ADMONITION NO. 13-18

IN THE MATTER OF DISCIPLINE OF AN ATTORNEY
See Memorandum of Decision

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No: BD-2013-074

IN RE: MATTER OF AN ATTORNEY

JUDGMENT FOR ISSUANCE OF ADMONITION
BY BAR COUNSEL

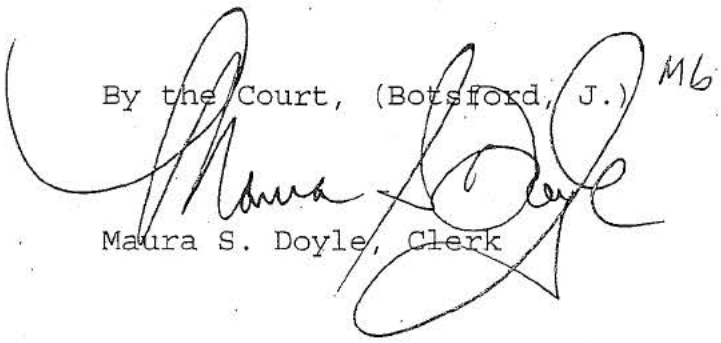
This matter came before the Court, Botsford, J., on an Information and Record of Proceedings with the Vote and Recommendation of the Board of Bar Overseers filed by Bar Counsel on July 16, 2013. A hearing was held on August 22, 2013, attended by assistant bar counsel and the lawyer's counsel.

After hearing, and in accordance with the Memorandum of Decision of this date, it is ORDERED and ADJUDGED that an admonition be administered to the lawyer by the Office of Bar Counsel.

It is FURTHER ORDERED that the lawyer is required to

attend a course on estate administration to be approved by bar counsel.

By the Court, (Botsford, J.) MG



Maura S. Doyle, Clerk

Entered: September 30, 2013

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2013-074

IN RE: MATTER OF AN ATTORNEY

MEMORANDUM OF DECISION

The Board of Bar Overseers (board) has filed an information in which a majority of its members recommend that the respondent be publicly reprimanded for charging and collecting excessive fees. The respondent argues that the underlying petition for discipline should be dismissed. After a hearing, and based on my review of the record before me, I conclude that the respondent should receive an admonition.

Background. Bar counsel brought a petition for discipline against the respondent on October 19, 2011, alleging that in violation of Mass. R. Prof. C. 1.5(a), she had charged clearly excessive fees in connection with her work as executrix of and attorney for the estate of her former client. A hearing committee of the board conducted an adjudicatory hearing and thereafter issued a decision concluding that the fees charged by the respondent were clearly excessive and recommending that the respondent receive a public reprimand. The respondent appealed to the board. In a decision dated June 27, 2013, a majority of the board adopted the hearing committee's findings and its recommendation of a public reprimand.[1] This information

[1] More particularly, seven members of the Board of Bar Overseers (board) recommend a public reprimand; the four dissenting members recommend that the underlying petition for

followed.

1. Facts. I summarize the facts as found by the hearing committee and as accepted by the board. The respondent was admitted to the Massachusetts bar in 1988. From approximately 2002 to the present, she has worked as a solo practitioner, with about twenty-five to thirty per cent of her practice consisting of probate matters. In May of 2002, the respondent prepared a healthcare proxy, a durable power of attorney, and a will for her client, who executed the documents that month. The respondent was named in them as the healthcare agent, the attorney in fact, and the executrix of the client's estate, and was also to be the attorney for the estate. The will provided for two charitable bequests and, after directing the executrix to sell the client's personal property, left the remainder of the estate to a friend of the client and children of other friends.[2]

On July 3, 2006, the client died. At the time of her death, the estate was valued at approximately $1,220,600.[3] The estate consisted of the following property: a condominium valued at $364,650, furniture and furnishings valued at $10,000,[4] clothing and jewelry valued at $9,000, and a car valued at $42,670. The estate also included checking and savings accounts with a balance of $53,392.52, a premium deferred annuity worth $251,798.27, mutual funds valued at $485,361.40, and a claim against an antique dealer for $3,786.75.

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discipline be dismissed, or in the alternative the matter be remanded to the hearing committee for further findings.

[2] The property was dispensed as follows: (1) fifty per cent to one individual; (2) thirty per cent to another individual; and (3) ten per cent each to two other individuals.

[3] This valuation is based on the estate inventory that the respondent prepared and submitted in January, 2007.

[4] In the amended first and final account, the value of the furniture and furnishings was increased from $10,000 to $15,410.

On October 13, 2006, a judge in the Norfolk Probate and Family Court appointed the respondent as executrix of the estate. The will directed the respondent to sell the testatrix's personal property. The respondent testified that, prior to her death, the client orally instructed her to sell the property to people that would appreciate it as much as she did.

On August 28, 2008, the respondent filed a first and final account with the Probate and Family Court. As there reflected, the respondent's hourly fees were $225 for her work as executrix and $300 for her work as an attorney. The respondent charged the estate a total of $134,437.50 for her fees – $99,787.50 for her work as executrix[5] and $34,650 for her work as attorney. After receiving a copy of the first and final account, two of the residuary beneficiaries filed objections, and one of them also filed a complaint with bar counsel. The respondent paid each objecting beneficiary $10,000 from her personal funds to settle the dispute, and the estate was charged $15,000 for legal fees resulting from the settlement negotiations. Subsequent to the settlement, the respondent filed an amended first and final account that listed $85,387 in fees charged to the estate for her work as executrix, and $34,650 in fees for her services as attorney.[6] The Probate Court judge accepted the amended account on November 9, 2009.

Although the Probate Court accepted the amended first and final account, the hearing committee found that the fees that the respondent charged as executrix and as attorney were clearly excessive. In reaching this determination, the hearing committee implicitly appeared to accept that the respondent's hourly rates were reasonable, but nevertheless concluded that the number of hours she spent on the estate was unreasonable. It concluded that a reasonable total

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[5] Included in this total is $14,400 the respondent charged for services provided before the respondent was formally appointed as executrix. She charged $200 per hour for these services. No claim is made that the respondent did not perform these pre-appointment services.

[6] The account did not include the $14,400 for services charged by the respondent for services she had performed before her appointment as executrix. See note 5, supra.

for both executrix and attorney services for an estate of this size would have been approximately $60,000-$65,000 rather than the $134,437.50 that the respondent had charged and received. In particular, with respect to her executrix fees, the hearing committee noted that the respondent charged the estate more to sell the furniture and furnishings than their value of $15,410, including charges for multiple trips to consignment shops and a $4,644 consignment fee. The respondent also spent and charged for two internet car listings. After charging the estate for three hours to clean out a safety box and locate a cemetery deed, the respondent subsequently charged the estate approximately four additional hours to verify that the safety deposit box was empty and to close it. Additionally, the respondent made twenty-four trips from her home or law office to the testatrix's condominium.

With respect to legal fees, the respondent charged more than thirty hours to prepare and file the first and final account for the Probate Court; the hearing committee found that a reasonable amount of time for this task would have been approximately four to five hours. Despite being able to mail a petition to the Probate Court, the respondent instead charged three hours to file the petition for approval of the court in person, including her travel time. Additionally, the respondent spent approximately twenty-one hours preparing estate tax returns even though the respondent has an LL.M in tax law and the task could have been performed in under five hours using tax preparation software.

Based on its conclusion that in her roles as executrix and attorney the respondent charged a clearly excessive fee in violation of Mass. R. Prof. C. 1.5(a) (rule 1.5[a]), the hearing committee recommended that the respondent receive a public reprimand. As previously indicated, the board's decision on the respondent's appeal from the hearing committee's decision was split. A majority of seven members of the board agreed with the hearing committee that the

respondent had violated rule 1.5(a) by charging and collecting a clearly excessive fee, and recommended that she receive a public reprimand. The dissenting members asserted that this case required either dismissal or a remand.

Discussion. Rule 1.5(a) prohibits a lawyer from charging a "clearly excessive fee." Mass. R. Prof. C. 1.5(a) (rule 1.5[a]).[7] The rule provides a non-exclusive list of eight factors to be considered in deciding whether a fee is "clearly excessive." In addition, quoting language in an earlier version of this rule, this court has stated that "'[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee.'" Matter of Fordham, 423 Mass. 481, 492 (1996), cert. denied, 519 U.S. 1149

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[7] Rule 1.5 (a) of the Massachusetts Rules of Professional Conduct states:

> "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:
>
> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> "(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> "(3) the fee customarily charged in the locality for similar legal services;
>
> "(4) the amount involved and the results obtained;
>
> "(5) the time limitations imposed by the client or by the circumstances;
>
> "(6) the nature and length of the professional relationship with the client;
>
> "(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> "(8) whether the fee is fixed or contingent."

(1997), quoting S.J.C. Rule 3:07, DR 2-106(B). Rule 1.05(a)'s prohibition applies to a lawyer in connection with the direct provision of legal services as well related services, such as those performed as executrix of a client's estate. See Mass. R. Prof. C. 5.7.[8]

In determining that the fees charged to the estate by the respondent for her services as executrix and attorney were clearly excessive, the hearing committee reviewed the facts it found in light of the eight factors listed in rule 1.05(a), and concluded in substance that the respondent spent far too many hours performing the work necessary to administer the relatively simple estate of her client and to perform the necessary legal work. The board agreed. The subsidiary facts contained in the board's majority report are supported by substantial evidence in the record of the hearing, see S.J.C. Rule 4:01, § 8(6), and I agree with the board majority as well as the hearing committee about the excessive nature of the fees. The rate's reasonableness is not dispositive; the number of hours exceeding what a prudent and experienced lawyer would have spent must be considered. See, *e.g.*, Matter of Fordham, 423 Mass. at 490 ("the number of hours spent was several times the amount of time any of the witnesses had ever spent on a similar case"); Matter of Woodhouse, 23 Mass. Att'y Discipline Rep. 787, 789 (2007) ("The number of hours spent by the respondent on the case was substantially in excess of the hours a reasonably prudent experienced lawyer would have spent").

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[8] Rule 5.7 of the Massachusetts Rules of Professional Conduct provides in pertinent part:

> "(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to law-related services, as defined in paragraph (b), if the law-related services are provided:
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> "(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; . . . .
>
> "(b) The term 'law-related services' denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."

The assets in the client's estate included a condominium and highly liquid monetary assets -- a deferred annuity, mutual fund investments, checking and savings accounts; these assets were all known and easily accessible to the respondent, and not difficult to appraise. While the client's furniture, furnishings, and clothes have been a major source of contention in these proceedings, at the end of the day, I share the board's view that regardless of whether one takes into account the instructions that the respondent testified her client gave orally to sell the personal property to purchasers who would appreciate the items as much as the client did, the hours spent by the respondent in removing the property from the client's condominium and consigning it for sale, resulting in executrix fees that equaled or exceeded the property's value, were far in excess of what should appropriately be charged to the estate.[9] With respect to legal fees, as mentioned, the respondent charged over thirty hours to prepare and file the first and final account; supported by the testimony of bar counsel's expert witness, the hearing committee found that this task should have taken four to five hours to complete. In fact, even the respondent's own expert testified that it would take between ten and twenty hours to complete the first and final account for this estate. Charging over thirty hours to prepare and file the account was thus well beyond a reasonable fee by either expert's measure. The same is true of the other examples of hours and resulting fees highlighted by the hearing committee and the board majority.

I appreciate that none of the individual fee amounts referred to in the preceding paragraph is outrageously or even remarkably high; the same is true of the fee total of $134, 437.50,

[9] As previously stated, the respondent charged the estate six hours at a rate of $225 per hour to post two internet car listings. She also charged the estate for twenty-four trips between her home or office and the testatrix's condominium. Including travel time, the respondent charged the estate over fifty-five hours to pack and clean the condominium. Additionally, the respondent charged over fifteen hours to drop off and pick up clothing from various consignment shops.

particularly when viewed in light of the total value of the client's estate. But what is "clearly excessive" obviously must be considered in a particular factual context, and when evaluated in light of the specific facts presented here about the nature of this client's estate, I conclude that the fees were clearly excessive.

In arguing against this view, the respondent contends that when the factors listed in rule 1.5(a) are considered as a whole, as they must be, the fees she charged were reasonable. She has emphasized four factors in particular: the first factor – time and labor, novelty and difficulty and the skill required; the fourth – the amount involved and results obtained; the sixth – the nature and length of the professional relationship; and the seventh – the experience, reputation, and ability of the lawyer. I do not agree that these factors weigh heavily in the respondent's favor.

While she claims that it was unusual for a will to direct the sale of personal property like furniture, furnishings, clothes, and jewelry, because usually family members are interested in and simply given such items, it is of course not unusual for an executrix or administratrix of an estate to be required to sell many types or property belonging to a decedent, and there is no evidence that the particular items here were of such a nature that arranging for their sale should have been extraordinarily difficult or time-consuming. As for results obtained, the respondent points to the increase in value of the estate's monetary investments over the duration of the estate's administration. But the respondent did not select the deferred annuity or the mutual funds involved – it appears that she simply did nothing to sell or dispose of them. I do not accept the respondent's view that this passive retention of an annuity and an investment in mutual funds offers a justification of a fee award that significantly exceeds a reasonable limit for the nature of

the work involved.[10]

Turning to the nature and length of the respondent's professional relationship with her client, I accept that during the final years of the client's life, the respondent worked closely with her and, it appears, the client put great trust in her. But to some extent, the close relationship between attorney and client, and in particular the respondent's familiarity with her client's home, property, and assets overall, support the hearing committee's and board majority's conclusion that the many hours spent by the respondent in collecting and disposing of client's personal property, as well as in preparing the final account and estate tax return were grossly excessive. Finally, with respect to the respondent's experience and reputation, the factor does not appear particularly relevant or helpful to her position. As stated, the evidence shows this was a relatively simple estate that did not require special or particular skills to administer. The respondent's advanced degree in taxation and her apparent experience in administering estates argue in favor of requiring less rather than more time to administer this one.

The respondent also supports her position by joining in some or all of the points made by the dissenting members of the board. I turn to those points.

1. Effect of the Probate Court's judgment. The dissenting members acknowledge that the Probate Court's approval of the respondent's amended first and final account, including the amount of fees charged by the respondent as listed in the account, is not res judicata in relation to this disciplinary proceeding. At the same time, they assert that the Probate Court judge's "allowance of the respondent's accounts should be dispositive on the issue of the reasonableness

[10] The increase in value of these investments appears more related to positive developments in the market rather than any affirmative action by the respondent. If one accepts the respondent's argument that she should be credited for this increase in the estate's assets, it would follow logically that an executrix who left assets alone should be held responsible for the investments' loss in value should the market decline. Thus, "results obtained" under rule 1.5(a) would be subject to the vagaries of the market rather than affirmative action by the executrix.

of the respondent's fees" (Report, p. 31), and that "the opinion of a court on the reasonableness of a fee should be the final word." (Id., p.35.) The argument fails.

Under rule 4:01, §11, a judgment or ruling in a civil proceeding concerning the same allegations does not prevent bar counsel from pursuing disciplinary proceedings.[11] "The thrust of the rule is to permit the board to go forward with its business without regard to other criminal and civil proceedings." Matter of Segal, 430 Mass. 359, 363 (1999). Although another tribunal may adjudicate similar issues based on the same factual allegations, the question whether an attorney's conduct warrants professional discipline is a separate matter that bar counsel and the board are entitled to investigate, and its resolution ultimately rests with this court. See Matter of Weiss, 460 Mass. 1012, 1013 (2011) ("The duties and prerogatives of bar counsel and the board – and this court's power to superintend the bar and impose discipline when appropriate – are not preempted or compromised in any way by the decisions of other counsel . . . or the judge in the underlying litigation"). The Probate Court judge's acceptance of the respondent's amended first and final account did not preclude bar counsel or thereafter the board from investigating and determining that the respondent charged a clearly excessive fee in violation of rule 1.5(a).

Nevertheless, there is a substantial overlap between the factors considered by a court in awarding attorney's fees and the factors that inform a determination by the board or this court as to whether an attorney's fees are clearly excessive. In determining an appropriate fee award, a court must determine whether the fees sought are fair and reasonable. See, *e.g.*, McMahon v. Krapf, 323 Mass. 118, 123 (1948); Cummings v. National Shawmut Bank of Boston, 284 Mass. 563, 569 (1934). Factors that bear on this determination include (1) the ability and reputation of

[11] Supreme Judicial Court Rule 4:01, § 11, provides in relevant part: "a verdict, judgment, or ruling in the lawyer's favor in civil, administrative, or bar disciplinary proceedings shall not require abatement of a disciplinary investigation predicated upon the same or substantially similar material allegations."

the lawyer; (2) the demand of a lawyer's services by others; (3) the amount and importance of the matter involved; (4) the time spent; (5) the prices usually charged for similar services by other attorneys in the same area; (6) the amount of money or the value of the property affected by the controversy; and (7) the results secured. See Cummings, supra. Rule 1.5(a) directs that similar factors be weighed when determining whether a lawyer's fees are clearly excessive. (See note 7, supra, where the rule is quoted.) Given this correspondence between considerations relevant to fee awards and the factors listed in rule 1.5(a), a judge's fee award in the same matter may well provide useful and even persuasive guidance to bar counsel, a hearing committee, the board, or this court in determining whether the attorney has charged or collected a clearly excessive fee, but as rule 4:01, § 11, makes clear, the fee award is not dispositive. See Matter of Weiss, 460 Mass. at 1013.[12]

2. The respondent's testimony regarding her client's wishes. The respondent and the dissenting members contend that the hearing committee and the board were incorrect in failing to take into account the respondent's testimony that the testatrix wanted her personal property given to people who would appreciate it as much as she did. The hearing committee stated in its decision that "while we do not affirmatively disbelieve the respondent's testimony about [the testatrix's] expression of her wishes, we disregard the testimony pertaining to those alleged wishes" because it concluded in substance that the will was unambiguous, and the client's

[12] There is disagreement between the majority of the board and the dissenting members over whether the Probate Court judge made a "finding" with respect to the appropriateness of the attorney's fees included in the respondent's amended first and final account. The board contends that the judge did not make such a finding in accepting the account – that the language used by the judge was essentially boilerplate; the dissenters advance the opposite conclusion. It is impossible to resolve this dispute on the present record, but in the end, resolution is not required because, as indicated in the text, even if the judge did carefully review and approve the fees charged – as opposed to accepting the parties' settlement of their fee dispute – such a determination would not be binding on bar counsel or the board.

alleged instructions would conflict with the terms of the will. See Flannery v. McNamara, 432 Mass. 665, 667-668 (2000); Putnam v. Putnam, 366 Mass. 261, 266 (1974). See also McMillen v. McMillen, 57 Mass. App. Ct. 568, 572 (while extrinsic evidence may be admitted to understand testator's intent at time will drafted, and "while intent is the lodestar of testamentary construction, it cannot be used to displace what a will has said") (quotation and citation omitted).

It is not necessary to resolve this dispute. As I have stated previously, accepting the existence of the client's alleged directions to the respondent does not change the fact that the respondent still had a duty under rule 1.5(a) to ensure that the amount she was charging was not clearly excessive, and the hours and associated fees charged by the respondent in relation to the disposition of her client's personal property indicate that the respondent failed to satisfy that duty.

3. Justification for crediting experts. The dissenting members contend that the hearing committee was obligated to explain its reasons for crediting the testimony of bar counsel's expert witness and not the respondent's. I disagree.

As a preliminary matter, expert testimony is not always a necessary prerequisite to finding that an attorney has committed an ethical violation. Matter of Saab, 406 Mass. 315, 329 (1989), quoting Fishman v. Brooks, 396 Mass. 643, 650 (1986). Nonetheless, expert testimony is usually warranted in petitions for clearly excessive fee violations under rule 1.5(a) because the hearing committee needs to consider the fee customarily charged in the locality for similar legal services. See Mass. R. Prof. C. 1.5(a)(3). When expert testimony is offered, however, the hearing committee and the board are not bound by an expert's testimony even if there is no opposing expert. See Matter of Minkel, 13 Mass. Att'y Discipline Rep. 548, 552 (1997).

Under S.J.C. Rule 4:01, § 8(5)(a), the hearing committee is "the sole judge of the

credibility of the testimony presented at the hearing." See Matter of Donaldson, SJC No. BD-2012-045 (April 4, 2011), citing S.J.C. Rule 4:01, § 8(5)(a). See also Matter of McCabe, 13 Mass. Att'y Discipline Rep. 501, 506-507 (1997). Absent clear error or a finding that the determination is wholly inconsistent with other findings, a court cannot disturb the hearing committee's credibility determinations. Matter of Nissenbaum, 21 Mass. Att'y Discipline Rep. 513, 523 (2005); Matter of Hachey, 11 Mass. Att'y Discipline Rep. 102, 103 (1995). "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). While clearly it may be helpful in a particular case, especially in connection with a fact witness, for a hearing committee to explain why it chose to believe or disbelieve the witness, there is no requirement that it do so. See Matter of Donaldson, supra at 7-9 (stating that board did not need to provide thorough explanation for why it accepted part of respondent's testimony and rejected part); Matter of McCabe, supra at 506-507 (contrasting narrow review of hearing committee's credibility determinations with review applicable to administrative hearing officers). Moreover, the defining characteristic of an expert witness is his or her ability to offer opinion testimony, and opinion testimony by its nature often does not admit to fine parsing by the fact finder to pinpoint exactly why it was persuasive. The board's minority suggests that the risk presented by expert opinion testimony is that a hearing committee will accept the expert's opinion as to an ethical violation, and will do so without independent analysis. But, as the board's majority points out, that risk did not materialize here. The hearing committee accepted the expert testimony of bar counsel's expert on a variety of issues and implicitly discredited opposing opinions of the respondent's expert, but the hearing committee also made its own findings from the evidence that supported its ultimate determination that the

fees here were clearly excessive.

The board's dissent also contends that bar counsel's expert's testimony was inappropriate because (1) the expert opined on the ultimate issue, and the hearing committee relied on this opinion in finding that there was a violation, and (2) he relied for his opinions on his own experience in his own legal practice rather than general principles. Both of these arguments are unpersuasive.

Although bar counsel's expert, as well as the respondent's expert, testified about whether given fees were "clearly excessive," the hearing committee did not adopt those statements point blank. Rather, as suggested in the previous paragraph, the hearing committee credited factual and opinion testimony of bar counsel's expert that supported its ultimate conclusion that the respondent's fees were clearly excessive. For example, the hearing committee adopted bar counsel's statements that a fair and reasonable amount of fees for such an estate, including both legal and executrix fees, would be $60,000-$65,000. The hearing committee also credited the testimony of bar counsel expert's that the estate was not complex. Both of these opinions supported the conclusion that the respondent's fees were clearly excessive, but neither touched directly on that ultimate issue.

The separate argument that bar counsel's expert testified as to his own practice is equally unavailing. Most of the statements that the hearing committee credited were opinions pertaining to the character of the estate and the amount of time it should take to complete various tasks. It is the case that the hearing committee adopted the expert's testimony that the fees charged for the basic administration tasks – selling clothing, selling furniture, and cleaning the condominium – were too high because the respondent did not take reasonable steps to minimize time spent on costs and expenses and failed to delegate to others, and in connection with that testimony, the

expert discussed his own practice. But the expert's testimony on this subject was not necessary to the hearing committee's determination that the respondent's fees connected to the disposition of personal property were clearly excessive: merely comparing the amount that the respondent spent in fees to sell various items to the items' value provides its own justification of the determination.[13]

6. Sanction. The remaining issue is the appropriate sanction in this case. The hearing committee and board majority recommend that the respondent receive a public reprimand. Although I am not bound by the board's recommendation, it is entitled to "substantial deference." Matter of Finneran, 455 Mass. 722, 739 (2010), quoting Matter of Tobin, 417 Mass. 81, 88 (1994). In deciding what sanction to impose, I must make sure that the sanction I select is not "'markedly disparate from judgments in comparable cases.'" Matter of Finn, 433 Mass. 418, 423 (2001). For the reasons set forth below, I find that an admonition is the appropriate sanction in this case.

The board majority and bar counsel point to Matter of Fordham, 423 Mass. at 494-495, as establishing a presumptive sanction for charging a clearly excessive fee as a public reprimand. I am not wholly convinced that the case does establish a presumption, compare, *e.g.*, Matter of Schoepfer, 426 Mass. 183, 187-188 (1997), but in any event, this case is distinguishable from Fordham. The attorney there charged over three times a fair and reasonable amount for his attorney's fees, and much of that time was spent teaching himself criminal law principles that were new to him and outside of his areas of legal practice. See id. at 490. Here, the respondent

[13] In addition, the board's dissenting opinion argues that the finding of a rule 1.5(a) violation for clearly excessive fees under these circumstances will have a negative practical effect on solo practitioners. This presents an interesting theoretical argument, but it is inappropriate to impose a different standard for fees based on an attorney's type of practice. At every level of practice, an attorney must exercise discretion when charging fees to ensure that they are not unreasonable.

charged two times the amount that the hearing committee found was reasonable, and there is no indication that she was charging the estate for her self-education.

Matter of Fordham may be the only contested case of public discipline in which the sole misconduct charged was clearly excessive fees.[14] Attorneys in other excessive fee violation matters have received admonitions. In Admonition No. 06-02, 22 Mass. Att'y Discipline Rep.

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[14] In Matter of Lewis, 19 Mass. Att'y Discipline Rep. 271 (2003), the parties stipulated to the imposition of a public reprimand. The facts of the case, found in Lewis v. Committee for Pub. Counsel Servs., 50 Mass. App. Ct. 319, 320-323 (2000), reflect that Lewis, a lawyer appointed to represent indigent clients, spent well over fifty per cent of the time for which he billed in reviewing and updating his client files. In Matter of Palmer, 413 Mass. 33, 34, 38-40 (1992), the lawyer received a public reprimand where his fees to administer an estate were approximately twice the reasonable rate. However, the lawyer committed numerous other violations in addition to the clearly excessive fee violation. Id. at 37. The court determined that public censure was appropriate given the cumulative effect of violations. Id. at 38-40.

There are other cases in which the lawyer received a term of suspension rather than a public reprimand. As in Matter of Palmer, the lawyers in these cases were charged with multiple disciplinary rule violations. In Matter of Rafferty, 26 Mass. Att'y Discipline Rep. 538 (2010), a lawyer permitted a client to dictate a litigation strategy that involved excessive and improper discovery requests resulting in little to no value to the client, but generating high fees: the lawyer charged approximately $700,000 for discovery in two cases. Acknowledging that the hourly fee was reasonable, the board concluded the lawyer's total fee was excessive and substantially exceeded fees typically charged in such cases. Id. at 540. In addition to the clearly excessive fee violation, the lawyer violated three other ethical rules: competent representation under Mass. R. Prof. C. 1.1, diligent representation under rule 1.3, and failure to explain matters to allow the client to make an informed decision under rule 1.4(b). Id. at 539. Additionally, the lawyer had a prior history of discipline and was motivated by self-interest. Id. at 541.

In Matter of Woodhouse, 23 Mass. Att'y Discipline Rep. 787 (2007), a lawyer charged for seventy-four hours at a rate of $200 per hour – resulting in a total of $10,500 in fees – to write a letter to the wrong governmental body, to file a procedurally improper complaint in Federal District Court, and to oppose a motion to dismiss that action. As a result of the lawyer's action and inaction, the client lost the right to pursue his age discrimination claims in either the Federal or State court, rendering his legal services valueless. Id. at 789. The attorney had received a retainer for $10,000, and failed to return it. The number of hours spent by the lawyer was substantially in excess of the number of hours a prudent and experienced lawyer would have spent on the matter. Id. at 789-790. The lawyer also violated Mass. R. Prof. C. 1.1 for competent representation and rule 1.16(d) by failing to return unearned fees after the lawyer was discharged. Id. at 790. There was also a history of discipline for related conduct, and the lawyer demonstrated a lack of insight into the wrongfulness of his misconduct. Id.

848, 848 (2006), a lawyer represented a client as sole heir at law and administrator of a small estate and charged the client at a rate of $225 per hour for services that were both unnecessary and redundant. The lawyer made restitution of such fees, and received an admonition conditioned upon attending a course on estate administration. In Admonition No. 00-78, 16 Mass. Att'y Discipline Rep. 563 (2000), a lawyer became trustee of two inter vivos trusts for the benefit of an elderly client and the client's brother in 1993, and charged a flat fee of $10,000 per year to serve as trustee of each trust, although he performed no legal services connected to the trusts except the probate of the brother's estate in 1995. Beginning in 1994, the lawyer also charged the client his hourly legal fee to perform non-legal caretaking services for the client, who was very elderly and only borderline competent. In mitigation, the lawyer was not aware before bar counsel so informed him that he could not charge at this rate for non-legal services, the lawyer refunded "a substantial sum to the trust," and he also had taken "very good care" of the client over the years. The lawyer was admonished for his misconduct. Id. at 564. See also Admonition No. 12-17, (2012), http://www.mass.gov/obcbbo/admon2012.pdf. (attorney who sent a prospective client an illegal and overly generous contingency fee agreement for primarily ministerial work, but never actually collected a fee, received an admonition for charging a clearly excessive fee).

Each of these cases presents different factual circumstances than the present one, to be sure. But in the present case, the evidence indicates that from when she first began to represent the client in 2000 until the client's death in 2006, the respondent committed herself to providing the client with attentive, competent legal services and to make sure the client's needs were met. This is not a case with any evidence of bad faith or overreaching on the respondent's part, nor one involving charges of disciplinary rule violations in addition to the fee issue. Nor is there any

aggravating factor of prior discipline: the respondent has none. The amount of professional time the respondent spent on this estate was clearly excessive, but there is no suggestion that she charged the estate for more hours than she actually devoted to the tasks that were listed. Finally, as a result of the settlement with the beneficiaries regarding the first and final account and the fees charged, the respondent paid each of the contesting beneficiaries $10,000 from her personal funds. In all the circumstances, I conclude that an admonition, with the additional requirement that the respondent attend a continuing legal education course on estate administration to be approved by bar counsel, is not markedly disparate and is the appropriate sanction.

Conclusion. For the reasons stated, a judgment is to enter that an admonition be dispensed to the respondent with the condition that she attend a course on estate administration to be approved by bar counsel.

Margot Botsford
Associate Justice

DATED: September 30, 2013