NO. BD-2004-071

IN RE: JOSEPH T. MORIARTY

S.J.C. Order of Indefinite Suspension entered by Justice Cowin on January 13, 2005, with an effective date of February 14, 2005.[1]

MEMORANDUM OF DECISION

This matter comes before me on an information, record of proceedings and a vote of the Board of Bar Overseers (board). The matter was initiated by bar counsel's petition for discipline brought before a hearing committee of the board. The petition alleged that Joseph T. Moriarty (respondent) violated various disciplinary rules arising out of his mishandling of client funds. The hearing committee concluded that the respondent intentionally commingled personal and client funds by depositing a portion of funds into his office operating account when the funds should have been escrowed; failed to deliver deposit monies to his client on a specified date in compliance with the escrow agreement; failed to return a portion of said monies to the buyer in the underlying transaction pursuant to a termination of the agreement assented to by his client; knowingly misappropriated escrow funds for his own personal and business needs, which resulted in actual deprivation to his client and the buyer; made false representations to his client, to attorneys representing the buyer, and to an investigator of the Office of Bar Counsel as to the status of the escrowed funds; and failed to hold the deposit monies in escrow pending completion of the agreement.

The hearing committee concluded that these actions constituted the violation of several ethical rules[2] and warranted the sanction of indefinite suspension. The respondent appealed from the hearing committee report. After oral argument, an appeal panel of the board rejected the respondent's appeal, adopted the hearing committee's findings of fact, conclusions of law, and clarified one ambiguous conclusion of the committee. The respondent objected to the appeal panel's report. After review, the board voted unanimously to adopt the appeal panel's report and recommendation, and suspend the respondent indefinitely. The board then filed an information with the county court pursuant to S.J.C. Rule 4:01, § 8 (4), as appearing in 425 Mass. 1309 (1997). The respondent now seeks a reduced sanction.

1. Facts. The hearing committee made the following findings of fact, which were adopted both by the appeal panel and the board. On November 17, 2000, the respondent put the sum of $40,000 in escrow for a client who was selling a liquor license. The respondent was to hold that money while the buyer obtained approval for the transfer of the license. The respondent deposited only $20,000 into his IOLTA account, depositing $19,700 of the remainder into his law office's operating account and retaining $300 in cash for himself. The respondent subsequently used all the escrowed funds to pay personal or business expenses unrelated to the sale of the liquor license.

The purchaser was unable to complete arrangements for the transfer of the license by June 29, 2001, at which point the escrow agreement entitled the respondent's client to the entire $40,000. The respondent told his client that the best course would be to leave the escrowed funds with him. The respondent thus deliberately and falsely implied that the funds were still intact. He later falsely told the buyer's attorney that he had paid the funds over to his client. The respondent then proceeded repeatedly to deceive his client and others involved in the transaction in order to avoid having to deal with his misappropriation. At one point, the respondent's client agreed to terminate the escrow agreement and return the funds to the

buyer, less $4,000 in legal fees for the respondent. The respondent failed for two months to return $36,000 to the buyer. After the Office of Bar Counsel began an investigation, the respondent borrowed from legitimate sources and repaid $36,000 to the buyer.

2. The Appropriate Sanction. The recommendations of the board and Bar Counsel are entitled to substantial deference. See Matter of Foley, 439 Mass. 324, 333 (2003); Matter of Alter, 389 Mass. 153, 157 (1983). The primary aim in bar discipline cases "is to ensure that the disposition imposed should not be markedly disparate from the dispositions imposed on attorneys in similar cases." Matter of the Discipline of an Attorney, 392 Mass. 827, 834 (1984), citing Matter of Alter, supra at 156.

Disbarment or indefinite suspension is the presumptive sanction where "an attorney intended to deprive the client of funds, permanently or temporarily, or if the client was deprived of funds." Matter of Schoepfer, 426 Mass. 183, 187 (1997), citing Matter of the Discipline of an Attorney, supra at 836. See also Matter of Luongo, 416 Mass. 308, 309 (1993). "I look to the hearing committee's findings concerning the respondent's intent and whether the client was deprived of funds." Matter of Gonick, 15 Mass. Att'y Disc. R. 230, 234 (1999). The hearing committee explicitly found Moriarty engaged in "knowing misappropriation and misuse of the escrowed funds for his personal financial needs . . . [which] resulted in actual deprivation" to his client, as well as actual deprivation to the buyer by failing initially to return the funds to the buyer when instructed to by his client and as agreed to by the parties. Based on these findings, which Moriarty does not dispute, the case falls squarely within Schoepfer. See Matter of Carrigan, 414 Mass. 368, 373 (1993) ("When an attorney knowingly misappropriates client funds and knowingly continues to use these funds after they are due and payable, it is reasonable to conclude that the attorney has intentionally deprived the client of these funds . . . ."). As between disbarment and indefinite suspension, suspension is proper where, as here, restitution has been made. See Matter of Bryan, 411 Mass. 288, 292 (1991) ("absence of restitution is a factor in choosing between disbarment and indefinite suspension"); Matter of Gonick, supra at 235.

Moriarty contends that public reprimand rather than indefinite suspension is the appropriate sanction. In support of his position, he relies on dicta in Matter of the Discipline of an Attorney, supra at 837, stating that sanctions in each case are to be determined on an individual basis. As clarified in Matter of Schoepfer, a respondent "has a heavy burden" to demonstrate that in a case of this nature "special mitigating facts . . . justify less severe discipline" than the presumptive disbarment or indefinite suspension.[3] Matter of Schoepfer, supra at 187. Although Moriarty suggests that several factors justify a lesser punishment, he has failed to meet this heavy burden. Moriarty claims his punishment should be reduced to public reprimand because: he was a "public figure in Leominster in the past" and has a "long history of public service"; his misconduct "already [has] been the source of much humiliation" and client loss due to its coverage in the local newspapers; and his age, health and status as a solo practitioner make the punishment unduly severe. These factors do not amount to the "clear and convincing reasons" necessary to justify diversion from the presumptive disposition in this case. See Schoepfer, supra at 188. See also Matter of Griffith, 440 Mass. 500, 510 (2003) (although "some mitigation" appropriate due to publicity, it is "a close point"); Matter of Bailey, 439 Mass 134, 152 (2003) (long and "highly successful" career does not mitigate misconduct); Matter of McCarthy, 416 Mass 423, 430-431 (1993) (status as solo practitioner not a mitigating factor); Matter of Luongo, supra at 311-312 (age not a "substantial" mitigating factor); Matter of Alter, supra at 157 ("otherwise excellent reputation in the community" not a "special" mitigating factor).[4]

Finally, Moriarty argues that, notwithstanding our case law, the goal of any internal disciplinary process is not to punish but to improve the behavior of the offender and his or her fellow professionals. Accordingly, public reprimand is to be preferred over indefinite suspension. This argument ignores the well-recognized principal that, although the effect upon respondent lawyer is important, the primary consideration in determining the proper

disciplinary sanction is the "effect upon, and perception of, the public and the bar." Matter of Alter, supra at 156. See also Matter of Foley, supra at 333. The "'[u]se of a client's funds by a lawyer violates one of the most fundamental precepts of our profession'" and "'weakens the confidence of the public in all [lawyers].'" Matter of the Discipline of an Attorney, supra at 836 (citations omitted).

Accordingly, I conclude that the appropriate disciplinary action in this case is indefinite suspension. A judgment shall enter suspending the respondent indefinitely from the practice of law.

By the Court
Judith A. Cowin
Associate Justice

Entered: January 13, 2005

FOOTNOTES:

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

[2] Specifically, the hearing committee found that the respondent violated Mass. R. Prof. C. 1.15 (a) (safekeeping of client or third person property), Mass. R. Prof. C. 1.15 (b) (prompt delivery of property to client or third person which that person is entitled to receive), Mass. R. Prof. C. 1.2 (a) (acting within scope of representation), Mass. R. Prof. C. 1.3 (acting with reasonable diligence), Mass. R. Prof. C. 1.4 (a) (communication to keep client reasonably informed), Mass. R. Prof. C. 1.4 (b) (reasonable explanation of matter to client), Mass. R. Prof. C. 4.1 (a) (knowingly making false statement of material law or fact to third person), Mass. R. Prof. C. 8.4 (c) (professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), Mass. R. Prof. C. 8.4 (h) (professional misconduct to engage in any other conduct adversely reflecting on fitness to practice law).

[3] Moriarty also cites Matter of Driscoll, 410 Mass. 695 (1991), in support of his position. However, in Matter of Schoepfer, 426 Mass. 183, 187 (1997), the Driscoll case was rejected by the court for deviating from the standards established by Matter of the Discipline of an Attorney, 392 Mass. 827 (1984).

[4] Also in support of his position, Moriarty cites seven admonitions by the board in 2003 which involved the mishandling of money and full restitution. However, the seven cases cited by Moriarty are inapposite, as they did not involve the level of dishonesty, misrepresentation, and client deprivation present here. Those cases involved only inadequate record keeping or the improper retention of funds during a genuine dispute between counsel and client.