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

BAR COUNSEL, Petitioner, vs. CHRISTOPHER PILAVIS, ESQ., Respondent.	BBO File Nos. C2-94-0394, C2-98-0014, & C2-98-0636

S.J.C. Order of Disbarment entered by Justice Greaney on January 17, 2001, with an effective date of February 17, 2001. [1]

BOARD MEMORANDUM

A hearing committee recommended that the respondent, Christopher Pilavis, be disbarred for misconduct described in six counts. On appeal the respondent asks that we reverse the committee's findings and dismiss the petition for discipline. Oral argument having been waived by the parties, see Rules of the Board of Bar Overseers, Section 3.50(b), the Board considered the matter on the papers on August 14 and October 16, 2000. We adopt the committee's report and its recommendation for disbarment.

Findings of Fact and Conclusions of Law

Five of the six counts in the petition for discipline relate to or arise out of the respondent's representation of Richard Campana. The hearing committee invoked issue preclusion to bar the respondent from denying the material factual allegations in the first three Campana counts, and the committee found against him on the other two. The sixth, unrelated count arises out of the respondent's handling of an immigration matter. For the reasons set out later in this memorandum, we adopt and incorporate by reference the committee's findings of fact and conclusions of law, which are summarized below.

Count One. In 1981 Campana retained the respondent to represent him on interrelated claims against the Massachusetts Housing Finance Authority for wrongful termination and against Avis Car Leasing for defamation. Lawyer and client entered into an oral contingent fee agreement under which the respondent's fee would be one third of any recovery obtained. The respondent settled the claims against Avis for $800 in 1982 but did not pay over any of the proceeds to his client. That same year the respondent commenced a civil action against the MHFA.

In 1987 Campana was reinstated by the MHFA when the Supreme Judicial Court affirmed a lower court order that it do so. Shortly thereafter, the MHFA offered to settle the damages portion of the claim for $175,000. This offer exceeded the agency's prior offer by $100,000. Without consulting his client, the respondent rejected the offer. The Superior Court later conducted a hearing and awarded Campana about $75,000, which the MHFA paid to the respondent. In the meantime, the respondent had borrowed $56,100 from his client, which he had promised to credit against his contingent fee in the MHFA matter. Notwithstanding this agreement, the respondent retained a full third of the award as his fee.

The hearing committee found disciplinary violations in the respondent's failures to commit the contingent fee agreement to writing, to pay the client his rightful portion of the Avis settlement proceeds, to repay the loan to his client as promised, and to apprise his client of a substantial settlement offer.

Count Two. In 1981 the respondent and others incorporated New Gasoline Corporation, a privately held

speculative venture for the manufacture and sale of synthetic gasoline. New Gasoline never had a laboratory and never manufactured or sold any synthetic fuels. The respondent was a shareholder and its treasurer.

In March 1982, while he was representing Campana in the MHFA matter, the respondent persuaded him to purchase stock in New Gasoline for $25,000. Campana was an unsophisticated investor who had never previously bought stock in a privately held corporation. The respondent failed to disclose the speculative nature of the investment, that this was the only sale of New Gasoline stock that had ever occurred, or that the shares purchased were his own. In addition, the respondent falsely stated that the purchase money would be used for corporate purposes when in fact he intended to and did use them to make personal expenditures. He also misrepresented that New Gasoline was about to receive substantial funding from the federal government. Although Campana relied on the respondent for advice and professional judgment to protect his interests, the respondent failed to advise him to seek advice of independent counsel, failed to give him advice that independent counsel would have provided, and failed to obtain his client's informed consent to the transaction.

New Gasoline was dissolved in 1990, and Campana lost his entire investment.

The hearing committee concluded that the respondent's actions in selling the stock to his client violated Canon One, DR 1-102(A)(4) and (6) (engaging in conduct involving dishonesty, deceit, misrepresentation, or fraud and adversely reflecting on fitness to practice), Canon Five, DR 5-104(A) (entering into business transaction with client without client's consent after full disclosure), and Canon Seven, DR 7-101(A)(3) (prejudicing or damaging client in course of representation).

Count Three. The respondent represented Campana as executor of his mother's estate following her death in 1982. Before she died the mother had transferred title to her home to herself and Campana. The respondent advised Campana not to include the house on the estate tax return. The Department of Revenue later disagreed and demanded approximately $21,000 in taxes, interest, and penalties. The respondent advised Campana to pay DOR and to file an application for abatement. After the abatement was denied, the respondent agreed to bring an appeal to the Appellate Tax Board for a $10,000 fee, which Campana paid.

Despite the agreed fee, the respondent prevailed upon Campana to pay him an additional $4,000. The respondent drafted a second application for abatement, which contained intentionally false statements regarding the amounts paid by the estate to cover attorney's fees and the executor's commission. When Campana discovered the false statements, he paid his accountant to prepare an accurate application.

The hearing committee concluded that, by charging a fee in excess of that agreed upon and by preparing a false application for abatement, the respondent violated Canon One, DR 1-102(A)(4) (engaging in dishonesty, deceit, fraud, or misrepresentation), (5) (engaging in conduct prejudicial to the administration of justice), and (6) (engaging in conduct adversely reflecting on fitness to practice); and Canon Two, DR 2-106(A) (charging an illegal or clearly excessive fee).

Count Four. Campana brought a civil action against the respondent for the conduct giving rise to the findings described in the previous three counts. Campana prevailed at trial and was awarded judgment in the amount of $592,032.03. Seeking to collect on the judgment, Campana sought and obtained a preliminary injunction restraining the respondent "from conveying, transferring, or in any other manner or fashion alienating any assets or property of Christopher Pilavis, whether owned individually or jointly . . . ." The order excepted payments necessary for his or his wife's welfare so long as they were disclosed and documented in a monthly report to Campana's counsel.

In December 1996, on the very afternoon the respondent learned of the injunction, he deposited the cash surrender proceeds of his life insurance policy into his IOLTA account, thereby commingling his own funds with those of his clients. For the rest of 1996 and throughout 1997, the respondent drew on that account to pay personal and business obligations, including those for rent, typing services, telephone bills, and support payments to his estranged wife. The respondent did not disclose these payments to Campana's counsel as required by the preliminary injunction.

In December 1997, the respondent deposited to the IOLTA account settlement proceeds he had received on behalf of another client. After disbursing the client's share, the respondent retained the balance of the proceeds in the commingled account. A few days later, Robert Aronson, a lawyer who claimed he was entitled to a referral fee from the respondent, brought a civil action against him and obtained an attachment by trustee process against the IOLTA account. Following a tip from Aronson, Campana's counsel obtained a similar attachment against the account. As a consequence, checks drawn on the IOLTA account were dishonored and the account was in overdraft on five separate occasions.

In July 1998, the respondent filed a petition for bankruptcy under Chapter 11. He sought to discharge his debt to Campana and others. Campana commenced an adversary proceeding to oppose discharge of the debt. The Bankruptcy Court later entered an order denying discharge.

The hearing committee concluded that the respondent violated the court's preliminary injunction, in violation of Canon One, DR 1-102(A)(4) (dishonesty, deceit, fraud and misrepresentation), (5) (conduct prejudicial to the administration of justice) and (6) (conduct adversely reflecting on fitness). The committee further found that he commingled personal and client funds in his IOLTA account, in violation of Canon Nine, DR 9-102(A) (lawyer shall maintain client's funds in separate trust account and shall not deposit or maintain personal funds in the account).

Count Five. When the respondent's IOLTA account went into overdraft, his bank notified the Office of Bar Counsel. See Mass. R. Prof. C. 1.15(f). The respondent failed to respond to inquiries by Bar Counsel, ignored the threat of a subpoena and, when a subpoena was issued, failed to produce all subpoenaed documents or to give a complete answer to Bar Counsel's inquiries.

The hearing committee concluded, and the respondent apparently does not dispute on appeal, that his failure to cooperate with Bar Counsel's investigation was in violation of S.J.C. Rule 4:01, § 3, and Mass. R. Prof. C. 8.4(g) (lawyer shall not fail without good cause to cooperate with Bar Counsel's investigation).

Count Six. In December 1997, Carol Burgess and her son were airlifted from Bermuda to Boston so that the son could receive medical attention following a motorcycle accident that had left him paralyzed. Burgess paid the respondent a retainer to assist her in obtaining a green card so she could work and an extension from the INS so that she and her son could remain in the United States. Burgess gave the respondent certain original documents, including their birth certificates, an adoption certificate, marriage and divorce certificates, both of their passports, and a letter from the son's doctor.

The respondent consulted one Mario Lanza, an immigration consultant. The respondent sent him the clients' original documents and directed Burgess to confer with Lanza for assistance in filing for extensions with the INS. The respondent did not tell her he had sent Lanza the original documents, and he did not advise her that Lanza expected to be paid $1,220 for his services.

Burgess did as the respondent instructed, and applications were filed with the INS in early June 1998. By letter dated July 1, 1998, the INS notified the respondent that it needed, within twelve weeks, evidence of his clients' residence abroad and of their ability to maintain themselves financially in the United States. The respondent took no action despite Burgess' efforts to communicate with him. By letter dated November 9, 1998, the INS notified the respondent and Burgess that the applications had been denied "due to abandonment," but that they could be reopened by filing a motion and a fee by December 12, 1998.

After her initial "urgent" messages went unanswered by the respondent, Burgess finally succeeded in meeting with him in his office on November 17th. The respondent claimed he had not received the INS notice, but assured her he would file a timely motion to reopen the applications. When the respondent failed to keep a subsequent appointment, Burgess appeared with her neighbor at the respondent's office. The respondent told her he needed the original documents. She reminded him that she had already given them to him and she asked him to return them to her. The respondent told her he had sent them to Lanza and, despite her willingness to pick them up herself, he undertook to arrange for their return and to turn them over to her at an agreed-upon time. Burgess' neighbor called back at the agreed-upon time, but succeeded only in reaching the respondent's answering machine.

The respondent did not make any request of Lanza for return of the documents. The respondent took no further action on behalf of Burgess and her son. The applications were denied due to abandonment, and Burgess never received her original documents back from the respondent.

She filed a grievance with the Office of Bar Counsel. The respondent failed to answer the grievance until after a subpoena duces tecum was issued to compel his cooperation. When he appeared in response to the subpoena, he failed to provide a response to the grievance and produced none of the documents enumerated in the subpoena. Bar Counsel was later able to retrieve the original documents sent to Lanza.

Mitigating and Aggravating Evidence.

The hearing committee made no findings in mitigation of the respondent's misconduct. In aggravation, the committee found that he was an experienced attorney in the relevant practice areas; acted with a selfish, pecuniary motive in his dealings with Campana; neglected vulnerable clients with limited resources in the immigration matter; refused to acknowledge the wrongfulness of his actions, failed to make restitution, affirmatively obstructed Campana's efforts to obtain compensation, and evinced a lack of candor in the disciplinary proceedings. In addition, he previously had received a private reprimand. PR 88-19, 5 Mass. Att'y Disc. R. 560 (1988).

The hearing committee recommended that the respondent be disbarred.

The Respondent's Appeal

On appeal, the respondent objects to the invocation of issue preclusion with respect to the first three counts, denies having violated the preliminary injunction, denies having commingled his IOLTA account, and assails the credibility of Burgess. He does not challenge the findings that he failed to cooperate with Bar Counsel's investigation. We consider each of his objections in turn.

1. Issue preclusion. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982), quoted in Cinelli v. Revere, 820 F.2d 474, 479 (1st Cir. 1987) (applying Massachusetts law). Massachusetts has abandoned the requirement that the parties be the same and now permits a stranger to invoke issue preclusion, whether offensively or defensively, against a party bound by the first action. See, e.g., Aetna Casualty & Sur. Co. v. Niziolek, 395 Mass. 737 (1985). In 1995 the Supreme Judicial Court held that issue preclusion may be invoked in bar disciple proceedings to the same extent as in a civil matter. Bar Counsel v. Board of Bar Overseers, 420 Mass. 6, 11 Mass. Att'y Disc. R. 291 (1995). This is what the hearing committee did here.

The hearing committee reviewed the findings in Campana v. Pilavis, Civil Action No. 90-3274 (Middlesex Sup. Ct. June 2, 1995), a civil action Campana brought against the respondent alleging legal malpractice, breach of fiduciary duties, and breach of contract. The committee found that the relevant factual findings made by the Superior Court "mirror" the allegations in the first three counts of the petition for discipline. The committee also determined that the findings subject to issue preclusion had been made against him after being fully litigated in the civil action, were essential to the judgment entered in it, and were concluded by a final judgment. Applying these principles, the committee refused to permit the respondent to retry the issues and found against him on the first three counts.

The respondent does not quarrel with the committee's analysis in this respect, and he mounts no reasoned argument that the committee misapplied the principles of issue preclusion. He insists instead that Campana's claims were fabricated and perjurious (with the connivance of his trial counsel), were unsupported by the evidence before the Superior Court, and were embraced by a judge who was "willful[ly] biased" against the respondent and in favor of the law firm that represented Campana. He charges, further, that Bar Counsel engaged in misconduct by "deliberate[ly] and knowingly misleading and/or forcing [the hearing committee] to accept the Judge's unethical and bias[ed] findings and Judgment and to find against Respondent." We read these contentions as a claim that he did not have a full and fair opportunity to contest Campana's charges because of bias. So read, the contentions fail to

convince. As Bar Counsel points out, the respondent's argument resembles one made in Aetna Casualty & Sur. Co. v. Niziolek, supra. Niziolek claimed he had been denied a full and fair opportunity to litigate the criminal charge of which he had been convicted in the prior proceeding because discovery is not permitted defendants in criminal trials and because the prosecutor had unfairly influenced the outcome by agreeing to drop criminal charges against a witness in exchange for testimony. 395 Mass. at 746. The Supreme Judicial Court rejected these arguments on the grounds that Niziolek had not identified any information that discovery would have unearthed and he had had "full opportunity to challenge [the cooperating witness'] testimony at trial and on appeal from his conviction." Id. Here, too, the respondent had a full opportunity to challenge the challenge Campana's alleged perjury, to object to the judge's perceived bias, and to press his objections on appeal.

Moreover, the hearing committee had before it the judgment and transcript of the proceedings in the civil matter. The respondent presented no evidence of the judge's perceived bias, and he has not demonstrated why his objections could not have been dealt with on appeal. The committee weighed the respondent's contentions, which he briefed fully and argued orally, before allowing Bar Counsel's motion to preclude evidence on these counts. Our own independent review of the committee's decision and the record in the civil action lends no credence to the respondent's claim that he was denied a full and fair hearing in the Superior Court. Accordingly, we dismiss his objections to the committee's determination to invoke issue preclusion.

2. The preliminary injunction. The respondent insists that distributing funds to his wife and others did not violate the court order enjoining him from using or transferring assets. He does not deny having notice of the order or that it forbade him from distributing funds without disclosure to Campana's counsel, and he concedes that he did not make such disclosure. Nonetheless, he insists the transfers to his wife were "proper, legal and ethical." The respondent misperceives the committee's findings as well his obligations under the preliminary injunction.

The respondent cashed out a policy that insured his life, deposited the proceeds to his IOLTA account, and then used the proceeds to pay personal obligations, including business expenses and support payments to his wife. He argues on appeal that these actions did not violate the injunction because the proceeds were his wife's property, not his. The documentary evidence does not support this claim. While the application for the policy listed both the respondent and his wife as owners, the policy itself does not appear to be in evidence. Assuming the policy was issued in accordance with the application, the record demonstrates that the respondent and his wife were joint owners, with the respondent as the insured and his wife as the beneficiary. (See Ex. 9A; Ex. 9B) As a consequence, it is no defense to claim that she, in her capacity as his client, ordered him to deposit the funds and to make the transfers. This would not excuse him from reporting the transfers to Campana's counsel, for the injunction specifically restrained transfers of his property "whether owned individually or jointly." (Ex. 8 (emphasis added))

Finally, the respondent nowhere explains how, if the insurance proceeds were somehow his wife's sole property, he could have used them to pay his own debts, including (most curiously) his support obligations to her.

The other transfers were even less defensible. Transfers to pay for office rent, telephone bills, and typing services were funded either by the life insurance proceeds or by his share of the proceeds of a settlement received on behalf of another client. The issue is not whether the expenditures were made to pay genuine debts or in a good faith belief that they were "necessary for the welfare" of him and his wife, as described in the injunction. The transfers violated the court order because they were made without disclosure to Campana's counsel. The hearing committee did not err in finding the respondent had violated the court order.

3. The commingled IOLTA account. The respondent contends that he did not commingle client and personal funds in his IOLTA account and that, if he did, it was not intentional. Neither claim has merit.

The respondent does not dispute that his IOLTA account contained client funds at the time he deposited the life insurance proceeds in December 1996. The committee found (rightly, as we just discussed) that the insurance proceeds were his property, not client funds. It follows, a fortiori, that the respondent

commingled his own funds with those of his clients.

On the question whether a violation occurred, the respondent's intent is irrelevant. The charge of commingling does not require proof of intent. See, e.g., Matter of Mirkin, 13 Mass. Att'y Disc. R. 555, 560-561 (1997) (commingling charge sustained when secretary deposits client funds to wrong account). Intent may be relevant in choosing the appropriate sanction. See Matter of the Discipline of an Attorney (and two companion cases) (Three Attorneys), 392 Mass. 827, 836-837, 4 Mass. Att'y Disc. R. 155, 166 (1984) (presumptive sanction for intentional commingling without use of client funds is private reprimand). Here, however, the evidence is strong that the respondent deliberately set out to commingle his funds with his clients'.

The respondent conceded at hearing that he did not open a personal account because he feared it would be attached by Campana. He also conceded that he did not have a business account during 1996 and 1997. He apparently had only an IOLTA account, and he does not dispute that depositing the insurance proceeds was an intentional act. He deliberately paid his business and personal obligations out of the account.

Similarly, a year later he settled another case and deposited the proceeds in the still commingled IOLTA account. He immediately disbursed the client's share of the settlement proceeds and paid his son what the respondent claimed was a fee for legal work done on the case. Thereafter, he retained the balance, which he considered his fee (though Aronson claimed a share of it), in the IOLTA account. As a consequence, he committed two acts of commingling with respect to the settlement, first by pooling the settlement funds with his own insurance proceeds and, second by leaving his fee in the account after his entitlement to it had become fixed vis-à-vis the client. See, e.g., Matter of Karahalis, 7 Mass. Att'y Disc. R. 130 (1991) (failure to remove earned fees from client funds account constitutes commingling). These actions exposed his clients' funds to seizure by his creditors, two of whom (Campana and Aronson) succeeded in attaching the account and sending it into overdraft on several occasions. It does not appear from the record that any clients were deprived of their funds as a result, but the risk was there. That is one of the risks the prohibition against commingling was intended to prevent. See, e.g., C. Wolfram, Legal Ethics 177 (1986). The committee rightly determined that the respondent commingled personal and client funds.

4. The immigration matter. The respondent's objections to the hearing committee's findings on the immigration matter are difficult to understand, but all of them appear to be subsumed by his claim that Burgess' "testimony does not rise to the level of being credible."

We are required to give "due deference to the hearing committee as the sole judge" of the credibility of the witnesses appearing before it. S.J.C. Rule 4:01, § 8(3) (emphasis added). We may not disturb those findings absent clear error. See, e.g., Matter of Tobin, 417 Mass. 81, 85-86, 10 Mass. Att'y Disc. R. 269, 273 (1994); Matter of Provanzano, 5 Mass. Att'y Disc. R. 300, 303-04 (1987). The deference we owe is akin to that due a jury in making a credibility finding, and the Board may not reject such a finding unless it can "be said with certainty" that it is "wholly inconsistent with another . . . finding." Matter of Hachey, 11 Mass. Att'y Disc. R. 102, 103 (1995).

On appeal, the respondent has not identified any evidence in the record that satisfies such criteria. He claims Burgess breached her obligation to pay his fee and that her motive for wanting to recover the original records was to get married. Assuming without deciding the truth of these two claims, we note that the former is entirely irrelevant (her failure to pay would not justify his failure to return her original documents), and the latter has little impact on her credibility in other respects. Her testimony was corroborated in relevant respects by that of her neighbor and Lanza's wife. There is no basis for disturbing the committee's credibility determinations. The respondent's objections to the committee's findings under the last count are without merit.

The Appropriate Sanction

The respondent does not claim that the charges, if sustained on appeal, would not warrant the sanction proposed by the hearing committee. Disbarment, as the committee observed, is the only appropriate

sanction for the respondent's cumulative misconduct. Standing alone, his fraudulent scheme to induce Campana to buy his stock in New Gasoline merits indefinite suspension. See Matter of Voros, 11 Mass. Att'y Disc. R. 287, 289-290 (1995). Similarly, the respondent's intentional misappropriation of the proceeds of Campana's recovery from Avis presumptively warrants disbarment. See, e.g., Matter of Schoepfer, 426 Mass. 183, 187-188, 13 Mass. Att'y Disc. R. 679, 685 (1997).

The respondent's misconduct does not stop there, however, and we must weigh its cumulative effect in choosing a sanction. See Matter of Saab, 406 Mass. 315, 325, 6 Mass. Att'y Disc. R. 278, 290 (1989). He also charged an excessive fee, refused honor to his promise to repay loans made to Campana, unilaterally rejected a settlement offer to his client's detriment, prepared a deliberately false tax abatement application, violated a lawful injunction, commingled his IOLTA account, neglected an immigration matter undertaken on behalf of vulnerable clients, obstructed Campana's efforts to achieve restitution, and failed to cooperate with Bar Counsel investigation. Finally, we note that the respondent has a disciplinary history, which must be considered in determining the sanction. Matter of Dawkins, 412 Mass. 90, 8 Mass. Att'y Disc. R. 64 (1992).

Given the totality of the respondent's misconduct, the proper sanction is disbarment.

Conclusion

For all of the foregoing reasons, we adopt the hearing committee's report and recommendation that the respondent, Christopher Pilavis, be disbarred.

Respectfully submitted,

THE BOARD OF BAR OVERSEERS

By: _____
Mitchell H. Kaplan
Secretary

Approved: October 16, 2000