IN RE: MATTER DAVID C. NEWTON
BBO No. 673560

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

BAR COUNSEL, Petitioner, v. DAVID C. NEWTON, ESQ., Respondent.	)	B.B.O. File No. C1-19-259401

MEMORANDUM OF BOARD DECISION

The respondent admitted to stealing more than $20,000 from his law firm's bank account. On appeal to us, he argues that the hearing committee incorrectly failed to take into consideration two mitigating factors: his claimed restitution to his law partners and his asserted gambling addiction, which he claims was the cause of his misdeeds. We agree with the committee that the respondent failed to carry his burden of proof on both arguments. We diverge from the hearing committee only as to the recommended sanction. We propose a license suspension of two years, rather than the 15-month suspension suggested by the committee.

Factual Findings and Procedural History

Finding no error, B.B.O. Rules, § 3.53, we adopt in full the hearing committee's findings of fact.

The respondent was a partner in the law firm of Reilly, Newton & Rosnov, LLP. ("RNR" or "the firm"). RNR had a bank account (which it used for the firm's operations) (the "Operating Account") with the Institution for Savings Bank and a credit card account with American Express. The partners agreed to share equally monthly draws based on RNR's net profit. The

respondent took responsibility for the monthly payment obligations. The partners also agreed that each of them could use the firm's credit card account for both business and personal charges on the condition that they would reimburse the credit card on a monthly basis for personal expenses. Because the credit card carried a high interest rate for unpaid bills, the partners agreed to pay off monthly balances in full. As with the Operating Account, the respondent was in charge of the credit card payments.

Between October 2015 and April 2017, the respondent, without the knowledge or consent of his two partners, withdrew from the Operating Account more than $5,000 over and above the amount he was entitled to be paid as monthly draws. Between July 2015 and May 2016, the respondent failed to reimburse his partners approximately $10,000 in personal expenses charged to the firm's credit card. The respondent made additional unauthorized withdrawals from the Operating Account, for example by paying himself $9,500 in monthly draws while paying his partners only $8,500. (Hearing Committee Report (HCR) ¶ 14). In another month, he wrote himself eight checks from the Operating Account in a total amount of $18,500 while paying one of his partners only $10,000 and the other partner only $6,947.49. (HCR ¶ 15). One of his law partners discovered the misuse, when she noticed that her monthly draws were inconsistent with her hours and billings.

In April 2017, the respondent's partners confronted him with the information they had uncovered about his unauthorized payments. They calculated the amount taken as $20,478.35, not including credit card interest payments incurred due to the unreimbursed charges. He admitted his misconduct to them. He promised to pay back $20,000, by "hustl[ing] the money together." (HCR ¶ 27). His access to the credit card and Operating Account were revoked soon after the April 2017 meeting. He was dismissed from the partnership. The locks on the office

were changed. The two remaining partners changed the firm's registration with the Secretary of State.

Over time, the respondent paid back his former partners the $20,000 they had agreed as a reimbursement amount. He did this mostly by leaving in the Operating Account payments due to him on work he had performed when he was a partner.

In response to a complaint from the respondent's former partners, in June 2019 bar counsel opened an investigation, which comprised a written response to the complaint by the respondent and an examination under oath. The hearing committee found that the respondent was not truthful during the investigation. It found that his written response to the complaint omitted a material fact: the respondent had been found in contempt by a New Hampshire court for failing to pay court-ordered child support to his former wife. While claiming that he was attending meetings of Gamblers Anonymous, the respondent failed to inform bar counsel that he had gambled during the pendency of the investigation, an omission the hearing committee later found to be material. Despite evidence that the respondent had gambled in June, July and August 2020, he represented to bar counsel (through a letter from his attorney) that he had not gambled since December 2019. During an examination under oath in December 2020, the respondent knowingly lied to bar counsel that he had last gambled in December 2019, even though evidence existed that he had gambled during the summer of 2020. He then changed his story, admitting that he had gambled in June 2020 for the last time, despite photographs showing him at poker tables in July and August that year.

A two-count Petition for Discipline followed. Count One focused on the respondent's thefts from his partners, in violation of Mass. R. Prof. C. 8.4(c) and (h). The respondent's

misstatements to bar counsel formed the crux of Count Two, triggering Rules 8.1(a) and (b), and 8.4(d), (g) and (h).

At the hearing, the respondent admitted the substantive allegations. He did not argue that he did not take the money from the Operating Account or that he had failed to reimburse his partners for the credit card charges on a monthly basis.

Rather than contest the misconduct, the respondent argued that his alleged gambling disorder should be considered in mitigation. The hearing committee rejected the defense, concluding that the respondent had failed to carry his burden of proof. B.B.O. Rules, § 3.28. The hearing committee found that the respondent had failed to prove that he suffered from a gambling disorder or that, assuming he had a disorder, it caused the misconduct. In reaching its conclusion, the committee rejected the testimony of the respondent's post-event treating therapist, Rose Baker, as not credible. The committee noted that she had not been offered as an expert witness; she lacked the credentials for an opinion concerning an alleged gambling disorder; her opinion failed to comply with the accepted diagnostic standards; and she allowed the respondent's lawyer to unduly influence her report. In addition, the committee concluded that, even if the respondent suffered from a gambling disorder, he did not prove that it was the cause of his misconduct.

The committee rejected the respondent's other mitigation arguments, finding that he failed to prove that he had made complete restitution. It concluded that the other proffered reasons: financial difficulties, lack of prior discipline, practice as a solo practitioner (which he admittedly was not) do not qualify as special mitigation circumstances under our case law.

The committee found the respondent's experience in the law as a factor in aggravation. It declined bar counsel's invitation to find in aggravation the failure by the respondent's lawyer to

comply with discovery orders, the committee expressing reluctance to hold the conduct of trial counsel against his client. While the committee agreed that the respondent's testimony at trial lacked candor, it did not consider this as an aggravating factor, since the misconduct was charged separately in Count II of the Petition for Discipline.

The hearing committee recommended that the Supreme Judicial Court suspend the respondent's law license for fifteen months.

Discussion

Rules Violations

As to Count One, we adopt the hearing committee's conclusions that the respondent violated Rules 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 8.4(h) (conduct reflecting adversely on fitness to practice law) of the Massachusetts Rules of Professional Conduct. These conclusions are based on the undisputed facts that the respondent misappropriated more than $20,000 from his law firm's Operating Account.

On appeal, the respondent appears to challenge only the conclusion that he violated Rule 8.4(h). He appears to argue that the conclusion is not based on the facts of the case. To the contrary, there was ample supporting evidence to conclude that the respondent's misconduct reflects adversely on his fitness to practice law. In similar cases, we have approved charges under both Rules 8.4(c) and (h). Matter of Levy, 32 Mass. Att'y Disc. R. 334, 338 (2016). A lawyer's dishonesty reflects adversely on his fitness to practice. Matter of an Attorney, 451 Mass. at 145. We reject the argument that Rule 8.4(h) is somehow unconstitutionally vague.

As to Count Two, we also agree with the hearing committee that the respondent's misrepresentations to bar counsel during his investigation violated Rules 8.1(a) (knowing false statement of material fact in a disciplinary matter); 8.1(b) (omission of material fact or fail to

respond to request for information from disciplinary authority); 8.4(c); 8.4(d) (conduct prejudicial to administration of justice); and 8.4(h). The respondent admitted that his statements were false.

The respondent makes a variety of additional appellate challenges, including the exclusion by the hearing committee of character witness and the conclusion that his lying under oath violated Rule 8.4(d). We reject these and all of the other arguments.[1]

Mitigation and Aggravation

We turn now to the principal issue at the hearing and on appeal: the respondent's asserted gambling disorder as a mitigating factor.

It is the respondent's burden to prove facts in mitigation. B.B.O. Rules § 3.28; Matter of Kydd, 38 Mass. Att'y Disc. R. ___, 2022 WL 2906257 (2022) ("for medical issues or disability to constitute mitigating evidence, the respondent must prove a causal connection between the condition and the misconduct"); Matter of Haese, 468 Mass. 1002, 1008, 30 Mass. Att'y Disc. R. 196 (2014) (respondent's burden to prove a "causal connection" between medical or other mitigating factors and charged misconduct); Matter of John Johnson, 444 Mass. 1002, 1004, 21 Mass. Att'y Disc. R. 355 (2005) (respondent must prove that condition was "cause" of misconduct"); *see also* Doull v. Foster, 487 Mass. 1 (2021) (in deciding issue of causation,

[1] Rule 3.51(c)(1) limits an appellate brief to 30 double spaced pages of at least 12-point type. We do not provide for filing an appendix, because the entire record is available to the board. Without seeking leave to file a non-conforming brief, the respondent filed an appellate brief of 37 pages, most of which was single-spaced. He appended to his brief an additional 167 pages of material, including the Proposed Findings of Fact and Conclusions of Law he had filed with the hearing committee. Included in the material were letters from character witnesses whose testimony the committee had excluded. As a whole the respondent's appellate filings were a stew of incomprehensible and haphazard arguments, which required prodigious effort to follow. Bar counsel did not move to strike any of the superfluous material, and we have reviewed all of it. However, in the future, the board will not countenance this attempt to circumvent our rules.

question is whether, in absence of conduct, the tort would have occurred).[2] There are two elements. As applied to this case, the respondent must prove he had a gambling disorder[3] and (assuming he had such a disorder) it was the cause of the misconduct.

The hearing committee concluded that the respondent did not suffer from a gambling disorder. The respondent disputes the conclusion. We need not address the question, because we find that, regardless of whether such a condition existed, the respondent failed to prove that his gambling (however described or defined) caused the misconduct.

The respondent did not steal from his partners to cover his gambling debts.[4] While that fact is not fatal to his mitigation defense (money is fungible, so he could have used the money to pay other expenses that would have been paid but for his gambling), he presented no evidence of financial difficulties generally caused by gambling losses and that the gambling losses were the result of a disorder, rather than frequent wagering. Apparently, he used some or most of the stolen funds for luxury items such as jewelry and massages. In addition, as we will discuss in the next paragraphs, the respondent was not so compelled to gamble that it caused him to act unethically.

It is not enough simply to argue, without credible foundation, that the respondent had a gambling disorder (again, assuming this fact for the sake of analysis) and that he stole money

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[2] As applied to the respondent's mitigation defense, the causation question would ask whether, in the absence of an alleged gambling disorder, the respondent would have taken the money from RNR's Operating Account or would have failed to pay back the credit card charges.

[3] "Gambling Disorder" is recognized as a diagnosable mental disorder. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 585-589 (5th ed. 2013) ("DSM-V"). The DSM-V notes that "clinical training and experience are needed to use DSM for determining a diagnosis …[t]he case formulation for any given patient must involve a careful clinical history and concise summary of the social, psychological, and biological factors that may have contributed to developing a given mental disorder." DSM-V at 5 and 19.

[4] The hearing committee noted that the respondent offered three different explanations for his thefts: (1) financial stress and marital problems unrelated to gambling; (2) gambling losses incurred to pay expenses; or (3) a gambling disorder. (HCR ¶ 40). Of course, only the third reason would qualify as mitigating. The alternative explanations further undermine the respondent's defense.

from his firm. Correlation is not causation. The respondent must prove that his disorder impaired his judgment such that he conducted himself in a manner inconsistent with legal ethics. Matter of Kydd, *supra*; Matter of Keating, 32 Mass. Att'y Disc. R. 294 (2016) (in mitigation, respondent's ADHD and OCD along with family dispute impaired his judgment); Matter of Molloy, 31 Mass. Att'y Disc. R. 463 (2015) (depression and anxiety impaired respondent's judgment); Matter of Balliro, 25 Mass. Att'y Disc. R. 35 (2009) (respondent offered expert testimony that respondent "was not cognizant of engaging in unethical behavior"); Matter of Brett, 22 Mass. Att'y Disc. R. 102 (2006) (evidence showed that respondent's ADHD caused him to be impulsive and impaired his judgment); *cf*. Matter of Gonick, 15 Mass. Att'y Disc. R. 230 (1999) (rejecting mitigation argument due to lack of evidence to demonstrate impairment); Matter of Ablitt, 486 Mass. 1011, 1018, 37 Mass. Att'y Dis. R. 1, 15 (2021) (medical conditions not mitigating where respondent offered no proof that conditions caused misconduct). Neither the hearing committee nor we may simply accept as true a facile assertion that the respondent's gambling (even if it rose to the level of a medically-recognized disorder) caused his misconduct. This is particularly true in this case, where the respondent offered varying and contradictory explanations for his thefts from his law partners.

The respondent pursued two avenues of proving causation: the testimony of his treating therapist, Rose Baker (who treated him in 2021, after the events that led to this case), and Baker's treatment notes, which were marked as exhibits as trial.

Turning first to Baker, she offered no testimony as to causation. The respondent did not offer Baker as an expert witness. While the lack of an expert may not be fatal, even accepting Baker as a percipient lay witness, her testimony fell short. Baker lacked qualifications to testify about gambling disorders. Her resume mentions smoking cessation and eating disorders, not

gambling. As of the hearing in this case, she held no licenses or certifications for treatment of gambling disorders. (Transcript, Vol. V, p. 171). She had no formal training in the area. She first registered for a training after she treated the respondent. Thus, she was not qualified to testify about a causal connection between the respondent's gambling and his misconduct.[5]

Indeed, Baker did not testify about causation. She was not asked about her views on causation as of the time she treated the respondent. She did not testify that the respondent's gambling impaired his judgment to the extent required for us to consider it in mitigation.[6] The hearing transcript is silent on this point.

Likewise, nothing in the Baker's medical records links the gambling with the misconduct. While the notes reflect that Baker and the respondent discussed his gambling, we have searched in vain for any evidence that gambling impaired his judgment to the extent it caused him to steal money from the firm's Operating Account.

Indeed, the evidence was to the contrary. The respondent continued to practice law. Although he admittedly could have stolen client funds, he limited his theft to the law firm's Operating Account, acknowledging that he was not so "impaired" that he stole from his clients. He stole only from his partners.

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[5] The trial record discloses attempts by the respondent's lawyer to participate in the preparation of Baker's reports (the first one, in April 2021 and a subsequent report in June 2021). For this and other reasons (including her lack of relevant qualifications), the hearing committee found that Baker was not a credible witness. We will not disturb that finding on appeal, since it is amply supported by the record and we discern no evidence to the contrary. B.B.O. Rules, § 3.53. To the extent the issue may become relevant at a later stage of the case, we note that Baker's testimony plays no role in our decision other than the undisputable point that her testimony elided any causal connection between the respondent's gambling and his misconduct.

[6] The hearing committee sustained bar counsel's objections to questions put to Baker by respondent's counsel that sought her expert opinion whether the alleged gambling disorder caused the misconduct. (Hearing Transcript, Vol. V, pages 83 and 92-93). The ruling was correct. Baker was not offered as an expert, and she was not qualified as an expert. While she could have testified as to her observations of the respondent at the time she treated him, she could not testify as to her *ex post facto* opinion. Accordingly, the record is devoid of <u>any</u> evidence demonstrating a causal link between the respondent's gambling and his misconduct.

Lastly, we will credit an impairment as mitigation only where the respondent has addressed the underlying issue. The respondent bears the burden of proving that he has taken steps to minimize the risk of future misconduct. No such evidence was presented in this case. Baker testified only that the respondent "reportedly has a relapse prevention plan." (HCR ¶ 97). Other than that conclusory and unreliable remark, there was no evidence to assure the hearing committee or us that the respondent will not continue to gamble. Presumably, if the respondent had not gambled between his misconduct (2017) and when he met with Baker, that fact would have been noted. However, the records are silent on that point, and Baker did not so testify.

In sum, the respondent fell short of proving that his gambling (assuming it rose to the level of a recognized disorder) was a cause of his misconduct. Simply put, there are no facts in the record to support the defense. In addition, there was no evidence the respondent has addressed the issue and has a plan to prevent recidivism. We adopt the hearing committee's conclusion that the respondent's asserted gambling disorder should not be considered in mitigation.[7]

The respondent also argues that the hearing committee should have considered in mitigation the fact that he made restitution to his former law partners. When lawyers steal money, we may consider restitution as a mitigating factor. Matter of Gonick, supra 15 Mass. Att'y Disc. R. at 230. In this case, the respondent's partners calculated that he stole $20,478.35 (HCR ¶ 28). He repaid his former partners $20,000, doing so only after they confronted him about his thefts. We agree with the hearing committee that the repayment is not mitigating.

[7] For the same reasons, we adopt the hearing committee's conclusion that, to the extent the respondent suffered from post-traumatic stress disorder (PTSD), it is not mitigating, nor is it a defense to the allegations in Count Two that he lied to bar counsel. There was no evidence whatsoever that PTSD caused his misconduct. Even if it did, respondents may not defend against allegations that they lied to bar counsel by blaming their lies on PTSD. The condition would be relevant only in mitigation, not to the merits of the case.

Although we take no position on the amount the respondent repaid,[8] it is clear that he did so only after he was confronted about his theft. We recognize repayment as mitigating because we want to acknowledge lawyers who have voluntarily admitted their misconduct and taken voluntary steps to make amends. Making a payment in the circumstances of this case does not serve the same interest. We respectfully disagree with our dissenting colleagues that the respondent should be credited for repaying the money he stole before bar counsel's investigation but after being confronted by his partners. Presumably, he would not have repaid the money if they had not discovered his theft.

We agree with the hearing committee's rejection of the other proffered mitigation defenses: the lack of disciplinary history; financial difficulties; and status as a solo practitioner.

We adopt the committee's findings in aggravation: substantial experience in the legal field and lack of candor at the disciplinary hearing, including the failure to produce documents. We agree with the hearing committee that the conduct of his lawyer should not be imputed to the respondent.

Recommendation

As the hearing committee observed, law partners owe each other a fiduciary duty of "the utmost good faith and loyalty." Meehan v. Shaughnessy, 404 Mass. 419, 433-434 (1989). As the RNR partner with primary responsibility for firm finances, he owed his partners a duty to

[8] The partners agreed to accept $20,000, which should settle that question. The contrary cases cited by the committee, Matter of Zankowski, 487 Mass. 140, 152, 37 Mass. Att'y Disc. R. 555, 571 (2021) and Matter of Fordham, 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996), are not helpful, because they involved excessive fees to which the clients did not object. Here, the respondent wrongfully took partnership money; the amount of restitution was the result of negotiation between parties with equal bargaining power. It would be illogical to ignore the partners' agreement as to the amount. Accordingly, we would accept as "full restitution" a payment by a respondent to his partners of an agreed amount. For reasons explained in the text, this does not answer the entire question.

preserve the firm's assets. His thefts flew in the face of his obligation. He caused harm to his partners. He took advantage of their trust.

In Matter of Chum, 29 Mass. Att'y Disc. R. 125, 126 (2013), an attorney received an 18-month suspension for misuse of law firm funds. In Matter of Barrett, 447 Mass. 435, 22 Mass. Att'y Disc. 58 (2006), a lawyer stole money from a corporation where he served as CEO. He restored the funds, but not until after he had created a false report to conceal his conduct. The court suspended his license for two years, based partly on a prior admonition he had received. *See also* Matter of Carreiro, 25 Mass. Att'y Disc. R. 91 (2009) (two-year suspension for theft of law firm funds (subsequently re-paid) aggravated by prior admonition).

We strive to treat each respondent fairly based on the individual characteristics of the case. However, our discretion is not unlimited. A disciplinary sanction must not be markedly disparate from comparable cases. Matter of Lupo, 345 Mass. 345, 359, 22 Mass. Att'y Disc. R. 513, 533 (2006).

Although the respondent has no prior discipline, this case has the additional element that he repeatedly lied to bar counsel during the course of the investigation. In addition, we note several aggravating factors. Accordingly, the license suspension must be longer than the 18 months in Chum. The Barrett and Carreiro matters appear to be the most analogous. Accordingly, we recommend a license suspension of two years.

Conclusion

An Information shall be filed in the County Court, recommending that the respondent's license to practice law in the commonwealth be suspended for two years.

Dated: July 10, 2023 BOARD OF BAR OVERSEERS

By: Frank E. Hill, III
Frank E. Hill, III
Secretary

DISSENT

I agree with my colleagues in the majority on their findings and conclusions. I further agree that the respondent failed to carry his burden of proof on his mitigation defense based on is asserted gambling disorder. I disagree on one issue: the respondent's restitution to his former law partners. Unlike the majority, I would consider this fact in mitigation. I also would defer to the hearing committee's recommendation of a suspension of 15 months. The committee was in the best position to observe the respondent and evaluate the efficacy of a sanction on the interests of the public and the bar.

As to restitution, the respondent re-paid his former partners $20,000, an amount on which they apparently agreed. I consider this restitution in full. The cases cited by the hearing committee, Zankowski and Fordham, *supra*., are not on point. Both involved excessive billing of clients. The clients apparently did not object to the bills. The hearing committee characterized the clients' response as "waiver" or "acquiescence." By contrast, the respondent in this case agreed to make a repayment. The amount was negotiated and appears to represent most of the stolen funds. Moreover, this is not a case of repayment after a lawyer was notified by bar counsel of an investigation and used repayment in a possibly cynical effort to mitigate his offenses. Here, the repayment (April 2017) occurred before the involvement of bar counsel

(June 2019). Whatever his motivations, the respondent cooperated with his former partners. He did not try to lie or dissemble. He admitted what he did. We should give credit for acknowledging what he did.

In light of my conclusion as to restitution and our deference to the hearing committee, I would recommend a license suspension of 15 months.

Ernest L. Sarason, Jr.