IN RE: MATTER EDWARD A. SARGENT
BBO No. 655258

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

BAR COUNSEL, **Petitioner,** **vs.** **EDWARD A. SARGENT, ESQ.,** **Respondent.**	**C1-19-260146**

MEMORANDUM OF BOARD DECISION

The respondent represented a minor-plaintiff in a personal injury action. The plaintiff, a pedestrian, was struck by a motor vehicle. The driver's automobile insurer issued a check to the respondent for Personal Injury Protection benefits ("PIP") in the amount of $8,000. Rather than pay his client's medical providers as he was required to do under the PIP statute, the respondent misused the money for his own personal benefit. On these points, there is no dispute. A hearing committee found further that the respondent intended to deprive the providers of funds that were due to them and, in fact, deprived them. On appeal, the respondent challenges these latter conclusions, arguing that he did not deprive any third party of their money, nor that he intended to do so. We agree with the hearing committee and adopt its findings of fact and conclusions of law, including the disputed issue of deprivation. We disagree with the hearing committee only on its recommended disposition of an indefinite suspension. Because of our findings and conclusions, because the respondent has not made restitution, and in the absence of special mitigating circumstances, we recommend that the respondent be disbarred.

Factual and Procedural Background

Intentional Misuse of PIP Funds in IOLTA Account

The respondent is Attorney Edward Sargent, who practices in Beverly, Massachusetts.

On December 10, 2018, the respondent's client, who was six years old at the time, was struck by a motor vehicle while crossing the street to her grandmother's house. Suffering substantial injuries, the child was flown by helicopter (operated by New England Life Flight (NELF)) from North Shore Medical Center to Massachusetts General Hospital (MGH) in Boston. The child's injuries were substantial, and she incurred medical bills in the total amount of approximately $91,000.

The child's parents sought legal representation for their child. After being turned away by at least two attorneys, the child's mother retained the respondent.[1] They entered into an engagement agreement on or about December 18, 2018 for the respondent to represent the child.

Under Massachusetts law, an auto insurer for a vehicle involved in an accident must make PIP payments up to a maximum of $8,000 without regard to fault. These payments are to cover "all reasonable expenses incurred within two years from the date of the accident for necessary medical, surgical, x-ray, and dental services, including prosthetic devices and necessary ambulance, hospital, professional nursing and funeral services." Mass. G.L. c. 90, § 34A. The child was insured under MassHealth, the commonwealth's public health insurer. By letter dated December 31, 2018, MassHealth notified the respondent of its statutory lien on any third party settlement obtained on behalf of his client, MassHealth's insured.

[1] According to the mother, the attorneys who turned down the case indicated to her that video footage of the incident indicated that the driver was not at fault.

By correspondence on January 2, 2019 and January 7, 2019, the respondent notified the driver's automobile insurer, USAA, that he represented the injured pedestrian. He made application for payment of the PIP benefits, describing the accident as "pedestrian struck by motor vehicle." He represented that the amount of medical bills incurred to date (less than one month post-accident) already exceeded $30,000. On January 9, 2019, NELF sent the respondent certified medical bills in the amount of $15,425.00. On January 18, 2019, MGH notified he respondent that its bills to date were $55,711.44. By check dated January 16, 2019 and made payable to "Edward A. Sargent," USAA mailed the respondent a PIP payment in the amount of $8,000. The respondent deposited the check into his IOLTA account on January 24, 2019. The hearing committee found (a finding that we adopt) that the respondent notified neither NELF nor MGH that he had received the $8,000 PIP payment. However, he told his client's mother about the PIP payment and represented to her that he would "hold onto" the funds until all medical bills were paid.

MassHealth negotiated the child's medical bill with MGH, paying MGH $15,202.33, with MGH writing off the remaining balance of $40,509.11. Similarly, NELF received a payment of $3,775.00 from MassHealth and wrote off the remaining $11,650.00 of its bill. MassHealth notified NELF that it had paid the insured or her representative the $8,000 in PIP benefits. In January 2020, a tort case the respondent had filed on behalf of his client settled for $18,500. MassHealth claimed a lien of over $22,000 on the settlement. After negotiations with the respondent, MassHealth accepted a final payment of $9,900 from the settlement. The respondent received a legal fee of $6,166.66 based on his one-third (1/3) contingent agreement with his client.

Contrary to the statement to his client's mother, the respondent did not "hold onto" the PIP funds. Instead, in 17 separate cash transactions beginning the day after the deposit, he withdrew the entire $8,000 from his IOLTA account, using the money for his personal benefit.

The hearing committee found (and having seen no evidence to the contrary, we agree) that the respondent knew that the funds were to be paid to the providers and did not belong to him. The committee further found that the respondent made an intentional decision to not pay the providers. Thus, he intentionally misused funds entrusted to him.

On December 4, 2019, the day before he was required to produce his bank records to the Office of Bar Counsel pursuant to a subpoena, the respondent replaced the $8,000 he had taken out of his IOLTA account.[2] On December 9, 2019, he issued a check to his client's mother for $8,000.

Record-keeping Violations

Separate from the misuse of PIP funds, bar counsel also investigated the respondent when Citizens Bank reported at least seven transactions returned for insufficient funds in his IOLTA account. The respondent admitted to not maintaining a compliant check register, individual client ledgers, and a ledger for bank fees and charges. The failures continued from approximately June 1, 2018 through December 15, 2019. He also failed to perform any three-way reconciliations for the IOLTA account during the same time. He admitted to paying personal and business expenses directly from the account, including at least 26 cash withdrawals. He entered into an agreement with a lender in which the lender loaned the respondent $5,5000

[2] At the time of these events, bar counsel was investigating the respondent's IOLTA account in connection with some irregular transactions, discussed in the next section of this memorandum. In October and November 2019, bar counsel issued a subpoena for the bank records.

against $8,140 in future receipts. The transactions were made into and out of the IOLTA account and concerned the respondent's personal funds, not client or trust funds, meaning that he commingled.

The hearing committee found that, at least as to one client, the client's IOLTA balance was negative for a period of time. In other words, there were insufficient funds in the account to pay the client what she was owed. While the respondent denied that he knew at the time that any individual client matter was carrying a negative balance, the hearing committee found his testimony not credible on this point. We will not disturb the committee's credibility determination. B.B.O. Rules, § 3.53.

On two occasions, the respondent paid a lawyer a referral fee without informing the clients or obtaining the clients' written consent. The referral fees were paid out of the respondent's share of personal injury settlements. The clients were not harmed by the payments, since they were made from the respondent's legal fee, not the total amount.

Conclusions of Law

By intentionally misusing the PIP funds, the respondent violated Rules 1.15(b) and (c) (lawyer to hold trust funds separately from personal funds; lawyer to promptly notify client or third party of receipt of trust funds, and disburse promptly) as well as Rules 8.4(c) and (h) (conduct involving dishonesty, fraud, deceit or misrepresentation; conduct reflecting adversely on lawyer's fitness to practice law) of the Massachusetts Rules of Professional Conduct. We adopt the hearing committee's conclusions of law on these violations.

The hearing committee also found (and the respondent did not dispute) that the respondent violated Mass. R. Prof. C. 1.15(f)(1)(B), (C), (D) and (E) of the Massachusetts Rules

of Professional Conduct by reason of his failure to comply with record-keeping requirements for his IOLTA account. He also violated Rules 1.5(b)(2) and 1.15(f)(1)(C) by commingling personal and trust funds and by allowing the IOLTA account to have a negative balance. His admitted cash withdrawals violated Rule 1.15(e)(4). Paying a referring attorney (twice) without first obtaining the clients' informed written consent violated Rule 1.5(e). We adopt all of the findings and conclusions regarding the respondent's record-keeping violations.

Matters in Mitigation and Aggravation

The respondent argued that financial and emotional distress should mitigate the sanction we recommend. The hearing committee rejected the argument, and we agree. Rarely do we find that "stress" will mitigate a lawyer's misconduct. When we do, the circumstances are more dire than this case. We require a showing that external factors proximately caused the respondent to engaged in aberrant behavior and that, absent cause, he would not have done so. *See, e.g.*, Matter of Sweeney, 32 Mass. Att'y Disc. R. 552 (2016) (mitigation for respondent's daughter's physical health and emotional stability); Matter of Guidry, 15 Mass. Att'y Disc. R. 255 (1999) (extreme financial and emotional stress arising from "grave and acute family problems"). Here, the respondent's family situation required him to care for his elderly parents, who lived in separate assisted living facilities. Due to the time commitment, he gave up appointed criminal defense work, focusing his practice on personal injury matters. He testified that 2019 was a bad year financially for him, he could not pay bills, and he felt overwhelmed. At one point, he faced eviction, although this was many months after he misappropriated the PIP funds. By his own admission, his financial picture improved greatly in 2020, continuing into 2021 and 2022. In sum, while we appreciate the financial and personal challenges and do not minimize them, we

agree with the committee that they were not so unusual or extreme to mitigate the respondent's misconduct.

For similar reasons, we do not consider the respondent's professed remorse and "altruistic motive" (in taking a case rejected by two other lawyers) as worthy of consideration as special mitigating factors. The Supreme Judicial Court has limited the situations where we may consider mitigation to a few specifically named circumstances, for example, serious mental health issues that the respondent has taken active steps to resolve, or inexperience. Expressions of remorse are not considered mitigating. Indeed, we expect all respondents to feel and convey sincere, genuine remorse for their misconduct. We also do not agree that the respondent was motivated by altruism. He did not take on the case pro bono. He expected to earn a fee. Whatever benign intentions he may have had at the outset of the case were overshadowed by his theft of trust funds.

In cases involving intentional misuse of trust funds, restitution may reduce the sanction. The respondent argues that he made restitution by paying the PIP funds to his client after settlement of the tort case. The argument misapprehends the PIP statute. Pursuant to the Massachusetts "no-fault" insurance program, Mass. G.L. c. 90, § 34A, et seq., PIP funds are to be paid to medical providers or, if the providers are paid by a health insurance company, to the insurer. At no point does the injured party have a right to PIP proceeds. In this case, the funds did not belong to the respondent's client, a fact the respondent acknowledges. (Respondent's Brief on Appeal, p. 3 and 11), *citing* Chhoeun Ny v. Metro. Prop. & Cas. Co., 51 Mass. App. Ct. 471, 475, *rev. den*. 435 Mass. 1103 (2001) (PIP payment belongs to provider, not injured party). Rather, the money should have been used to pay the providers or, when as here the providers are

paid by a health insurer, to the insurance company.[3] Paying a client the fruits of a lawyer's misconduct is not mitigating where the money did not belong to the client. Matter of Hilson, 448 Mass. 603, 611-612, 23 Mass. Att'y Disc. R. 265, 280 (2007).

We agree with the hearing committee that the respondent's prior discipline (an admonition in 2014 for trust account violations), his fifteen years as a lawyer, and the multitude of rules violations are properly considered as aggravating.

Respondent's Argument for an In-Person Hearing

On appeal the respondent argues that he should have been granted an in-person hearing rather than a hearing conducted virtually through Microsoft Teams (the remote platform used by the board). He requests a new hearing before a different committee. His request for an in-person hearing was denied by the chair of the board. For similar reasons, we reject the argument.

On July 14, 2020, in the early days of the COVID-19 pandemic, the board issued an order that provided for remote disciplinary and reinstatement hearings. The order followed an order of the Supreme Judicial Court dated July 7, 2020, authorizing the board to conduct remote proceedings. Both were a response to the COVID-19 pandemic and the related concerns to human health. Between the date of the order and January 1, 2023, all board hearings have been held on Microsoft Teams. There were no in-person hearings during that time.

There is nothing fundamentally unfair or unconstitutional about remote proceedings. Diaz v. Commonwealth, 487 Mass. 336 (2021). Throughout the commonwealth, judicial and administrative bodies have pivoted to remote or virtual arrangements because of the COVID-19

[3] While G.L. c. 90, § 34A precludes a health insurer from placing a lien on PIP funds, it does not preclude the insurer from being paid out of those funds. Once MassHealth paid the providers, the entity to which the PIP funds were due switched from the providers to MassHealth.

pandemic. Due to technological advances, hearing committees are able to see and hear live testimony in real time. During the pandemic, the board has conducted 56 remote hearings over 146 days of testimony (both disciplinary and reinstatement). Most of the cases involve some degree of credibility assessment by hearing committees or panels. We (as well as the Supreme Judicial Court) have relied comfortably on the finders of fact in adjudicating these cases.

Moreover, the cases relied on by the respondent are all criminal in nature. Criminal law provides defendants with a more complete set of rights (for example, the right to confront witnesses and the right to counsel), which are not required in bar discipline proceedings. Matter of Gannett, 2002 WL 2388863, 37 Mass. Att'y Disc. R. ___ (2022) (bar discipline respondents not entitled to full panoply of rights provided to criminal defendants); Matter of Kenney, 399 Mass. 431, 436, 5 Mass. Att'y Disc. R. 167 (1987) (respondents entitled to notice and opportunity to be heard).

Lastly, the respondent cannot show prejudice as a result of the remote proceeding. In his brief, he points to two instances when emotional testimony concerning his mitigation evidence was interrupted by "technical glitches." (Respondent's Brief on Appeal, p. 9). The argument proves too much. Clearly, the respondent was able to present his case. The committee recognized the stress of caring for his parents. Its disagreement was based on its legal conclusion that the proffered testimony was not sufficient to establish mitigation. With regard to another mitigating factor, the hearing committee found that the respondent was remorseful, a factor based on his demeanor during trial and which the committee considered in his favor in mitigation.

Recommended Disposition

In recommending a sanction, we first must confront the principal issue on appeal: whether the respondent's intentional misuse of the PIP funds was motivated by his intent to deprive anyone of the funds or whether he actually deprived anyone of the funds. The answer to the question determines whether the presumptive sanction we recommend would be a term suspension as opposed to disbarment or indefinite suspension. Matter of Schoepfer, 416 Mass. 183, 187 (1997). We answer the question in the affirmative.

PIP benefits are paid without regard to fault to cover an injured party's medical expenses. The money is intended to be paid to medical providers. Section 34M of chapter 90 of the Massachusetts General Laws provides that PIP funds are "due and payable as the loss accrues, upon receipt of reasonable proof … " In other words, where an injured party has incurred medical expenses, the provider is entitled to immediate reimbursement. Indeed, when benefits are due and payable and not paid within thirty days, an unpaid party may file an action in contract. Mass. G.L. c. 90, § 34M; Fascione v. CNA Insurance Companies, 435 Mass. 88, 91 (2001). In this case, even though the client's auto insurer, USAA, sent the PIP funds to the respondent rather than the providers (NELF or MGH), they remained due and payable to the providers. The respondent held them in trust for third parties, standing in the shoes of the auto insurer. As the hearing committee correctly concluded, "When the respondent received the funds on January 24, 2019, he therefore assumed USAA's immediate obligation to pay the bills that were already due. As a result, the respondent's subsequent misappropriation of the PIP funds constituted a deprivation." (Hearing Committee Report, ¶ 71). The conclusion accords with our precedent. Matter of Shyavitz, 19 Mass. Att'y Disc. R. 424 (2003); Matter of Garfinkle,

18 Mass. Att'y Disc. R. 239 (2002); Matter of Lemler, 18 Mass. Att'y Disc. R. 360 (2002). In all of these cases, we held that misuse of PIP funds deprived the medical providers of money that was due to them at the time.

The hearing committee correctly rejected the respondent's argument that the funds were not immediately due and payable when he received them, a contention that would fly in the face of the plain language of the statute as well as the case law in the prior paragraph. The respondent had received notice from the providers of their bills. He was aware his client had already incurred large expenses, which would increase. Indeed, he sent the bills to USAA. He also knew the providers were entitled to payment from the PIP funds.[4]

The respondent also argues that the providers were "unsecured creditors." Their status as such has no relevance to the respondent's misconduct. In addition, he argues that, because MassHealth reimbursed the providers, the failure to send the providers the PIP money did not result in a loss. The argument misconstrues the language and purpose of the no-fault insurance scheme. Even if MGH and NELF had been fully reimbursed by MassHealth, the insurer would have stepped into their shoes and would have been entitled to the funds. In other words, PIP money belongs to either medical providers or health insurance companies. Under no interpretation would it belong to the respondent (or his client). For similar reasons, we reject the respondent's argument that he did not deprive any third party of the money because the statute provides a two-year window for providers to submit claims. While he accurately recites the law,

[4] Relying on Matter of Watt, 430 Mass. 232, 236, 14 Mass. Att'y Disc. R. 762 (1999), the respondent argues that there can be no deprivation prior to the time a lawyer is directed to pay a client's medical bills. (Respondent's Brief on Appeal, p. 11). The argument misconstrues that case, which did not involve Massachusetts PIP benefits. As we have explained, the money was immediately due and payable once the providers had incurred the expenses. It is not necessary that the third party issue an explicit demand for payment, although sending an invoice could be construed as such. Indeed, the Watt court recited the well-established principle that deprivation arises based on unavailability of the money once it is due even if no actual harm occurs. *Id*, 430 Mass. at 236.

the two-year window is not a license for the respondent to remove the money from his IOLTA account for his own purposes. If the respondent were concerned about additional, ongoing claims, he could have (and should have) held the $8,000 in his IOLTA account and negotiated with the various providers as to payment. Regardless of the two-year window, the money is immediately due and payable to any party who makes a claim at the time the claim is made.

Since the respondent knew the funds belonged to third parties, it follows that he intended to deprive third parties of the money. Deprivation has three elements: (1) intentional misuse of funds that do not belong to the respondent resulting in the unavailability of funds; (2) after the funds are due; and (3) risk of harm to the rightful owner of the funds, even if no harm eventually occurs. These elements are conjunctive. Matter of Bailey, 439 Mass. 134, 150, 19 Mass. Att'y Disc. R. 12, 31 (2003); Matter of Carrigan, 414 Mass. 368, 737, fn. 6, 9 (1993) ("There is deprivation whenever an attorney uses a client's funds for unauthorized purposes after the time those funds are due and payable"). In this case, there was intentional misuse of the PIP funds, which did not belong to the respondent. Under the PIP statute, the funds were due to the providers at the time he held them. Finally, there was a risk of harm to the rightful owners of the funds. As an experienced attorney, the respondent knew the funds were immediately due and payable to the providers and that by withdrawing the money for his own purposes, he was depriving them of what they were due at the time. In other words, the respondent intended to deprive the rightful owners of the PIP proceeds.

Presumptively, we recommend disbarment or indefinite suspension for lawyers who intentionally misuse trust funds with intent to deprive or with resulting deprivation. Matter of Schoepfer, *supra*, 416 Mass. at 187. As between the two alternatives, we generally recommend indefinite suspension if the respondent has made voluntary restitution. *Id*. We depart downward

from the presumption only if we find special mitigating circumstances. As discussed above, we agree with the hearing committee that the respondent did not make restitution. In addition, there are no mitigating circumstances, and we have noted a few aggravating matters.

Based on the above, we recommend that the Supreme Judicial Court disbar the respondent. There is no basis to depart from the Schoepfer presumption. While we defer in some matters to a hearing committee (particularly with regard to factual findings), we review *de novo* its recommended disposition. B.B.O. Rules, § 3.53. It is difficult to reconcile the committee's findings and conclusions with its ultimate recommendation. It is improper to consider as part of its conclusion factors that it intentionally avoided in construing mitigation.

We respectfully disagree with our colleagues in dissent (as well as the hearing committee) that an indefinite suspension would be appropriate in this case. None of the cited mitigating factors – remorse, family stress, altruism – are recognized by the Court. In the absence of such factors, the Court has instructed us to apply the Schoepfer paradigm. Nor do we agree that the respondent's misconduct should be partially excused because he was confused about the owner of the funds. The respondent was neither naïve nor inexperienced. The PIP statute is clear that the money did not belong to the respondent's client. It obviously did not belong to the respondent himself. If the respondent were confused as to whether the medical providers or MassHealth had the superior claim, the appropriate course would have been to hold the money in a trust account and seek guidance from the parties or a court. And we hasten to point out that the respondent misused the PIP funds the day after he received the money from USAA. "Confusion" had nothing to do with it. In sum, we are unsympathetic to the argument that the respondent made an error of judgment in a complicated situation.

While, as our colleagues in dissent point out, a hearing committee and the board have discretion to weigh numerous factors in proposing a disposition, our discretion is circumscribed by our jurisprudence. In this case, the case law allows for only one outcome.

Conclusion

Based on the respondent's intentional misuse of trust funds with resulting deprivation and the absence of mitigating factors, the appropriate discipline is a disbarment. An Information shall be filed in the County Court recommending that the respondent be disbarred.

Frank E. Hill, III
Secretary

Dated: April 10, 2023

DISSENT

We agree with the majority that the respondent's intentional misuse resulted in deprivation of funds to third parties. We further agree that he has not made restitution. Thus, under Matter of Schoepfer, 416 Mass. 183, 187 (1997), we are limited in our recommendation to an indefinite suspension or a disbarment. We would propose an indefinite suspension, which is what the hearing committee recommended.

The hearing committee noted the respondent's sincere remorse as well as his genuine interest in helping his client. It also accepted that the respondent has learned from his mistakes and hired a bookkeeper as a prophylactic measure. Based on these findings, and even in the

absence of restitution, the hearing committee recommended an indefinite suspension rather than disbarment. We agree this is the appropriate discipline, taking into account the misconduct as well as the mitigating and aggravating factors. We do not view the aggravating circumstances as sufficiently egregious to support a higher level of discipline.

In limited cases, we have considered remorse when recommending a sanction. *See, e.g.*, Matter of Flaherty, 32 Mass. Att'y disc. R. 165, 166 (2016); *see also* Matter of Parigian, 33 Mass. Att'y Disc. R. 375, 388 (2017) (hearing committee takes into account respondent's acceptance of responsibility and remorse in recommending three-year suspension rather than indefinite suspension for intentional misuse of client funds with restitution); *cf* Matter of Hadley, 33 Mass. Att'y Disc. R. 180, 188 (2017) (respondent's deliberate conversion of client funds without restitution and without remorse requires disbarment). The committee also credited the respondent for putting in place safeguards (including hiring a bookkeeper) to ensure compliance with accounting rules. We defer to the committee on these findings and agree they may be mitigating.

While we strive for consistency in our recommended sanctions, we evaluate every matter based on its unique characteristics. Matter of Balliro, 453 Mass. 75, 85, 25 Mass. Att'y Disc. R. 35, 47 (2009). "Each case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984). "Our case law notes "the importance of the 'factual nuances' in each case ... and we do not impose a particular level of discipline without considering each bar disciplinary matter on its own merits." Matter of Parigian, *supra*, *citing* Matter of Finneran, 435 Mass. 722, 733, 26 Mass. Att'y Disc. R. 178, 190 (2010).

We also value the assessment of the hearing committee into matters uniquely within its purview, such as the respondent's demeanor and character. In Matter of Doyle, 429 Mass. 1013, fn. 5, 15 Mass. Att'y Disc. R. 170, 172, fn. 5 (1999), the Supreme Judicial Court acknowledged that, while cooperation and remorse are generally considered "typical" factors that do not merit a level of discipline less than disbarment, they may play a role in our recommendation. *See also* Matter of Flaherty, *supra*, Matter of Parigian, *supra.* In other words, we may consider the respondent's genuine remorse (as found by the hearing committee) in recommending a sanction to the Court.

When considering the individualized aspects of this case, including the factors in mitigation and aggravation, and deferring to the hearing committee's opportunity to observe the respondent first-hand, we agree that an indefinite suspension is the appropriate sanction.[5] An indefinite suspension would fulfill the obligation to protect the public and deter other lawyers from engaging in similar misconduct, Matter of Curry, 450 Mass. 503, 520, 24 Mass. Att'y Disc. R. 192, 223 (2008), while dispensing a sanction that is fair and just under the circumstances.

R. Michael Cassidy
R. Michael Cassidy

Ernest L. Sarason, Jr.
Ernest L. Sarason, Jr.

[5] We also acknowledge that bar counsel has not appealed from the hearing committee's recommendation. Given bar counsel's wide experience in these matters, his position is due a modicum of weight.