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In the Matter of Glenn H. HAESE.

SJC-11510.

May 16, 2014.

Attorney at Law, Disciplinary proceeding, Disbarment, Misuse of client funds. *Board of Bar Overseers. Due Process of Law*, Continuance. *Administrative Law*, Substantial evidence. *Evidence*, Administrative proceeding.

The case was submitted on briefs.

Arnold R. Rosenfeld for the respondent.

Christine P. Deshler, Assistant Bar Counsel.

RESCRIPT

The respondent, Glenn H. Haese, appeals from a judgment of a single justice of this court disbaring him from the practice of law for multiple violations of the Massachusetts Rules of Professional Conduct. [FN1] We affirm.

1. *Procedural background.* Bar counsel filed a petition for discipline with the Board of Bar Overseers (board) on March 4, 2011. After requesting and receiving at least three extensions of time to answer while he sought counsel, the respondent filed an answer, pro se, on May 20, 2011. On May 26, 2011, the board notified the parties of a prehearing conference on June 28, 2011, and hearing dates in September, 2011. On June 24, 2011, the respondent filed his first request for a continuance of the hearing. At the prehearing conference, the hearing was continued to October, 2011, and the respondent was given until July 28, 2011, to obtain counsel and file an amended answer conforming to the board's rules.

In early August, the respondent, represented by counsel, moved for an extension of time to file an amended answer, and filed his second motion to continue the hearing dates, this time requesting that the hearing be continued to January, 2012. A second prehearing conference was held on August 23, 2011. The hearing committee postponed the hearing, but only until December, 2011. The respondent, through counsel, filed an amended answer on September 13, 2011.

On October 26, 2011, the respondent moved to amend the hearing schedule to accommodate his and his counsel's schedule, and an accommodation was made. Then, seven business days before the hearing was scheduled to begin, on November 22, 2011, the respondent filed his third motion to continue the hearing, accompanied by the appearance of successor counsel. Prior counsel's notice of withdrawal followed. The respondent requested that the hearing be continued until late January or February, 2012, so that successor counsel could prepare for the hearing, and to accommodate successor counsel's planned vacation. The hearing committee denied the motion but, on reconsideration, permitted the parties, at their option, to elect to try the matter over three days, so that the remainder of the scheduled days could be used for preparation.

The hearing was conducted over three days in December, 2011. The hearing committee thereafter issued its report and recommendation, recommending that the respondent be disbarred. The board accepted the recommendation, an information was filed in the county court, and after hearing, the single justice entered a judgment of disbarment.

2. *Factual background.* We summarize the findings of fact and conclusions of law of the hearing committee that, with one exception, were adopted by the board. See note 2, *infra*. The respondent was admitted to the practice of law in Colorado in 1983 and to the bar of the Commonwealth in 2005. In 1996, prior to being admitted in Massachusetts, the respondent opened a law firm in the Commonwealth and employed one or more attorneys licensed to practice here. As the firm's principal, the respondent managed and controlled the financial aspects of the firm's practice, including setting rates charged to clients and approving client bills. The respondent's conduct giving rise to the board's petition for discipline was alleged in five counts.

a. *Count one.* In 2001, homeowner clients retained the respondent's law firm in connection with claims arising out of construction work on their home, and paid the firm certain retainer funds. The case was settled, and settlement funds were received by the firm in July, 2005. The respondent transferred the clients' retainer funds to the firm's operating account before they were earned, withdrew all of the settlement funds from his trust account, and converted the funds for his own business and personal use. More than a month later, after misrepresenting to the clients that the delay in payment resulted from accounting issues rather than misuse, the respondent paid the clients the amounts due to them out of personal funds.

The board found that the respondent's conduct violated Mass. R. Prof. C. 1.15(b), as appearing in 440 Mass. 1338 (2004), by failing to keep the retainer funds in his trust account until they were earned; Mass. R. Prof. C. 1.15(c), as appearing in 440 Mass. 1338 (2004), by failing to pay the clients promptly the funds to which they were entitled; Mass. R. Prof. C. 1.15(b) and (c), by negligently misusing client funds; Mass. R. Prof. C. 1.15(d)(2), as appearing in 440 Mass. 1338

(2004), by failing to provide his clients with notice of withdrawal of their retainer and settlement funds from his trust account; Mass. R. Prof. C. 1.4(a) and (b), 426 Mass. 1314 (1998), and Mass. R. Prof. C. 8.4(c), 426 Mass. 1429 (1998), by misrepresenting to his clients that their settlement funds were delayed by accounting issues, and concealing that he had withdrawn their funds from the trust account; and Mass. R. Prof. C. 1.15(f)(1)(C), by issuing checks from his trust account that created a negative balance for a client matter.

b. *Count two.* In February, 2004, the respondent's law firm entered into a fee agreement with a construction company client to collect money owed to the client. The agreement provided for payment of a retainer, a reduced hourly rate, and a contingent fee of twenty per cent of the recovery. During the period March, 2004 to December, 2005, the respondent converted the retainer to his own use before it had been earned, without providing notice to the client. When the case settled in late 2005, the settlement funds were deposited in the respondent's trust account. He withdrew funds belonging to the client for purposes unrelated to the client, and failed to notify the client of the disbursements. The respondent subsequently transferred other funds into his trust account and paid the client its share of the settlement.

The board concluded that the respondent knowingly and intentionally converted the client's funds, causing temporary deprivation, in violation of Mass. R. Prof. C. 1.15(b) and 8.4(c). It also concluded that respondent violated Mass. R. Prof. C. 1.16(d), 426 Mass. 1369 (1998), by failing promptly to return the client's unearned retainer; Mass. R. Prof. C. 1.15(c), by failing promptly to pay the client funds to which it was entitled; Mass. R. Prof. C. 1.15(d)(2), by failing to provide his client with notice of withdrawal of retainer and settlement funds from his trust account; Mass. R. Prof. C. 1.15(e)(3), as appearing in 440 Mass. 1338 (2004), by issuing a check on his trust account payable to "cash"; and Mass. R. Prof. C. 1.15(f)(1)(C), by issuing checks from his trust account that created a negative balance for a client matter.

c. *Count three.* In May, 2003, various parties involved in litigation entered into a settlement agreement, which included a provision that one side would pay \$75,000 toward the other side's attorney's fees. Three law firms, including the respondent's firm, were entitled to receive a portion of the fees. After filing a collection action, the respondent recovered the \$75,000 in unpaid legal fees, and paid one firm its share of the proceeds. He failed to pay the other firm the amount to which it was entitled and, instead, intentionally misappropriated the funds to his own use.

The board determined that respondent's conduct violated Mass. R. Prof. C. 8.4(c), by failing to pay the second law firm the funds that were due to it, by converting those funds to his own use, and by failing to account to the firm for those funds. [FN2]

d. *Count four.* In 2004, the family of a minor child retained the respondent's firm to represent the child in a claim against a manufacturer and a retailer. Thereafter, the respondent and a commercial lender entered into a loan arrangement in which the respondent pledged as collateral his legal fees in the child's case, agreed to use all of his fees in that case and others to pay down the loan, and agreed not to pledge any fees that secured the loan. From March to May, 2005, the lender deposited approximately \$250,000 into the respondent's trust account, and the respondent transferred the majority of those proceeds into the firm's business accounts. He also withdrew

funds from the trust account by means of an unnumbered check made payable to "cash."

For purposes of trying the child's case, the respondent associated with a North Carolina attorney, and agreed to pay the attorney thirty-five per cent of the firm's fee. The respondent neither disclosed to the attorney his prior pledge of the fee, nor apprised the lender of the attorney's interest in it. When the child's case settled, the respondent failed to notify either the attorney or the lender of his receipt of the settlement funds. Instead, he indorsed the attorney's name on the settlement check without authorization, and deposited it into his trust account. The respondent then withdrew and used for his own purposes funds that he owed to the lender and the attorney. The lender brought suit against the respondent and recovered the amounts due to it. The attorney had not received any portion of his fee from the respondent at the time of the hearing.

The board found that the respondent's conduct violated Mass. R. Prof. C. 8.4(c) and Mass. R. Prof. C. 8.4(h), 426 Mass. 1429 (1998), by inducing an attorney to provide legal services in return for a share of legal fees that had been pledged as security for loan, failing to notify the lender that the collateral had been reduced or impaired, signing the attorney's name to a settlement check without authority, and converting the fee in which the attorney had an interest; Mass. R. Prof. C. 1.15(b)(2), by depositing money received from the lender into his trust account; and Mass. R. Prof. C. 1.15(e)(3), by making a withdrawal from his trust account by an unnumbered check made payable to "cash".

e. Count five. Between August and September, 2006, the same North Carolina attorney loaned the respondent a total of \$81,000. The respondent discussed giving the attorney a note and mortgage, and promised to repay him from the legal fees earned in the child's case. He did not disclose to the attorney that the fees previously had been pledged to the commercial lender. The respondent deposited some of the borrowed funds in his trust account. After the child's case settled, the respondent failed to repay the attorney.

The board found that the respondent's conduct violated Mass. R. Prof. C. 8.4(c) and (h), by dishonestly inducing the attorney to lend him money by promising fees as security that had already been pledged for another loan, knowing he would be unlikely to repay the loans; and Mass. R. Prof. C. 1.15(b)(2), by depositing funds received from the attorney into his trust account.

3. Discussion. On appeal, the respondent raises essentially three issues. He claims that his due process rights were violated by the hearing committee's decision to deny him a third continuance of the evidentiary hearing; that certain of the board's findings are not supported by substantial evidence; and that he satisfied his burden as to mitigation.

a. Due process claim. Throughout the disciplinary process, the respondent sought and obtained multiple accommodations. He was given at least three extensions of time to answer the petition, during which period he sought counsel. He initially sought and obtained an extension of the hearing date, also citing the need to retain counsel. After obtaining counsel, the respondent again sought and was granted a lengthy extension. Having "lost confidence" in counsel just seven business days before the hearing, the respondent retained successor counsel who had neither reviewed relevant materials nor met with the respondent to discuss the allegations, and was

unavailable for the scheduled hearing. In the circumstances, the hearing committee's decision to deny the respondent's third motion for continuance was not an abuse of its discretion. *Matter of Brauer*, 452 Mass. 56, 73 (2008).

Nothing required the respondent to retain new counsel days before the hearing whose schedule could not accommodate it. See *Commonwealth v. Delacruz*, 463 Mass. 504, 509 (2012) (defendant does not have unfettered right to continuance of trial to accommodate a change of counsel); *Matter of Brauer*, *supra* at 73. We have recognized that, although a "lawyer has a constitutionally protected interest in his license to practice law," *Matter of Jones*, 425 Mass. 1005, 1006 (1997), bar disciplinary proceedings do not implicate the full panoply of rights accorded to criminal defendants. *Matter of Eisenhower*, 426 Mass. 448, 454, cert. denied, 524 U.S. 448 (1998), and cases cited. Although due process requires an "opportunity to be heard at a meaningful time and in a meaningful manner," *Matter of Kenney*, 399 Mass. 431, 435 (1987), citing *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970), a respondent does not have a constitutional right to counsel, *Matter of Jones*, *supra* at 1007, much less counsel whose schedule cannot accommodate the disciplinary process.

In ruling on the respondent's motion, the hearing committee properly could consider that he had requested and received two prior continuances of the hearing dates, and multiple other extensions of time. It could weigh those prior accommodations, the timing of the request, and any hardship or prejudice that would be imposed on the others involved in the process if the hearing was continued. *Matter of Brauer*, *supra* at 73-74. Cf. *Soe v. Sex Offender Registry Bd.*, 466 Mass. 381, 383 (2013) (decision to grant a continuance requires balancing petitioner's interests with the public interest). Further, while the hearing committee declined to continue the hearing outright, it did accord the parties an opportunity for additional preparation time, by--at their option--reducing the number of hearing days. The respondent's right to due process was not violated by the hearing committee's decision to deny his third request for a continuance of the hearing. The single justice properly denied the respondent's request for a new hearing. [FN3]

b. *Sufficiency of the evidence*. 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), citing *Matter of Abbott*, 437 Mass. 384, 394 (2002). S.J.C. Rule 4:01, § 8(5)(a), as appearing in 453 Mass. 1310 (2009). Those credibility determinations " 'will not be rejected unless it can be "said with certainty" that the finding was "wholly inconsistent with another implicit finding." ' " *Matter of Murray*, 455 Mass. 872, 880 (2010), quoting *Matter of Barrett*, 447 Mass. 453, 460 (2006). See *Matter of Finneran*, 455 Mass. 722, 730 (2012); S.J.C. Rule 4:01, § 8(4). In addition, like the single justice, we give the board's factual findings and recommendations great weight and, on consideration of the record, conclude that they are supported by substantial evidence. S.J.C. Rule 4:01, § 8(6)(1).

A primary focus of the respondent's argument concerns the board's determination, with respect to count two, that the respondent intentionally converted client funds. He contends that his former associate's testimony lacked credibility, and that the hearing committee should have credited the respondent's testimony instead. Although the hearing committee did not credit the entirety of the associate's testimony, not only was the respondent's testimony concerning intentional conversion contradicted by other evidence, but critical aspects of the associate's testimony were not. The

hearing committee's credibility determinations, and the subsidiary facts found by the board, are amply supported by the record, and we do not disturb them.

With respect to the remainder of the conduct underlying counts three through five, the hearing committee found and the board agreed that the respondent intentionally and dishonestly appropriated to himself funds representing attorney's fees that should have been distributed to another law firm; induced an attorney to perform legal services in return for a share of fees that already had been pledged to a commercial lender, and then appropriated to himself the attorney's fee; and induced that same attorney to lend him money by promising already-pledged legal fees as security, knowing he would be unlikely to be able to repay them. Although the respondent contends that the hearing committee should have credited his testimony that he intended to repay these attorneys, the hearing committee's credibility determination to the contrary is supported by the record. There is no basis to overturn the board's conclusions.

c. *Mitigation.* The respondent contends that his serious medical illnesses and heart condition adversely affected his capacity to practice law and his judgment, and that there was a causal relationship between those medical problems and the charged misconduct. [FN4] Although the respondent introduced a variety of medical records in evidence, and the substance of his conditions was addressed by the respondent and his physician through their testimony, the respondent failed to demonstrate a causal connection between his medical conditions and the intentional misconduct that formed the basis for counts two through five of the petition for discipline.

Although the respondent "missed a lot of time from work," and his medical condition "impaired ... his ability to work efficiently," there was no evidence that his multiple acts of intentional misconduct were the product of his medical illness, or that he lacked any cognitive capacity related to his medical conditions. The hearing committee was entitled to reject the respondent's explanation of his intentional misconduct. *Cf. Matter of Johnson*, 452 Mass. 1010, 1011 (2008) ("The special hearing officer's observation is well taken that 'methodical and systematic' misuse of funds for personal purposes is inconsistent with any conclusion that the respondent was operating under a cognitive disability"). Although we do not discount the severity of the respondent's medical conditions, it was his obligation to demonstrate a causal connection between the medical issues and the charged misconduct. *Matter of Luongo*, 416 Mass. 308, 311 (1993). There is no basis in the record for disturbing the conclusion that the respondent's medical issues did not cause him intentionally to convert funds belonging to a client, misappropriate funds belonging to another law firm and attorney, or to obtain, use, and fail to repay loans obtained by misrepresentation. [FN5]

d. *Sanction.* We review the judgment of the single justice as to sanction to determine whether it is markedly disparate from the sanctions ordered in comparable cases. *Matter of Goldberg*, 434 Mass. 1022, 1023 (2001). The board found, and the single justice agreed, that the respondent intentionally converted client funds, with deprivation resulting, and acted with intentional dishonesty. Where "an attorney intend[s] to deprive the client of funds, permanently or temporarily, or [causes] the client [to be] deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension." *Matter of Schoepfer*, 426 Mass. 183, 187 (1997), citing *Matter of the Discipline of an Attorney*, 392 Mass. 827, 836

(1984). Although the respondent made restitution promptly to his client, we agree with the board and the single justice that the respondent "engaged in more and wider misconduct," including in his dealings with other members of the bar, that adversely reflects on his fitness to practice law. Both clients and other attorneys must be able to rely on the personal integrity of members of our bar. See *Matter of Barrett*, 447 Mass. at 464, quoting ABA Standards for Imposing Lawyer Sanctions § 5.0 Introduction (1991) ("The most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law"). Having been admitted to practice in another jurisdiction since 1983, the respondent ought to have been well aware of these standards. *Matter of Crossen*, 450 Mass. 533, 580 (2008). Disbarment is the appropriate sanction.

Judgment of disbarment affirmed.

FN1. This bar discipline appeal, having been entered in the county court after April 1, 2009, is subject to the court's standing order governing such appeals. See Order Establishing a Modified Procedure for Appeals in Bar Discipline Cases, Mass. Ann. Laws Court Rules, Standing Orders of the Supreme Judicial Court, at 713-714 (LexisNexis 2013). The order twice has been extended, *id.*, and the respondent is incorrect in his assumption that it has lapsed. We have reviewed the materials filed. Pursuant to our standing order, we dispense with oral argument.

FN2. The board neither adopted nor rejected the hearing committee's ruling that with respect to counts three and four the respondent's conduct also violated Mass. R. Prof. C. 1.15(b), (c), and (d)(1), as appearing in 440 Mass. 1338 (2004), which concern a lawyer's obligations with respect to trust property and trust accounts. The single justice likewise observed that resolution of the question whether the attorney's fees and loan proceeds that were the subject of counts three, four, and five qualified as "trust property" or "trust funds" within the meaning of Mass. R. Prof. C. 1.15 was unnecessary in this case.

FN3. Although the respondent now claims that additional time would have afforded him a greater opportunity to present additional evidence, to prepare more extensive cross-examination, and to present additional rebuttal testimony, when he sought reconsideration of the denial of the third continuance, counsel represented that he had no intent to "propose witnesses or exhibits not already identified."

FN4. Like the single justice, we reject the respondent's argument that the hearing committee did not review the medical records submitted in evidence. Among other things, the committee's report evidences an understanding of the respondent's health issues.

FN5. After the appeal was briefed, the respondent filed a motion to suspend the rules of appellate procedure and to "admit into evidence" a psychiatric report prepared in April,

2014, more than two years after the disciplinary hearing in this case. The motion is denied. The report is not part of the record on appeal, see S.J.C. Rule 4:01, § 8(6), as appearing in 453 Mass. 1310 (2009), and was not before the board or the single justice, and the opinions contained within it are largely founded on materials that were available at the time of the disciplinary proceedings.

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