IN RE: MATTER OF DANIEL J. LARKOSH
BBO NO. 639569

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

BAR COUNSEL, Petitioner, v. DANIEL J. LARKOSH, ESQ., Respondent.	)	B.B.O. File No. C5-19-260323

MEMORANDUM OF BOARD DECISION

Ignoring all caution signs and his ethical duties, the respondent tried to sign up a client who resided in the memory unit of an assisted living facility. He did so at the request of one of the potential client's adult daughters, who was locked in a dispute with one of her sisters over their mother's house. A hearing committee concluded that the respondent violated Rules 4.2 (communication with a represented person) and 7.3 (solicitation of clients) of the Massachusetts Rules of Professional Conduct. While we disagree with the conclusion about Rule 4.2, we agree that the respondent violated Rule 7.3. We hereby issue a public reprimand.

FACTUAL AND PROCEDURAL BACKGROUND

Bar counsel must prove all facts in support of his allegations by a preponderance of the evidence. B.B.O. Rules, Section 3.28. We will adopt all facts that are supported by the evidence, paying due deference to the hearing committee's findings as to credibility. B.B.O. Rules § 3.53. We recite the facts below, with specific reference where relevant to the committee's findings.

In July 2019, Barbara Roberts, age 88 (and since deceased), lived at the Windemere Nursing Rehab Center at the Martha's Vineyard Hospital ("Windemere"). She was situated in a locked "memory unit" due to suffering from dementia. Starting in approximately 2012, Attorney Eric Peters had represented Roberts in various estate planning and real estate matters, including the transfer of Roberts' home to her as a gift from her sister, Judith Hart. In 2013, Roberts signed a general engagement letter with Peters, pursuant to which Peters provided legal services.

Roberts had four adult daughters, two of whom play a role in the events of this case, Wendy Bujak (who was Roberts's primary caretaker) and Lois Hart. In 2013, Roberts had moved into Bujak's home on Martha's Vineyard, and in the same year she appointed Bujak as her attorney-in-fact pursuant to a durable power of attorney prepared by Peters, the terms of which broadly encompassed the "full power to act for me" and which specifically contemplated retaining counsel on her behalf. In 2015, Roberts appointed Bujak her healthcare agent.

On September 13, 2016, Roberts signed a quitclaim deed, which transferred her home in Chilmark and a vacant lot to Bujak, reserving a life estate to herself. Roberts made the transfer "in consideration of love and affection, as a gift, and for no monetary consideration." After confirming with Roberts her intentions, Peters prepared, notarized, and recorded the deed. On the same day, Roberts signed a last will and testament, also drafted by Peters.

After a series of medical incidents, in January 2018, Roberts's health care provider signed a form that diagnosed her with ongoing moderate dementia and concluded that she was unable to communicate her own medical decisions. In March 2018, Bujak (pursuant to her authority under the durable power of attorney), authorized Roberts's transfer to Windemere. That same month, her physician at Windemere diagnosed her with moderate dementia.

Later in 2018, Lois Hart, another of Roberts's daughters, contacted Larkosh. At the time, Hart lived in Utah and was estranged from her family, including her mother, whom she had not seen since 2010. Hart and Larkosh met in person at his office in the spring of 2019 when Hart traveled to Martha's Vineyard to visit her mother.

According to the Larkosh, Hart asked him to represent her mother, whom she claimed was being held at the assisted living facility against her will and who was the alleged victim of elder abuse. She also claimed that the 2016 real estate transfer was the result of undue pressure placed on Roberts by Bujak or the result of false pretenses. She did not disclose that her mother had been diagnosed with dementia or that her sister had been named as health care proxy.

The hearing committee found that Roberts had not asked Hart to find an attorney to represent her in any matter. (Hearing Committee Report ("HCR") at ¶ 36). It also found that Hart did not tell the respondent that her mother had asked for her assistance in retaining counsel. (HCR ¶ 27).[1] In other words, the hearing committee found that neither Roberts nor Hart had asked Larkosh to represent Roberts.

Hart and Larkosh agreed that he would meet with Roberts at Windemere. Prior to meeting with her, Larkosh met with two of Roberts's caregivers, who informed him that Bujak was responsible for Roberts being "held against her will" at Windemere. They also told him that Attorney Peters was assisting Bujak, including with the 2016 property transfer. In addition to the caregivers, Larkosh reached out to two doctors who had treated Roberts, neither of whom

[1] This latter finding is not supported by the record. For the proposition that, "Hart never told the respondent that Roberts had asked Hart to find her an attorney," the hearing committee refers to Volume I, pages 66-67 of the hearing transcript. (HCR ¶ 27). The transcript does not say this. Rather, the respondent was asked to confirm a different question, that "Roberts never said to you [Larkosh] that she ever asked Hart to find her an attorney," which is a different statement than reflected in the hearing report. (Hearing Transcript, Vol. I, p. 66) (emphasis added). In any event, the respondent did not affirm the statement he was asked about, instead testifying that it was a "separate question." For purposes of our analysis, we find that Larkosh was under the impression that Hart's mother had asked to meet with a lawyer, a fact that Larkosh learned from Hart prior to July 2, 2019.

provided information as to Roberts's competency and neither of whom agreed to evaluate Roberts.

The hearing committee found that, as a result of their conversations, Hart and Larkosh entered into an attorney-client relationship, which the committee described as an "implied attorney-client relationship." (HCR ¶ 44).

On July 2, 2019, the respondent met with Roberts at Windemere. First, he attempted to assess Roberts's competency by asking her the day of the week, the current President and where she had lived in the past, questions she was able to answer. (Hearing Transcript, Vol. I, page 59 and Vol. II, page 65). Without Hart present, he asked her about her medications, the reason she was at Windemere, and the transaction with Bujak concerning her home. Roberts told him that she did not understand why she remained at Windemere and wanted to "go home." (Hearing Transcript, Vol. I, page 61). Larkosh informed Roberts that if she wanted his assistance, he would, "do what he could to help get you out of here." (HCR ¶ 49). He told her that, if she wanted to hire him, she would have to sign a fee agreement. He, Roberts, and Hart agreed that he would return the next day with a fee agreement for Roberts to sign.

At 3:37 p.m. the next day, July 3, 2019, Peters sent an email to Larkosh, which we quote in full below:

> Please be advised that I represent Barbara Hart Roberts and have done so for the last seven years or so.
>
> I also represent her daughter, Wendy Bujak, who holds a Health Care Proxy and a Durable Power of Attorney from her mother.
>
> I am informed that you were at Windemere Unit 4 yesterday or the day before with Wendy's sister, Lois Hart, and visiting and conversing with Barbara Roberts.
>
> Please be advised that your contact with Barbara Roberts is not authorized and should immediately cease and desist.

If you have something of concern, please kindly address is to me.

(HCR ¶ 56).

Larkosh saw Peters's email before he returned to Windemere on July 3. The email did not dissuade him from meeting with Roberts and presenting her with a fee agreement for, "Complaint in Equity, Enforcement of Life Estate and Return Home against Wendy Bujak." (HCR ¶ 60). The hearing committee found that Larkosh should have contacted Peters and done other investigation before meeting with Roberts on July 3. He should have realized that Hart and Peters were telling him different things. (HCR ¶ 63).

The hearing committee found that Larkosh represented Hart on July 3, 2019, even though he presented a fee agreement to Roberts and the agreement concerned matters of immediate interest to Roberts. (HCR ¶ 62). The committee based this finding on its theory that no one other than Hart would want Roberts moved from Windemere back to her home and the deed vacated. However, the committee also recognized that Roberts was "fixat[ed] on leaving Windemere and going home to live" (HCR ¶ 61) even though doing so would not have been feasible.[2]

Events took a confrontational turn when Larkosh and Hart returned to Windemere the evening of July 3, 2019. They met with Roberts in a common area of the memory unit. Larkosh showed Roberts the fee agreement and Peters's email. To his question whether Peters represented her, Roberts replied that he did not. The hearing committee found that, due to Roberts's declining mental state, Larkosh should not have relied on her denial that Peters represented her. The hearing committee found that the fee agreement encompassed matters for

[2] Returning home was not a viable option. Roberts suffered from dementia and physical infirmities, and she was confined to a wheelchair. (HCR ¶ 61).

which Peters continued to represent Roberts: the transfer and management of the property. The committee opined that Hart was the "real party in interest" for purposes of unwinding the 2016 real estate transfer. (HCR ¶ 72). When Larkosh advised Roberts that unwinding the transaction was a step in returning her to her home, he failed to mention that, because she had a life estate in the property, she could go home under the status quo. When Roberts expressed misgivings about signing the document without the assistance of Bujak and Peters, Hart assured her that Larkosh, "is your attorney." (HCR ¶ 75).

The meeting aroused the attention of a duty nurse, Amanda Cimeno, who was concerned that Roberts was signing documents at night "by herself." (HCR ¶ 69). She called both Bujak and the police. The police arrived before 9:00 p.m. An argument ensued, Larkosh insisting that Roberts was his client (even though she had not signed the retainer agreement) and that the officers had no right to interfere. During the discussion, Roberts sat at a table, "just kind of looking off as officers were engaging with" Larkosh. (HCR ¶ 79). Nurse Cimeno announced that Roberts would not sign any papers that evening, because she had an attorney-in-fact pursuant to a Power of Attorney. Larkosh asked Roberts if she wanted to sign the engagement letter and insisted that she was competent to sign. Eventually, Roberts said, "I don't think I should be signing papers if I don't know what they're about." (HCR ¶ 82). Larkosh and Hart left the building; Roberts did not sign the fee agreement.[3]

In 2022, having investigated the allegations against him, bar counsel recommended that Larkosh receive an admonition. On July 29, 2022, the board issued an admonition, but Larkosh refused and objected to it, as was his right under S.J.C. Rule 4:01, § 8(2)(c) and B.B.O. Rules §

[3] Represented by a different attorney, Hart later filed an equity action and a separate conservatorship in Probate Court against Bujak, alleging generally neglect and elder abuse. The matter went to trial in 2024, and the court entered a directed verdict against Hart. All of this is irrelevant to the present case.

2.12. As a result, we assigned a Special Hearing Officer ("SHO"), who held an evidentiary hearing and issued a report, concluding that an admonition should be imposed. The report was filed with the board, and Larkosh appealed, taking the position that an admonition was unwarranted. On May 8, 2023, the board remanded the matter for formal disciplinary proceedings. S.J.C. Rule 4:01, §§ 8(4)(b) and 8(5)(a). On October 30, 2023, bar counsel filed a Petition for Discipline, Larkosh answered on November 27, 2023, and the matter was scheduled for an evidentiary hearing, which was conducted de novo. The hearing committee admitted into evidence the transcript of the hearing before the SHO. The committee heard from five witnesses over two days and admitted thirty exhibits, including the aforementioned transcript of the prior hearing before the Special Hearing Officer.

Following the public hearing, the committee concluded that Larkosh had violated both Rules 4.2 and 7.3. It recommended a suspension of between three and six months. In arriving at the sanction, the committee rejected Larkosh's argument that the "delay" in prosecuting the case should be considered as mitigating. It found numerous aggravating factors, including: Larkosh's lack of candor at the disciplinary hearing; his failure to appreciate his ethical obligations; his experience as a lawyer; and his taking advantage of a vulnerable client (an elderly woman with dementia).

DISCUSSION AND LEGAL CONCLUSIONS

Except for matters pled by the respondent in mitigation, bar counsel bears the burden of proving by a preponderance of the evidence all facts in support of the Petition for Discipline. B.B.O. Rules § 3.28.

Rule 4.2

Rule 4.2 of the Massachusetts Rules of Professional Conduct generally prohibits lawyers from communicating about the subject of a representation with a person the lawyer knows to be represented by another lawyer in the matter. In relevant part, the rule provides:

> In representing a client, a lawyer shall not communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Whether Larkosh violated the rule depends on whether he represented Hart, whether he knew Peters represented Roberts, and, if so, whether the representation involved the same "matter" for which Larkosh communicated with Roberts.

For one significant reason, we conclude that Larkosh did not violate Rule 4.2: he was not representing a client (Hart) at the time he met with Roberts. Rule 4.2 is limited to situations where a lawyer is "representing a client." A lawyer who is not doing so is free to speak with a represented person. Thus, bar counsel's allegations and the hearing committee's conclusions depend on the predicate fact that Larkosh represented Hart; that there was an attorney-client relationship between them. Neither the facts nor the law supports the allegation.

Larkosh testified consistently that he understood his client would be Roberts. Indeed, he testified that he "never had an attorney/client relationship with Lois Hart." (Hearing Transcript, Vol. I, page 40). The fee agreement he drafted and presented to Roberts identifies her as the client. Lois Hart did not testify that Larkosh represented her (in fact, neither party called Hart as a witness). Although he initially was contacted by Hart, who paid him a retainer, these facts do not by themselves establish an attorney-client relationship, nor do they contradict the evidence that Roberts was the potential client. Patel v. Martin, 481 Mass. 29, 44 (2018). By itself,

payment of a fee does not necessarily establish an attorney-client relationship. Indeed, a lawyer may receive a fee from a third person to represent a client provided the client gives informed consent. Mass. R. Prof. C. 1.8(f).

As an alternative theory to an actual relationship, the hearing committee concluded that there was an implied attorney-client relationship between Hart and Larkosh. As articulated by the Supreme Judicial Court, an attorney-client relationship may be implied even in the absence of an actual relationship. It depends on three elements: (1) a person seeks advice or assistance from a lawyer; (2) the advice or assistance sought pertains to matters within the lawyer's professional competence; and (3) the lawyer expressly or impliedly agrees to give, or actually gives, the requested advice or assistance. Patel v. Martin, *supra*, 481 Mass. at 42, *citing* DeVaux v. American Home Assurance Co., 387 Mass. 814, 817-818 (1983). On the latter point, there must be evidence that the lawyer acted in such a way as to cause a reasonable person to understand that an attorney-client relationship had been established.

Typically (although contrary to Larkosh's argument, not exclusively), the doctrine of an implied attorney-client relationship is relied on by putative clients to establish the predicate for a civil case of legal malpractice. When lawyers rely on the absence of an express relationship in their defense, client-plaintiffs may respond that they sought the lawyer's advice and the lawyer agreed to give it, either expressly or impliedly. The doctrine requires that the client believed that the person holding themselves out as their lawyer is their lawyer and that the client reasonably relied on that belief. Id.; *see also* One National Bank v. Antonellis, 80 F.3d 606, 609 (1st Cir. 1996) ("It must be shown that the attorney should reasonably foresee that the nonclient will rely upon him for legal service").

In this case, there was no evidence that Hart sought advice or assistance from Larkosh for her own legal matters. Hart did not assert that Larkosh was her attorney. To the contrary, the evidence indicated that she wanted him to represent her mother. As mentioned above, neither party called Hart as a witness so she did not testify that she believed Larkosh represented her. In effect, the hearing committee's conclusion would impose on Larkosh and Hart a relationship unsupported by any evidence.

Bar counsel asserted (and the hearing committee agreed) that Hart wanted Larkosh to represent her mother in order to advance Hart's own agenda of unwinding the 2016 transaction. In effect, the committee found that Hart used the lawyer in an effort to obtain a benefit for herself, the unwinding of the 2016 transaction that favored her sister, Bujak. But that motive would not create an implied attorney-client relationship. Assuming Hart attempted to manipulate Larkosh, and assuming further that Larkosh was duped into believing the truth of Hart's "lies" (or even if he was not duped but knew full well what Hart was doing), those facts do not support the assertion that Hart sought to hire him as her lawyer. Her allegedly ulterior and nefarious motives are irrelevant for purposes of establishing an implied attorney-client relationship between the two of them.

The hearing committee may have imposed an attorney-client relationship in order to remedy what it viewed as attempted fraud on Roberts. But there is no authority to support the doctrine. Bar counsel did not argue it. Instead, bar counsel presented a case based on an implied attorney-client relationship. The cases he cites at pages 6-7 of his appeal brief all deal with situations similar to Devaux: a lawyer who denied an attorney-client relationship but whose conduct induced the client to believe they were represented and which imposed ethical obligations on the lawyer. As discussed at the outset of this section, the burden of proof stays

with bar counsel throughout the case. Having proceeded under a theory of an implied relationship, he was required to present evidence to prove it.

Although the absence of an attorney-client relationship resolves our inquiry, we address Larkosh's other arguments in the event the matter proceeds from here. Larkosh maintains that the second element of Rule 4.2 – the communications must concern the same matter – was not met because Peters's representation did not extend to the subject of Larkosh's communication, the unwinding of the transaction. The argument slices the tomato a bit too thinly for our taste. There is no question that Roberts had engaged Peters as her attorney for a variety of matters relating to her estate and property. These could reasonably be understood to extend to her supposed request to return home and unwind the 2016 transaction.

Lastly, Rule 4.2 requires that bar counsel prove that Larkosh knew Peters represented Roberts. If it were a relevant question, we would conclude that Larkosh was not aware of Peters's involvement prior to receipt of his email at around 3:30 p.m. on July 3, 2019, the date of his second visit. The email clearly put Larkosh on notice that Peters professed to represent Roberts. Although there may have been a question about the scope of Peters's representation, he obviously had made his presence known. This analysis would apply to the meeting on July 3, 2019, but not the initial consultation on July 2, 2019. At that time, Larkosh lacked any notice that he was treading into territory occupied by another lawyer.[4]

As discussed, the latter two questions are moot in light of our conclusion that bar counsel failed to prove that Larkosh represented Hart at the time he met with Roberts. Since that engagement was a necessary element of Rule 4.2, we conclude that bar counsel has not proved a violation of the rule.

[4] Although Peters had notarized the 2016 deed, this act alone would not necessarily indicate that he represented Roberts or continued to do so three years hence.

In fact, as we discuss in the next section, Larkosh visited Roberts on July 2 and July 3, 2019 in order to sign her as a client. This conduct (and the theory underlying it) is inconsistent with bar counsel's theory that Larkosh represented Hart at the same time.

Rule 7.3

As it was in effect in July 2019, Rule 7.3(a) prohibited, among other things, in-person solicitation of potential clients.[5] In pertinent part, it provided:

> (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment for a fee, unless the person contacted: [exceptions not relevant in this case]

Although not charged by bar counsel, Rule 7.3(b) in effect in July 2019 also is relevant here. That rule provides, in pertinent part:

> (b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if: … (3) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the target of the solicitation is such that the target cannot exercise reasonable judgment in employing a lawyer, provided, however, the prohibition in this clause (3) only applies to solicitations for a fee.

Among other things, Rule 7.3 prevents lawyers from pressuring potential clients to retain them. For obvious reasons, the rules prohibit lawyers from taking advantage of people, many of whom are in a vulnerable situation and without the experience or sophistication to make a sound judgment about hiring counsel. The rule applies, not only to face-to-face meetings, but also to phone calls and electronic communications. As articulated in section (b)(3) of the rule, the drafters were particularly concerned about vulnerable clients.

[5] In 2019, comment [1] to Rule 7.3 defined "solicitation" as "a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services."

A lawyer does not violate Rule 7.3 if the potential client requests a meeting through a third party. Matter of Donaldson, 27 Mass. Att'y Disc. R. 208, 232 (2011) (although potential client did not personally invite lawyer to meet with her, she had requested a meeting with the lawyer through a third party); cf. Ad. 05-25, 21 Mass. Att'y Disc. R. 724 (2005) (lawyer violated Rule 7.3 when he visited a potential client in a nursing home at the request of her son; the mother had not requested the meeting).

For our analysis, we focus on Larkosh's state of mind when he visited Roberts on July 2 and 3, 2019. Whether he violated Rule 7.3 depends on whether he knew or reasonably could infer that, when Lois Hart asked him to visit her mother at Windemere, she was doing so on behalf of her mother and that her mother had requested a meeting. If so, he was not soliciting a client; rather, he would have been responding to a request of the potential client as articulated by her daughter, conduct that would not violate Rule 7.3 under the rationale of Donaldson.

On this point, we scrutinize the testimony. As discussed at footnote 1, the hearing committee found that Hart did not tell Larkosh that Roberts had asked to meet with him, (HCR ¶ 27), but the finding is not supported by the record. To the contrary, the committee had before it evidence that Hart told Larkosh her mother wanted to meet with him.[6] In addition, he testified that, when they first met on July 2, 2019, Roberts confirmed to Larkosh she wanted a lawyer to represent her. "She indicated that she knew – when we first met she indicated – one of the things we talked about was if she knew who I was and why I was there. And she said yes, you're the lawyer. And she said she – she needed a lawyer." (Hearing Transcript, Vol. I, pages 63-64).

[6] This evidence may be found in the transcript from the SHO hearing, which was marked as Exhibit 21 at the public hearing. At page 172 of the transcript, Larkosh testified that Hart told him that "her mother wanted to meet with me." In addition, in the transcript at the public hearing at Volume I, page 53, Larkosh testified that, "Lois [Hart] told me that her mother was seeking a lawyer … I agreed to meet with Barbara Roberts directly, as I understood she was seeking legal counsel."

Without explanation, the hearing committee ignored this evidence. Of note, it did not reject the testimony as not credible. If it had, our analysis would be more limited. Instead, the committee simply referred to "no evidence that Roberts requested to see the respondent (or any other lawyer) and specifically, there is no evidence that Roberts actually told Hart (or anyone else) that she wanted to see a lawyer." (HCR ¶ 27). This observation is incorrect. There was evidence. It supported Larkosh's testimony that he had been told by Hart that Roberts wanted to meet with him.

We are left with the question whether Larkosh could reasonably rely on Hart's statements to him when he drove to Windemere to meet Roberts. On this question, the evidence is more problematic. Roberts resided in the locked memory unit of an assisted living facility. She had twice been diagnosed with moderate dementia. She had signed a health care proxy and a durable power of attorney in favor of one of her other daughters, Wendy Bujak.[7] In apparent acknowledgment of the issues presented, Larkosh informed Hart that he would have to determine whether Roberts was competent to hire him. He went so far as to request evaluations from two doctors, both of whom refused his request. On both visits to the facility, he observed his future client's demeanor. She appeared confused about what a lawyer and a legal action could accomplish for her. The situation was sufficiently fraught that a duty nurse called law enforcement. Given these facts, it should have been clear to a reasonable attorney that Roberts suffered from cognitive challenges.[8]

[7] On their own, the health care proxy and power of attorney, which were signed in 2013, would not provide conclusive evidence of incapacity. These are standard documents executed against the future possibility of incapacity. They are relevant to this case, however, since Larkosh should have known to ask the staff about them. They provide some evidence of Roberts's incapacity.

[8] Apparently, he asked no questions of the staff at the facility, which likely would have revealed Bujak's role and Roberts's mental state.

On top of this, when Larkosh returned to Windemere on July 3, he had received Peters's email, advising him of Peters's representation. Although that representation would not necessarily preclude Larkosh from communicating with Roberts (there is no rule against a lawyer who does not represent another client in the same matter from speaking with another lawyer's client), the information in the email was sufficient to put Larkosh on notice that his putative client had delegated authority to others. Added to the other facts, Peters's email was a flashing yellow light to proceed with caution. Rather than doing so, Larkosh sped ahead.

In sum, it was not reasonable for Larkosh to believe that he was dealing with a person competent to hire him. He lacked a reasonable basis to believe that Roberts had the capacity to request a lawyer. Because of this, his meetings with Roberts on July 2-3, 2019 were in-person solicitations, which Rule 7.3 prohibits.

Matters in Mitigation and Aggravation

We agree with the hearing committee that the length of time between the events and the filing of the initial admonition is not mitigating. We are troubled about the three years between the events in question (July 2019) and the request for an admonition (July 2022). Particularly in a straightforward case that involves limited facts, few witnesses, and minimal documents, the case could have been presented to the board more expeditiously (this does not include the time spent by the respondent in challenging the original admonition, for which he of course is solely responsible). However, the Supreme Judicial Court has instructed that delay may be considered mitigating only where the delay causes prejudice to the respondent. The respondent has not demonstrated any prejudice caused by the delay.[9]

[9] At oral argument, the respondent's lawyer mentioned that bar counsel did not speak with Roberts while she was alive and while the case "languished" for three years. This conclusory statement, while suggestive of possible prejudice, does not satisfy the respondent's burden of proving prejudice.

The hearing committee opined that Larkosh failed to testify truthfully and appeared to lack insight into his ethical obligations. Having reviewed the transcript, we are unable to locate any instance of prevarication, evasion, or willful ignorance. As we have stated on several occasions, respondents in bar discipline proceedings may defend themselves. *See, e.g.*, Matter of an Attorney, BBO File No. C2-20-265176 (March 11, 2024). While a vigorous defense is not a license to lie, we must be presented with evidence that the respondent failed to tell the truth before we penalize them for doing so. There is none here. Rather, on both direct examination and cross examination, Larkosh answered questions directly and – as far as we can ascertain – truthfully to the best of his memory. The questions were factual in nature. There was no indication that he did not understand his ethical obligations. Indeed, at times he asked the assistant bar counsel to clarify questions so that he could provide an answer. (For example, Hearing Transcript, Vol. I, pages 66-67).

We disagree with the hearing committee that "harm to others" should be considered in aggravation. While harm may be a consideration in some cases, the committee had before it no evidence of such.

We agree with the hearing committee on two aggravating factors: Larkosh's experience as a lawyer (he was admitted to the Massachusetts bar in 1998, more then twenty years before the events in this case) and the vulnerability of his putative client, Barbara Roberts. Matter of Pemstein, 16 Mass. Att'y Disc. R. 339, 345 (2000).

SANCTION RECOMMENDATION

We have imposed public reprimands and admonitions for violations of Rule 7.3 (or its predecessor). In Matter of D'Arcy, 11 Mass. Att'y Disc. 55 (1995), we issued a public reprimand to a lawyer who solicited a criminal defense client for a fee, even though the defendant was

represented by court-appointed counsel. The respondent also violated the predecessor to Mass. R. Prof. C. 8.4(d). In Matter of Gordon, 23 Mass. Att'y Disc. R. 203 (2007), a lawyer approached a man after he was arraigned on a charge of driving under the influence. The solicitation took place in the courthouse hallway. In addition to the in-person solicitation, the lawyer implied to the defendant that he had special influence in the district attorney's office. Matter of Mannion, 12 Mass. Att'y Disc. R. 265 (1996), involved a jailhouse solicitation, aggravated by lack of candor during our proceedings. In Ad 05-25, 21 Mass. Att'y Disc. R. 724 (2005), bar counsel issued an admonition to an attorney who mistakenly believed an elderly woman in a nursing home had requested to meet with him. We conclude that the facts from the 2005 admonition most closely resemble the facts of this case.

Although this case involves a single act of misconduct, we have found two significant aggravating factors. Consistent with the case law set forth above, a public reprimand represents an appropriate sanction.

Unlike the hearing committee or our colleagues in dissent, we do not see a suspension as the correct sanction. There is only a single (albeit aggravated) violation of the Rules of Professional Conduct, Rule 7.3. The respondent did not violate Rule 4.2.

CONCLUSION

For the foregoing reasons, we hereby issue a public reprimand to the respondent, Daniel Larkosh.

David B. Krieger
David B. Krieger, M.D., Public Member
Secretary Pro Tem

Dated: October 14, 2025

DISSENT

We disagree with our colleagues as to the sanction.

Even accepting that the respondent violated only Rule 7.3 of the Massachusetts Rules of Professional Conduct, the behavior here was brazen and egregious. As the majority acknowledges, Larkosh knew or at the very least should have known that Barbara Roberts lacked the cognitive faculty to retain a lawyer.[10] Despite this, he rushed headlong into an attorney-client relationship. His motives (whether he was snookered by Lois Hart or was a knowing participant in her scheme to unwind the transaction in favor of her sister) are irrelevant. He attempted to sign up an elderly, cognitively-impaired woman as his client, taking advantage of her diminished capacity. The trial testimony about the events of July 2-3, 2019 demonstrate the stress induced on his potential client.

On one prior occasion we issued an admonition to an attorney for an in-person solicitation that violated Rule 7.3 Ad 05-25, 21 Mass. Att'y Disc. R. 724 (2005). That case involved no aggravating factors.[11] Matter of D'Arcy, *supra*, resulted in a public reprimand despite the absence of aggravating factors. Matter of Gordon, *supra*, and Matter of Mannion, *supra*, involved courthouse or jailhouse solicitations; both lawyers received public reprimands. Based on the dearth of directly analogous case law, it can hardly be said that the "presumptive" sanction for a violation of Rule 7.3 is an admonition.

As our colleagues in the majority recognize, in-person solicitations are fraught with the likelihood of unfairness, compulsion and harassment, particularly with unsophisticated persons.

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[10] We found that the statements of the police officers and the nurse about the respondent's forceful behavior at the July 3rd meeting with Roberts (which the hearing committee found credible), and the fact that this meeting was taking place after normal business hours (i.e. approximately 9:00 p.m.), to be persuasive factors in our decision.

[11] In addition, it appears that the lawyer's inexperience may have mitigated her misconduct in that case.

Because they are difficult to scrutinize, in-person communications could lead to false and misleading statements by the soliciting lawyer. In-person solicitations tarnish the profession's reputation, feeding a stereotype of aggressive, dishonest and self-interested attorneys.[12] We are concerned that a private admonition fails to treat seriously the risks the sanction is intended to penalize. We are concerned that an admonition would fail to deter misconduct and would send the wrong message to the public.[13]

Therefore, we would impose nothing less serious than a public reprimand for a single, unvarnished violation of Rule 7.3. Starting from that presumption, we confront here a lawyer with years of experience and – more concerning – an elderly and vulnerable client.

In light of these factors, we would recommend a license suspension of three months. A suspension sends a message to the bar and the public about the dangers of in-person solicitation of potential clients. It protects the public, particularly those most vulnerable.

A. Bernard Guekguezian
A. Bernard Guekguezian, Esq.

Rita Balian Allen
Rita Balian Allen, Public Member

Dated: October 14, 2025

[12] *See, e.g.*, Barry Reed, The Verdict (1980). The book's protagonist, Attorney Frank Sheridan (played by Paul Newman in the Academy Award-nominated film), hands out his business card to grieving widows at funerals.
[13] We have at our disposal other means of soliciting business that do not pose such risks, for example written communications "that recipients may easily disregard." Mass. R. Prof. C. 7.3, comments [2] and [3].