NO. BD-2004-020

IN RE: FRANCIS X. JACKMAN

S.J.C. Order of Term Suspension entered by Justice Spina on May 24, 2004, with an effective date of June 23, 2004.[1]

MEMORANDUM OF DECISION

The Board of Bar Overseers filed an Information recommending that Attorney Francis X. Jackman, the respondent, be indefinitely suspended from the practice of law.

The case was submitted to the hearing committee on stipulated facts, summarized as follows: The respondent was admitted to the Bar of the Commonwealth on January 12, 1977. Since 1988, his practice has consisted primarily of criminal defense matters in the South Boston and East Boston District Courts. In over twenty-six years of practice, he has never received a complaint involving his representation of a defendant in a criminal matter.

From January, 1998, through October, 1999, the respondent maintained a separate office, known as the Law Offices of Francis X. Jackman, in Dorchester to handle personal injury cases for clients primarily of Vietnamese descent. The day-to-day operations of that office were managed by Mao Q. Nguyen, a non-lawyer, with whom the respondent had agreed to share the legal fees received. Nguyen and other non-lawyer staff members handled and settled personal injury cases with inadequate supervision or oversight from the respondent. Nguyen and other non-lawyer staff members engaged in the practice of law.

The respondent's personal injury office maintained four bank accounts: an IOLTA account and a business account at Citizens Bank, and two business accounts at BankBoston and Fleet Bank. Nguyen was a signatory on all four accounts, but was removed as a signatory on the IOLTA account in November, 1998. The respondent was a signatory only on the two Citizen Bank accounts. The office received a large number of checks in settlement of personal injury claims on behalf of clients (the office opened approximately ten new cases each month). Many of those checks were deposited to the three business accounts and were thereby commingled with the respondent's personal or business funds. The respondent did not require the staff to keep adequate records to document the receipt, maintenance, and disbursement of client funds.

Between July and December, 1998, the respondent's personal injury office received twenty seven checks totaling $52,721.93 from insurers for personal injury protection (PIP) benefits, payable to Alliance Physical Therapy (some were payable to Alliance and the respondent). Nguyen or another employee endorsed Alliance's name to each of the checks and deposited the funds to the office IOLTA account without Alliance's knowledge or authority. Alliance did not receive payments until after it filed a grievance against the respondent with Bar Counsel.

The respondent knew that Nguyen was handling personal injury claims and managing the office without adequate supervision. Beginning in May, 1999, the respondent knew that Nguyen was using the BankBoston and Fleet Bank business accounts for the receipt and disbursement of client funds and that he, the respondent, was not a signatory on those accounts. The respondent failed to take reasonable remedial measures to assure proper receipt, maintenance, and disbursement of client funds.

In 1999, Nguyen converted settlement proceeds due clients and PIP funds due medical

providers for his own use, with at least temporary deprivation resulting. Two clients agreed to settle their claims in August, 1999, for a total of $6,000, but the settlement proceeds were deposited to the office business accounts by staff members, without authority, and the clients never received any of the settlement proceeds. PIP payments totaling $4,033.40 received by the office on behalf of one of the clients in March and September, 1999, were deposited to the office business accounts by staffers. No payments were made to the medical providers.

Cases of two other clients were settled in August, 1999, for $6,600 without the knowledge of the clients. The proceeds were deposited to the office business accounts by staffers. No payments were made to the clients.

The office received $62,323.51 in PIP payments for Dorchester Chiropractic between February and November, 1999, of which $29,573.49 was remitted to this provider. Dorchester Chiropractic received the remaining funds by filing a claim against Fleet Bank for improper indorsements.

The respondent has cooperated with Bar Counsel throughout the investigation.

The hearing committee found the following violations of the Massachusetts Rules of

Professional Conduct:

(1) Rule 5.4(a) – lawyer shall not share legal fees with non-lawyer, with certain exceptions not applicable here;

(2) Rule 5.4(b) – lawyer shall not form a partnership or other business entity with non-lawyer if any activity of the business includes the practice of law;

(3) Rule 8.4(h) – conduct adversely reflecting on fitness to practice law (four violations);

(4) Rule 5.4(b) – with respect to non-lawyer employed, retained by or associated with lawyers, lawyer with direct supervisory authority shall make reasonable efforts to ensure person's conduct is compatible with lawyer's professional obligations (six violations);

(5) Rule 1.15(a) – lawyer shall hold client property separate from lawyer's property, shall safeguard client property and maintain complete records regarding client funds or property (three violations);

(6) Rule 1.15(b) – upon receiving funds in which client or third person has an interest, lawyer shall promptly notify such person (two violations);

(7) Rule 1.15(d) – all client funds shall be deposited in IOLTA account or client funds account;

(8) Rule 1.15(e) – all client funds shall be deposited in pooled IOLTA account or individual client account with interest payable to client

The hearing committee recommended suspension for one year, and that on reinstatement the respondent be limited in his practice to the representation of indigent criminal defendants in the District Courts and that he annually provide Bar Counsel with an affidavit stating under oath that he has not engaged in any civil practice during the preceding year.

Bar Counsel appealed the report of the hearing committee to the Board, including the hearing committee's rejection of certain conclusions. In particular, Bar Counsel argued that the stipulated facts required the hearing committee to conclude that:

(a) the respondent assisted Nguyen in the unauthorized practice of law, in violation of Rule 5.5(b);

(b) the respondent failed to provide his clients with competent representation, to seek their lawful objectives, failed to act with reasonable diligence on their behalf and failed to maintain adequate communication with them, in violation of Rules 1.1, 1.2(a), 1.3, and 1.4; .

(c) the respondent should be held responsible for Nguyen's theft of client funds under Rule 5.3(c), because he knew of misconduct by Nguyen involving client funds but failed to take remedial action that would have prevented the foreseeable consequences of Nguyen's misconduct; and

(d) a one year suspension for the respondent's misconduct is markedly disparate, and instead, an indefinite suspension or disbarment should be imposed.

The Board agreed with Bar Counsel in all respects except his construction of Rule 5.3(c)(2). The Board concluded that under the rule the respondent was responsible for the conduct he "knows of at the time. The Board concluded that the respondent was aware of the mismanagement of the client funds, but not their theft, as Bar Counsel argued. The Board recommends that the respondent be indefinitely suspended from the practice of law.

I agree with the conclusions of the Board, except as to the appropriate sanction. Some discussion is necessary with respect to certain findings by the Board as to the additional violations. The evidence supports, if not requires, the conclusion that the respondent violated Rule 5.5 (b). The parties stipulated that the respondent agreed to allow Nguyen to manage the day-to-day operations of the office and to share legal fees with Nguyen, a non-lawyer. Nguyen and other non-lawyer staff members handled and settled personal injury cases with inadequate supervision or oversight from the respondent. By setting up the office and allowing Nguyen and other non-lawyers to handle and settle claims (without supervision), the respondent provided the necessary "assistance" to a non-member of the bar to perform activity that constitutes the unauthorized practice of law. Rule 5.5(b). It is immaterial, as the respondent contends, that Nguyen and the others did not hold themselves out as members of the bar. The comment to the rule suggests that the failure to properly supervise delegated work to a paraprofessional alone would constitute a violation of the rule ("Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work"). Here, Nguyen and other staffers were not only unsupervised, but they were allowed to perform services that only should have been performed by attorneys. See Goldblatt v. Corporation Counsel of Boston, 360 Mass. 660,665(1971).

The evidence also supports the conclusion that the respondent failed to provide competent representation. Rule 1.1. Failure to supervise paraprofessionals is itself a failure to act with reasonable diligence. See Matter of Holzberg, 12 Mass. Att'y Disc. R. 200 (1996). A showing of injury is not required. The Board's analysis in support of the additional violations is supported by the evidence.

The remaining question is the appropriateness of the sanction. The applicable standard is whether the sanction imposed is markedly disparate from judgments in comparable cases, though substantial deference is paid to the recommendation of the Board. See Matter of Tobin, 417 Mass. 81, 88 (1994). The Board acknowledges that there is no evidence that the respondent intentionally misappropriated client funds, and the case is therefore unlike Matter of Schoepfer, 426 Mass. 183 (1997) (indefinite suspension for intentional misuse of client funds). Cases involving an unintentional misappropriation of client funds, without deprivation, have resulted in a term suspension. See, e.g., Matter of Newton, 12 Mass. Att'y Disc. R. 351 (1996) (two years); Matter of Zelman, 10 Mass. Att'y Disc. R. 301 (1994) (two years); Matter of Barnes, 8 Mass. Att'y Disc. R. 8 (1992) (three years, third year suspended and respondent

placed on probation). Here, there has been at least temporary deprivation.

The Board correctly notes that fee splitting and assisting in the unauthorized practice of law, which are separate violations, warrant a term suspension in their own right. See, e.g., Matter of Di Cicco, 6 Mass. Att'y Disc. R. 83 (1989) (two-year suspension for assisting unauthorized practice of law, for notarizing power of attorney where attorney knew or should have known that person executing power was under legal disability, and other serious violations).

The Board relies on In the Matter of Luongo, 416 Mass. 308 (1993), for its recommendation of an indefinite suspension. The Luongo case is similar in that it involved multiple violations of the Rules, two of which standing alone call for suspension. Like the present case, Luongo involved both a misappropriation of client funds and facilitating the unauthorized practice of law. However, the similarity ends there. Luongo had intentionally misappropriated client funds, a violation which presumptively calls for an indefinite suspension or disbarment. Id. at 309. Luongo also permitted an attorney associated with him to continue holding himself out as admitted to practice in the Commonwealth after learning that he was not so licensed, that the attorney had been convicted of stealing client funds in Connecticut and had resigned from the Connecticut Bar. Here, there is no evidence that Nguyen or the other staffers had held themselves out as members of the bar. Moreover, unlike the respondent here, Luongo had been subject to prior discipline and had failed to cooperate with bar counsel. The respondent's conduct here is certainly not exemplary, but neither is he as culpable as Luongo.

I conclude that a three-year suspension is appropriate, with the third year suspended and the respondent placed on probation for two years. A condition of probation, one which the respondent has volunteered, is that he limit his practice to the representation of criminal defendants in the District Court and that he annually provide Bar Counsel with an affidavit stating under oath that he has not engaged in any civil practice during the preceding year. See Matter of Provenzano, 5 Mass. Att'y Disc. R. 300 (1987); PR-90-22, 6 Mass. Att'y Disc. R. 422 (1990) (private reprimands with two-year probationary period in which attorney required to limit his practice).

Cases involving unintentional misappropriation, without deprivation, as noted, have resulted in a two-year suspension. Here, there has been at least temporary deprivation. A second set of violations, assisting in the unauthorized practice of law and fee-sharing with a non-lawyer, call for an additional period of suspension. However, the attorney in the Di Cicco case received a two-year suspension for multiple violations that were somewhat similar. Like the Di Cicco case, this case involves facilitation of the unauthorized practice of law. Unlike the Di Cicco case, this case involves commingling client funds, and although the respondent's commingling was unintentional (and although Di Cicco's notarizing a form for a person under a legal disability lends a more insidious dimension to his intent), the prohibition against commingling client funds occupies a special place in the rules: it is the subject of a particular rule, namely, Rule Number One. It is among the very first things on the list of prohibited acts that every lawyer must know. There can be nothing less than a two year suspension.

In imposing a three-year suspension with the third year suspended and probation for two years, I have given considerable weight to the mitigating factors found by the Board, namely, that the respondent was cooperative with Bar Counsel at all times, and that he had practiced over twenty six years without a complaint. I believe that the sanction now imposed is consistent with the sanctions imposed in Matter of Newton, supra, Matter of Zelman, supra, and Matter of Di Cicco, supra.

By the Court,
Francis X. Spina
Associate Justice

ENTERED: May 24, 2004

[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

[2] Compiled by the Board of Bar Overseers based on the record before the Court.