust of these funds, in violation of his obligation as trustee to make the trust property productive by collecting rent. He also caused Fred's estate to incur tax liabilities by selling pension investments, bonds, and annuities in order to have funds to purchase the house. The additional tax liabilities, totaling approximately \$100,000, harmed the respondent's two younger siblings, who would be beneficiaries under Fred's will. The respondent also used Fred's funds to pay for the respondent's moving expenses, and to purchase a fence, a shed, and a sprinkler system for the house. These items, like the house, benefitted the respondent, his girl friend, and her children, not Fred.

Compensation and fees for services. Beginning in January, 2010, the respondent paid himself at a rate of \$100 per hour for services he provided as "power of attorney and trustee." Among

other items for which he paid himself, the respondent charged for services rendered in making the "gift" checks and writing the "gift" letters, and also for personal services he undertook for Fred, such as taking him to doctor's appointments, shopping, and to watch sporting events, as well as for the respondent's time spent driving to and from a nursing home to visit Fred. From January through March, 2012, the respondent paid himself \$99,375 for services purportedly rendered beginning in January 2010. In May, 2012, the respondent paid himself an additional \$35,781 for services rendered in 2011, including "gifting fees." While Donald and Dorothy testified that they authorized the respondent to pay himself \$150,000 for services, the committee found that the durable springing power of attorney did not authorize compensation for the respondent, and also that the respondent intentionally delayed paying himself until his bankruptcy case was settled, to avoid having the fees included as income in his bankruptcy estate.

After Dorothy filed her complaint with the office of bar counsel in March, 2011, the respondent paid himself \$21,875 in legal fees to respond to the complaint, paid the attorneys who drafted the trust approximately \$4,559 for information and affidavits to use in responding to the complaint, and later paid counsel he retained to defend him in the disciplinary proceeding at least \$70,000, all from Fred's funds. The committee

distinguished this improper use of Fred's money for the respondent's personal benefit in conjunction with a bar disciplinary proceeding from the respondent's payments to defend his conduct as trustee in a civil action that Dorothy brought in a Superior Court proceeding.

Findings of hearing committee and board. The board adopted the findings of fact, conclusions of law, and recommendations of the hearing committee. The board found that the respondent violated Mass. R. Prof C. §§ 8.4(c) (dishonesty, deceit, misrepresentation, or fraud) and (h) (conduct otherwise reflecting adversely on fitness to practice).

The board found that there were no factors in mitigation, and cited a number of factors in aggravation. The respondent, who was an experienced attorney with substantial knowledge of financial matters, see Matter of Crossen, 450 Mass. 533, 580 (2008), engaged in an extended scheme to syphon funds for his personal use from a principal to whom he owed a fiduciary duty of utmost loyalty, and to deprive his father and siblings of those funds, in violation of multiple rules of professional conduct, over a period of years. See Matter of Saab, 406 Mass. 315, 326-327 (1989). The respondent also had a history of prior discipline. See Matter of Kerlinsky, 428 Mass. 656, 665 (1989). The respondent's testimony before the hearing committee demonstrated a lack of candor and a failure to appreciate the

wrongfulness of his conduct, as well as an ongoing pattern of deceit and dishonesty toward his principal, the beneficiaries of the trusts, and bar counsel. See Matter of Eisenhower, 426 Mass. 448, 456, cert. denied, 524 U.S. 919 (1998).

The board adopted the recommendation of the hearing committee and recommended that the respondent be disbarred from the practice of law in the Commonwealth.

2. Discussion. Both parties made largely the same arguments before me as they did before the board.

In addition, before me, as he did in his motion to show cause, the respondent made various allegations concerning an improper motive of bar counsel in pursuing the investigation, based on an asserted bias from a previous employment relationship (what the respondent describes as a "personal vendetta" that resulted in a request that he resign from the office of bar counsel in 1991). As noted, I allowed bar counsel's motion to file a response to this argument, made by the respondent for the first time in his show cause motion; that response included two affidavits, one from the then bar counsel, and one from the then director of the consumer and attorney assistance program. Both affiants assert that they have no knowledge of any complaint, problem, or friction between current assistant bar counsel and the respondent at the time of his employment there in the early 1990s, while he was a law student. The director of the consumer

and attorney assistance program asserts that, at this point in time, she remembers only that the respondent had worked briefly in that office and that he never mentioned any issue or concern relative to current assistant bar counsel; then bar counsel asserts that the respondent was asked to resign for reasons unrelated to assistant bar counsel. I decline the respondent's request that, due to bar counsel's purported personal animosity and bias, unsupported by anything in the record, the charges against him be dismissed and fines and sanctions be imposed against bar counsel.

a. Standard of review. Bar counsel bears the burden, in all attorney disciplinary proceedings, of proving misconduct by a preponderance of the evidence. See Mass. R. Prof. C. § 3.28; Matter of Mayberry, 295 Mass. 155, 167 (1936). See also Matter of Kerlinsky, supra at 664 n.10; Matter of Budnitz, 425 Mass. 1018, 1018 n.1 (1997).

Supreme Judicial Court Rule 4:01, § 8(5)(a), recognizes the hearing committee as the "sole judge of the credibility of the testimony presented at the hearing." See Matter of Tobin, 417 Mass. 81, 85 (1994). Like any finder of fact, the hearing committee is entitled to believe some portions of a witness's testimony and disbelieve others. "The hearing committee . . . is the sole judge of credibility, and arguments hinging on such determinations generally fall outside the proper scope of our

review." Matter of McBride, 449 Mass. 154, 161-162 (2007). "The hearing committee's credibility determinations will not be rejected unless it can be said with certainty that [a] finding was wholly inconsistent with another implicit finding." Matter of Murray, 455 Mass. 872, 880 (2010).

As stated, the respondent asserts that much of the testimony before the hearing committee was false, and made in retaliation for his actions in protecting his father's estate from his sister's efforts to take estate property for her own use, and that bar counsel knowingly introduced such false testimony. Having reviewed the hearing committee's decision, adopted in full by the board, and the hearing transcripts, I conclude that the hearing committee's factual findings have ample bases in the record, and that its credibility determinations were not inconsistent or contradictory; indeed, they are more than amply supported in the record.

b. Appropriate sanction. I turn to the remaining question of the appropriate sanction. Bar counsel supports the board's recommended sanction of disbarment.

The appropriate disciplinary sanction to be imposed is one which is necessary to deter other attorneys from similar behavior and to protect the public. Matter of Foley, 439 Mass. 324, 333 (2003), citing Matter of Concemi, 422 Mass. 326, 329 (1996). "If comparable cases exist in Massachusetts, [I] apply the markedly

disparate standard in imposing a sanction." Matter of Griffith, 450 Mass. 500 (2003), citing Matter of Finn, 433 Mass. 418, 423, 742 N.E.2d 1075 (2001). The sanction imposed must not be "markedly disparate" from sanctions imposed on attorneys found to have committed comparable violations. See Matter of Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited. In determining the appropriation sanction, a fundamental consideration is "the effect upon and the perception of, the public and the bar." Matter of McBride, *supra* at 163, quoting Matter of Alter, 389 Mass. 153, 156 (1983). At the same time, however, the sanction imposed must be appropriate for the particular circumstances. "Ultimately, we decide each bar discipline case 'on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances.'" Matter of Balliro, 453 Mass. 75, 85-85 (2009), quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984).

The presumptive sanction for intentional misuse of client funds with deprivation is indefinite suspension or disbarment. See Matter of Schoepfer, 426 Mass. 183, 187 (1997). In choosing between these two sanctions, the court "generally considers whether restitution has been made." Matter of LiBassi, 449 Mass. 1014, 1017 (2007). Here, the respondent returned approximately \$185,000 of the purported "gift" checks, and \$35,000 of the funds that he removed from the trust account and deposited in one of

his own accounts, after his sister had demanded an accounting and bar counsel's investigation had begun. See id., quoting Matter of Hollingsworth, 16 Mass. Att'y Discipline Rep. 227, 236 (2000) ("recovery obtained through court action is not 'restitution' for purposes of choosing an appropriate sanction"). There is no indication that any other restitution has been made, and, at the time of the disciplinary proceedings, the respondent apparently continued to live rent-free in the Framingham house. Making restitution "is an outward sign of the recognition of one's wrongdoing and the awareness of a moral duty to make amends to the best of one's ability. Failure to make restitution, and failure to attempt to do so, reflects poorly on the attorney's moral fitness." Matter of McCarthy, 23 Att'y Discipline Rep. 469, 470 (2007). In these circumstances, the intentional deprivation of trust funds alone likely would merit disbarment. See Matter of McBride, supra at 163-164; Matter of Dasent, 446 Mass. 1010, 1012-1013 (2006); Matter of Dragon, 440 Mass. 1023, 1023-1024 (2003).

In addition, the board noted in support of its recommendation that there were no mitigating factors and a substantial list of aggravating factors. I agree with both conclusions. The respondent has identified no mitigating factors that might justify reducing the recommended sanction, and his failure to repay the funds of which his family members were

deprived, or to express any remorse or recognition of the wrongfulness of his conduct, as well as his continuing efforts to conceal and misrepresent his misconduct, counsel against an indefinite suspension. See Matter of McCarthy, *supra*.

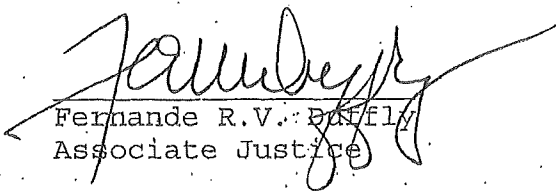
The respondent has a history of prior discipline. See Matter of Ryan, 24 Mass. Att'y Discipline Rep. 632, 641 (2008). The board also noted in aggravation that the respondent acted from a selfish motive to benefit himself financially, see Matter of Lupo, 447 Mass. 345, 354 (2006), rather than unintentionally depriving the trust of funds; his actions benefitting himself caused substantial harm to others, including his siblings, see Matter of Crossen, 450 Mass. 553, 581 (2008); his misconduct took advantage of an "elderly and vulnerable" person to whom he owed a fiduciary duty, see Matter of Pemstein, 16 Mass. Att'y Discipline Rep. 339, 345 (2000); he knowingly made false statements to bar counsel during the course of the disciplinary proceedings and gave knowingly false testimony at the hearing; and he refused to acknowledge the wrongfulness of his conduct. See Matter of Kerlinsky, *supra* at 665. Before me, the respondent continued to maintain that his conduct was not wrongful, and that he had acted precisely as authorized under the springing durable power of attorney and as intended by his father. Moreover, the respondent's deliberate misrepresentations to bar counsel and to the hearing committee "reflects adversely on the attorney's

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fitness to practice law." Matter of Garabedian, 416 Mass. 20, 25
(1993).

On this record, disbarment would not be "markedly disparate" from the sanction imposed in similar cases. See Matter of Goldberg, supra. The respondent's intentional misuse of his father's funds, his attempts to hide his syphoning of funds from his siblings, and his apparent efforts to delay or conceal his acquisition of funds to ensure that they did not go to his bankruptcy creditors, in conjunction with the multiple violations present here, repeated over a period of years, his record of prior discipline, and the absence of any mitigating factors, support a judgment of disbarment.

3. Disposition. A judgment shall enter disbarring the respondent from the practice of law in the Commonwealth.

By the Court


Fernande R.V. Duffly
Associate Justice

Entered: January, 16, 2015.