NO. BD-2004-091

IN RE: JOHN C. MCBRIDE

S.J.C. Judgment of Disbarment entered by Justice Sosman on August 5, 2005, with an effective date of September 5, 2005.[1]

This matter is before me on an Information and Record of Proceedings filed by the Board of Bar Overseers (board) seeking disbarment of respondent John C. McBride. The hearing committee found the respondent's violations warranted a three-year suspension. On appeal by bar counsel, seeking disbarment, and respondent, seeking dismissal or at most a public admonition, the board unanimously adopted bar counsel's recommendation that respondent McBride be disbarred from the practice of law. The board then filed the present Information pursuant to S.J.C. Rule 4:01, § 8(3), as amended, 435 Mass. 1301 (2002). After hearing and upon consideration, and for the reasons described below, I order that respondent be disbarred.

1. Background. The relevant findings of the hearing committee, adopted by the board, are as follows. Respondent McBride was admitted to the Massachusetts bar in 1974. In 1982, he founded his own firm. Since that time and throughout these proceedings, McBride has had a consistently busy practice. He has three prior disciplinary matters on record. Bar counsel filed the current charge, consisting of three counts, on November 24, 1999.

a. Count One. Count One arises from McBride's representation of Aubrey Stallworth, Jr. (Aubrey) and his parents (Stallworths) in forfeiture proceedings resulting from Aubrey's arrest on drug and firearm offenses. Pursuant to the arrest, the police seized $175,000 in cash, assorted jewelry, more than 400 grams of cocaine, two vehicles, and several guns from the Stallworths' house. On August 23, 1993, the Stallworths retained McBride to represent Aubrey in the criminal matter and to represent them in the forfeiture proceedings. McBride was paid $15,000 to represent Aubrey in the criminal action. Aubrey was convicted on May 27, 1994, after refusing a plea brokered by McBride. The Stallworths paid McBride $1,500 as a retainer to represent Aubrey on the appeal of his convictions.

On December 16, 1994, McBride sent a letter to Aubrey about the state forfeiture case requesting Aubrey call him to discuss the matter but, before it arrived, Aubrey was moved to another facility and failed to receive the letter. Without speaking to Aubrey or his parents, McBride made an offer to settle the state forfeiture case on December 19, 1994, which the assistant District Attorney accepted. McBride claimed at the hearing that he had been given authority to settle from the Stallworths. However, neither Aubrey nor the Stallworths had given McBride such general settlement authority, nor had they given their approval to the specific terms McBride proposed to the prosecutor.

Based on the settlement, final judgment in the state forfeiture action was entered on December 21, 1994. The Commonwealth then issued a $50,000 check and returned the seized jewelry. The check was made payable to "Aubrey Stallworth," but did not distinguish between Aubrey and his father. McBride's Office Manager, Diane Berman, signed the name of Aubrey's father after being informed by McBride that it was permissible to do so. On December 20, 1994, McBride sent a letter with a "Fee Settlement Statement" to the Stallworths advising them that a settlement had been agreed to in the state forfeiture action, stressing the importance of resolving the matter, and setting forth his fees, including a one-third contingency fee based on the value of the items saved from forfeiture. On December 22,

2004, McBride had Berman deposit $30,166.67 of the settlement proceeds into the operating account of his law office, all of which was subsequently used for McBride's unrelated business and personal expenses. McBride claimed $16,666.67 as a one-third contingent fee for handling the state forfeiture action and $13,500 as the remainder of the $15,000 McBride claimed the Stallworths agreed to pay him to pursue Aubrey's criminal appeal. The money was spent in shortly over a week. The rest, totaling $19,833.33, was put in Aubrey's client account. On December 23, 2004, the Stallworths met with McBride, discussed with him for the first time that a settlement had been reached, and signed the Fee Settlement Statement.

The hearing committee found that, at the time McBride deposited the funds in his own account, the total cost of Aubrey's criminal appeal had not been agreed to; there had been no prior agreement as to a contingent fee for the forfeiture case; and, by the time McBride claimed one third of the proceeds as a contingent fee, the forfeiture matter had already been settled and there was no "contingency" remaining. In subsequent conversations with Aubrey, McBride agreed to lower his claimed fee for the criminal appeal to $5,000, but never returned to his IOLTA account the excess amount he had already taken for that fee. After Aubrey terminated McBride's services for his criminal appeal, sometime between January 19, and January 26, 1995, McBride returned all of the remaining funds with the exception of $1,000. That amount has still not been returned.

Concurrently, a separate federal forfeiture action was proceeding with respect to the Stallworths' two vehicles. McBride failed to take any action on that matter between August, 1993, and February, 1995. Beginning in February, 1995, McBride was in contact with the Drug Enforcement Agency (DEA), complied with the DEA's requests for information about the Stallworths' financial condition, and otherwise pursued the matter actively. However, between May and August, 1996, McBride failed to inform the Stallworths that the DEA had requested copies of their income tax returns in order to assess the Stallworths' contention that they had purchased the vehicles without the use of any proceeds from drug transactions. McBride informed Aubrey of those requests on June 3, 1996, but the information was not relayed by Aubrey to his parents. Due to the failure to submit the requested information, the Stallworths' petition to have the cars returned was dismissed and the vehicles were eventually forfeited.

Based on this scenario, the hearing committee and the board found multiple violations of DR 1-102 (A)(4), (5) and (6); DR 2-106 (A); DR 2-110 (A) (3); DR 6-101 (A)(2) and (3); DR 7-101 (A)(1), (2), and (3); and DR 9-102 (A) and (B).

b. Count Two. Count Two involves the representation of seventeen stockbrokers by McBride and another attorney, John Doe (a pseudonym), in their claims against David Blech and D. Blech & Co., Inc. Doe began representation of the brokers before joining McBride's firm. At that time, Doe entered into written fee agreements with the brokers. They agreed to a 25% contingent fee and a capped amount of $300 each, paid in advance, to cover costs and expenses. Each of the brokers forwarded $300 to Doe. Upon joining McBride's firm, Doe informed McBride that he had written fee agreements with the clients and that the contingent fee was set at 25%, but not that each client's responsibility for expenses was capped at $300.

Doe and McBride filed a complaint with the National Association of Securities Dealers and, on July 8, 1997, succeeded in obtaining a $342,175 award in the brokers' favor. Blech failed to pay the award within the thirty days required. To prompt Blech into making payment, Doe and McBride filed (but did not serve) a Chapter 7 involuntary bankruptcy petition. As a result, in September, 1997, Blech's attorney approached Doe and McBride to negotiate a settlement. Not all of the brokers knew of these developments. On October 28, 1997, McBride and Blech's attorney agreed to a written payment schedule providing for an initial payment of $50,000, another $50,000 payment on or before November 28, 1997, to be followed by ten payments of $24,220.20 each month. Neither McBride nor Doe sought or received the brokers' approval for this agreement.

On the theory that he was entitled to withdraw his entire fees and expenses up front from the

payments as they were received,[2] McBride deposited the first $50,000 received into his business account on October 28, 1997, and used the money on unrelated matters. On October 29, 1997, Doe contacted between twelve and fifteen of the clients to inform them the money was being put toward legal fees and expenses. Eventually all but one of the clients were reached and approved of the money being so used. However, the one broker who had not been contacted, Shandal von Wood, later learned of the agreement, notified McBride and Doe of his view that McBride was only entitled to a contingent fee from the $50,000 actually received, with no further deduction for any additional expenses, and requested his share of the $50,000 outright.[3] With that request, von Wood included a copy of the fee agreement he had entered into with Doe and highlighted that it did not permit legal fees to be taken up front and did not permit more than the original $300 in expenses that had already been paid.

McBride then informed Doe he was not bound by the agreement and ordered Doe to resolve the matter. Doe contacted von Wood and they agreed Doe would poll the remaining brokers to determine whether they would agree to quarterly payments of amounts received. The brokers agreed to quarterly payments, and von Wood acquiesced in their decision. This proposed method of payment distribution was memorialized by letter, listing the dates and amounts of the anticipated upcoming payments from Blech and setting the dates on which each broker's share would be distributed. Nothing in that letter purported to reject von Wood's assertions with respect to the payment of attorneys' fees as a percentage of funds actually received or with respect to the capped amount of expenses.

Blech failed to make the November 28 and December 15, 1997, payments. On December 18, 1997, Doe met with Blech in New York and, by threatening another involuntary bankruptcy petition, obtained another $50,000 payment. Doe informed several of the brokers of this additional payment immediately thereafter. When Doe arrived back in Boston, McBride informed him that only the latest $50,000 payment, not the full $100,000 received that quarter, would be distributed to the brokers. Doe protested that McBride was reneging on the agreed quarterly payment plan based on all payments received, but McBride insisted that only $50,000 would be distributed. Checks were issued representing McBride's interpretation of each broker's share of the $50,000, and Doe wrote an accompanying letter explaining the breakdown of fees and expenses. Specifically, Doe's letter explained that McBride had withheld $12,500 for his contingency fee (25% of $50,000), but made no mention of the fact that McBride was already withholding the entirety of another $50,000. The letter also indicated that McBride had taken $8,079.40 in itemized expenses, plus an additional $4,420.60 for "Future Bankruptcy Expenses," with the result that each broker got his share of the remaining $25,000. The letter was drafted by Doe and reviewed by McBride.[4] Afterwards, Doe contacted several -- but not all -- of the brokers and explained that a December payment of $50,000 had been made, and it was only that payment that was being distributed. Doe further explained McBride's refusal to distribute the first $50,000 payment.

The hearing committee found that, for those brokers not contacted by Doe (von Wood being among those not contacted), the letter accompanying the distribution was misleading, as it would lead them to believe that Blech had made only one $50,000 payment – i.e., by not referencing the December payment, and by displaying calculations based on only $50,000 in payments, the letter gave the impression that what was being distributed was the original October $50,000 payment. That McBride was, despite prior discussions and agreements to the contrary, retaining the entirety of the original $50,000 payment toward his fees was thereby disguised.

On January 21, 1998, von Wood (still ignorant of the fact that another $50,000 had been received from Blech and retained in its entirety by McBride) filed a complaint with the Office of Bar Counsel, complaining that McBride and Doe had wrongfully retained expenses from his share of the distribution, contrary to the terms of the original fee agreement between Doe and the brokers.[5] At McBride's direction, Doe sent a letter informing the brokers that the initial fee agreement was still in force.[6] Doe and McBride also sent a check for von Wood's pro

rata share of the withheld expenses and, shortly thereafter, corresponding checks to the remaining brokers. That letter to the brokers made no mention of Blech's $50,000 December payment, nor did it alert them that McBride had already retained the entirety of the $50,000 October payment.[7]

On February 18, 1998, Doe wrote a letter to bar counsel responding to von Wood's complaint. McBride instructed Doe with respect to what the letter should contain, and reviewed it before it was sent. That letter contains what purports to be the attorneys' chronology of events pertaining to the history of the fee agreement, the claim against Blech, and the payment and distribution history following the award, but it again fails to mention the December $50,000 payment from Blech, again leaving the impression that nothing other than the single $50,000 October payment had been made.[8] The letter did recite that Doe and McBride had agreed to honor the original fee agreement and not make any further deductions for expenses. With the expenses issue resolved, von Wood informed Doe by letter dated February 23, 1997, that he had no further complaints.

Doe and McBride subsequently received notice that an independent involuntary petition for bankruptcy had been filed against Blech. On or about April 22, 1998, Doe and McBride notified the brokers by letter that a total of $100,000 had been received from Blech, distributed their shares of the remaining $50,000, and explained that, as the likelihood of obtaining the remainder of the payments from Blech was doubtful, the brokers should independently take steps to perfect their claims. By letter dated April 24, 1998, Doe and McBride also informed bar counsel (for the first time) that they had received two payments from Blech, had kept the October payment in its entirety and distributed the second payment in December, and had distributed the proceeds from the October payment (minus their 25% contingency fee) only after Blech's bankruptcy made it apparent that no further payments would be made.

On Count Two, the hearing committee and the board found violations of DR 1-102 (A)(4), (5) and (6); DR 2-106 (A); DR 7-101 (A)(1), (2) and (3); DR 9-102 (A), (B) and (C); and, for those violations occurring after January 1, 1998, Mass. R. Prof. C. 1.15 and 8.4 (c).

c. Count Three. Count Three stems from McBride's representation of Yves Felix ("Felix"), who had, prior to retaining McBride, been convicted of various drug offenses. Felix had pursued various pro se motions seeking to correct alleged miscalculations affecting his sentence and parole eligibility, all of which had been denied. In May, 1997, McBride was retained by Felix's brother, Emmanuel Felix ("Emmanuel"), who paid McBride $2,250 to represent Felix in his attempt to obtain reconsideration of the various motions.

Despite being retained, McBride took essentially no action, and did not file any appearance on behalf of Felix. On March 30, 1998, Felix filed a pro se motion for reconsideration of the denial of his motion to suspend his sentence and requested an evidentiary hearing. A hearing was then scheduled for May 13, 1998. McBride was unable to attend that hearing, and Felix sought and was granted a continuance so that his attorney could be present. However, the court ordered that there be no further continuances. The hearing was rescheduled for October 6, 1998, and McBride was so notified. McBride failed to prepare for the hearing. On October 5, 1998, the day before the hearing, McBride's office contacted the court to request a continuance because of a claimed scheduling conflict. In accordance with the court's earlier ruling, the continuance was denied. No one from McBride's firm attended the October 6 hearing and, as a result, Felix still appeared pro se. The judge allowed Felix's motion to reconsider and, based on a modification and recalculation of the sentence, Felix became immediately eligible for parole. In or around January 1999, Felix was released.

Before being released, Felix requested that McBride return the money paid by Emmanuel, as McBride had failed to do the work requested and twice failed to appear in court. McBride did not return the full amount to Emmanuel until over a year after Felix's request, and long after Emmanuel's November 3, 1998, request that the Office of Bar Counsel investigate the matter. The delay caused by McBride's neglect of the matter was directly harmful to Felix in that it

prolonged his incarceration while needlessly waiting for McBride's assistance.

On Count Three, the hearing committee and the board found violations of DR 6-101 (A)(2) and (3); DR 7-101 (A)(1), (2) and (3); and, for conduct occurring after January 1, 1998, violations of Mass R. Prof. C. 1.16 (d), 1.2 (a), and 1.3.

2. Discussion. a. Violations committed. I see no error in the hearing committee's findings or in the board's assessment with respect to the multiple violations committed in each Count. With respect to both Counts One and Two, I agree with the board's assessment that McBride's misconduct included the intentional misappropriation of client funds, and that actual deprivation resulted. The board's reasons for rejecting the hearing committee's assessment on this particular point are sound and persuasive. As to Count One, McBride "came into possession of the funds by settling the matter without authority in the first place, took what he wanted from them without consulting either his client or the client's parents, and spent them before anyone could register an objection. This was an outright misappropriation of funds held for another purpose altogether." As to Count Two, the board recognized that McBride's initial actions could arguably be seen as a good faith application of funds to fees that he believed he had earned. However, after being confronted with the express terms of the original fee agreement, McBride reached an agreement to the effect that his fees would be recovered on a pro rata basis with each successive payment on the award, meaning that he could not apply the entirety of any payment to his fees. He then failed to honor that agreement, despite Doe's protests that the money was owed to the clients, and kept the entirety of a payment while misleading some of his clients into thinking that no other payment had been made. Under the agreement, 75% of that additional payment was unambiguously owed to the clients, yet McBride kept all of it for himself for a period of over four months. This, again, amounts to intentional misappropriation.

b. Delay in proceedings. McBride claims that there was excessive delay in the disciplinary proceedings that caused him undue prejudice. The Petition for Discipline was not filed until three and a half years after Aubrey's complaint, two years after von Wood's complaint, and one year after Emmanuel's complaint. The hearing committee's report was not issued until a year and one half after the end of the hearing and nine years after the earliest of McBride's wrongful conduct. McBride claims there was special prejudice with regard to Count Three, as Emmanuel had indicated a desire to terminate his complaint, but by the time of the hearing had become unavailable. Also in terms of prejudice, McBride complains of undue stress, loss of clients and associates, and negative press scrutiny. McBride requests the proceedings be dismissed pursuant to Section 3.1 of the Rules of the Board of Bar Overseers because the delay caused "prejudicial irregularities" resulting in a miscarriage of justice.

"Mere delay in the commencement of disciplinary proceedings does not result in dismissal of the proceedings." Matter of Gross, 435 Mass. 445, 450 (2001), citing Matter of London, 427 Mass. 477, 481 (1998). The cases cited by McBride are not to the contrary. In Matter of Stern, 425 Mass. 708, 713 (1997), the court held that dismissal was inappropriate where the petition for discipline was commenced within six years of the last act of misconduct and there was no prejudice. In Matter of Kerlinsky, 406 Mass. 67, 75-76 (1989), the court determined that even where the hearing committee found prejudice, dismissal was inappropriate when the prejudice was not substantial and there was corroboration for the missing evidence. In this case, the petition was filed within three and one half years of all the complaints, the hearing committee found no prejudicial delay, and McBride had the opportunity to preserve testimony but chose not to do so. Part of the delay in bringing the petition was due to the number of complaints made against McBride, and bar counsel's corresponding need to investigate and decide which of them were appropriate to pursue in a consolidated proceeding. Moreover, McBride's present complaints with respect to delay ignore the fact that continuances were granted at his request in order to accommodate his trial schedule. The board properly declined to dismiss the petition.

3. Mitigating and Aggravating Factors. There are multiple aggravating factors present. These

aggravating factors include the multiple independent violations committed, McBride's status as a seasoned attorney, the vulnerable nature of his clients in Counts One and Three, the failure to make full restitution to the clients in Count One, the delay in making full restitution to the clients in Count Two, and McBride's failure to cooperate fully with bar counsel and the hearing committee.

McBride also has a prior disciplinary history involving similar infractions. That history includes 1) a private reprimand in 1987 for endorsing a client's name to a settlement check without authority, charging an excessive fee without consulting an incarcerated client, and withdrawing his fee from funds held for the client; 2) a private reprimand in 1989 for settling and agreeing to dismiss a case without consent from a minor client's parent; and 3) a 1993 public censure for failing to return a client's fee for two years after withdrawing from the matter and failing to ensure his secretary had filed a bond in a forfeiture matter, a lapse that ultimately cost his client the forfeited property. Although the last disciplinary action occurred over a decade ago, the similarities to the present infractions are evident, and it is troubling that prior discipline has failed to prevent such infractions from recurring.

In mitigation, numerous letters have been filed, submitted by individuals ranging from McBride's present and former colleagues, long-term acquaintances, and family members. The letters speak widely to McBride's integrity and involvement in the community, particularly his involvement in his children's, and by extension other children's, athletic activities. However, the court has previously taken the position that such considerations do not suffice to counterbalance grievously unethical conduct. See Matter of Alter, 389 Mass. 153, 156-157 (1983) (reputation in community not a special mitigating factor); Matter of Kennedy, 428 Mass. 156, 159 (1998).

I do not accept McBride's assertion that significant disapprobation and loss of business has resulted from news coverage of these proceedings, or that this alleged damage should be considered as mitigating. See Matter of Gross, 435 Mass. 445, 451-452 (2001). This case, where McBride has produced only a single newspaper article, differs markedly from Matter of Grossman, 3 Mass. Att'y Disc. R. 89, 93 (1983), where there was "widespread publicity" in a small town, and Matter of Bille, SJC No.BD-2004-096 (Mar. 4, 2005)(Cowin, J.), where the negative publicity resulted in the loss of "almost all" the attorney's business. As evidenced by his own requests for continuances to accommodate his trial schedule, McBride has maintained an active and busy practice throughout these protracted proceedings.

4. Sanction. The hearing committee recommended a three-year suspension for these violations, while the board recommended disbarment. Substantial deference is given to the decision of the board, Matter of Moore, 442 Mass. 285, 290 (2004), and it is the duty of the board, not the hearing committee or appeals panel, to give a recommendation to this court. Matter of Eisenhauer, 426 Mass. 448, 455 (1998). Moreover, the hearing committee's recommendation of a lesser sanction was predicated largely on its determination that there had been no intentional misappropriation of client funds. As discussed above, I find the board's analysis of this issue more persuasive, and the sanction must therefore reflect the fact that the violations include intentional misappropriation of client funds with actual deprivation resulting.

In recommending disbarment, the board looked to Matter of Schoepfer, 426 Mass. 183 (1997), and Matter of the Discipline of an Attorney, 392 Mass. 827, 836-837 (1984). If "an attorney intended to deprive the client of funds, permanently or temporarily, or if the client was deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension." Matter of Schoepfer, supra at 187. Here, there are two independent instances involving intentional misappropriation. Where even one such instance would, by itself, justify disbarment, two separate instances clearly call for disbarment. Moreover, those two instances of misappropriation do not stand in isolation, but are compounded by additional serious violations.

Even if McBride's conduct could in part be viewed as an overly aggressive pursuit of his fees, rather than full-scale intentional misappropriation, other factors support the board's recommendation. McBride has engaged in several instances of misconduct in multiple different matters, any one of which would, by itself, warrant a term suspension. The cumulative effect of the multiple violations suggests that something more than a term suspension would be appropriate. Finally, these most recent violations involve misconduct that eerily resembles McBride's prior misconduct, and repeated discipline for those prior offenses has failed to achieve the desired improvement in behavior. In light of all the violations committed, the presence of multiple aggravating factors, and the absence of any mitigating factors, I conclude that the board's recommendation of disbarment is appropriate.

ORDER

For the foregoing reasons, it is hereby ordered that respondent McBride be disbarred from the practice of law.

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Martha B. Sosman
Associate Justice

DATE: August 5, 2005

FOOTNOTES

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

[2] That theory is directly contrary to the unambiguous terms of the contingent fee agreement, which states that the contingency upon which compensation was to be paid was the "actual receipt of funds and/or non-cash benefits," that the clients were not liable for any payment other than "from amounts collected," and that the attorneys would be paid 25% "of the net amount collected." Having actually collected only $50,000, McBride was only entitled to 25% of that amount, not 25% of the total funds that Blech had promised to pay.

[3] von Wood's letter also protested that he had not been notified of or approved the arrangement with Blech whereby the payments on the award would be spread out over time.

[4] A further letter was sent by Doe on December 31, 1997, which was similarly misleading as to the total amount of payments made. The letter stated that what had been distributed to the brokers was their share of the payment made by Blech on October 28, 1997, and that "[t]o date [December 31, 1997] Mr. Blech is in arrears on the remaining payment schedule." However, this letter was not reviewed by McBride, and he is not directly responsible for its misleading content.

[5] From von Wood's detailed chronological account of events and computations set forth in his complaint to bar counsel, it was readily apparent that he was ignorant of the fact that another $50,000 payment had been received and retained by McBride in its entirety.

[6] Specifically, the letter confirmed that McBride would retain 25% of payments received from Blech, and that no further amount would be deducted for expenses.

[7] Indeed, where McBride had already retained an additional $50,000 toward his total fee, he would not be entitled to continue taking 25% of each subsequent payment. The letter's statement that he would be taking 25% of each subsequent payment is thus contrary to

any understanding that $50,000 of that fee had already been paid up front from the first payment.

[8] Specifically, after reciting the fact of the October payment of $50,000, and the agreement that funds would be distributed to the clients on a quarterly basis, the letter states that "[u]nfortunately, David Blech defaulted on the payment schedule he had committed to," and that distribution of $50,000 proceeded on December 18, 1997.