NO. BD-2005-059

IN RE: JODIE GROSSMAN

S.J.C. Order of Indefinite Suspension entered by Justice Spina on December 2, 2005, with an effective date of January 3, 2006.[1]
Memorandum and Judgment

The Board of Bar Overseers (board) filed an information pursuant to Rule 4:01, § 8 (4), of the Rules of the Supreme Judicial Court, in which it seeks an order that the respondent be suspended from the practice of law for four years. The board adopted the findings of fact and conclusions of law of the hearing committee, but modified the committee's proposed disposition, which was a suspension for a period of one year and one day. Both the hearing committee and the board found that bar counsel had established that the respondent had converted client funds, lied to bar counsel, and submitted fabricated evidence in one case, and, separately, that she commingled her own funds in her IOLTA account.

Both the committee and the board acknowledged that the presumptive disposition for conversion of client funds is either an indefinite suspension or disbarment, but believed that the protracted nature of these proceedings (bar counsel began the investigation in 1994) warranted mitigation, even if the respondent failed to show that she has been prejudiced. Bar counsel argues that an indefinite suspension is called for precisely because the respondent converted client funds and failed to show that she was prejudiced by any delay, some of which is attributed to her misconduct in hampering the investigation. The respondent argues that a public reprimand is the appropriate discipline because the finding that she converted client funds clearly is erroneous.[2] The findings that she made misrepresentations to bar counsel and fabricated evidence, which she says are unsupported by the evidence, warrant only a public reprimand. And the commingling of funds, which she claims was done out of an excess of caution, warrants no more than an admonition. She further contends that bar counsel's delay in this case, aside from being shocking and unnecessarily onerous, unfairly results in a harsher sanction, where, had this case been timely prosecuted, the likely sanction would not have been an indefinite suspension or disbarment, but a public reprimand or a very short suspension: not more than six months.

1. Conversion of client funds. The hearing committee made the following findings. The respondent, who was admitted to practice in 1980, was employed in Massachusetts from early 1985 to late 1989 by a multi-State law firm that provided prepaid legal services to union members. In February, 1988, two people sought the assistance of Bryan Akman, the principal of the law firm, concerning the estate of their late father. The decedent had owned a house and bank accounts that he had placed in joint ownership with a lady friend, and his children sought Akman's assistance in setting aside those transfers. One of the clients was the president and business manager of a labor union from which Akman hoped to obtain a prepaid legal services contract. He agreed to undertake the representation at no charge. He assigned the case to the respondent and told her not to charge the clients for legal services.

During the spring of 1988, the clients sent the respondent a Social Security check for $328 and a union pension check for $243, both issued to the order of the decedent. They also sent her a union death benefit check in the amount of $1,200 issued to the order of the union president. She told the clients she would hold the funds in escrow. On March 6, 1989, about one year later, the respondent opened a trustee passbook account for the estate on which she was the sole signatory.[3] She deposited the three checks into the account the same day. One week

later the $243 union pension check was returned due to a stop payment order. The account balance, $1,528, was held by the respondent until December 7, 1990.

In the spring of 1989, the respondent recommended to Akman that the firm retain Attorney Andrew Levenson to advise them about the issues involved in the estate. Akman agreed. In July, 1989, Levenson sent the respondent his report and recommendations. Levenson concluded that, of the money held in escrow, only $328 belonged to the estate, and the remainder ($1,200) belonged to the heirs. He opined that it would be difficult to set aside the right of survivorship created by the joint bank accounts, and that it would be nearly impossible to set aside the deed creating joint ownership in the house. The respondent relayed Levenson's opinions to Akman and the clients. She also advised the attorney for the voluntary administrator of her intention to distribute the funds she held in escrow. The clients told the respondent they did not want her to distribute the funds.

Levenson had sent a bill in July, 1989, for $542.50. Akman told the respondent that the firm would pay Levenson's bill, and the respondent accordingly sent the bill to Akman. Akman paid the bill promptly, and he told the respondent that it had been paid.

By late summer, 1989, the clients had become dissatisfied with the respondent's representation.[4] Akman told the respondent that he had agreed with the clients to terminate her work on the case, and he instructed her to turn the file over to Attorney J. Drew Segadelli. On September 15, 1989, the respondent sent Segadelli copies of papers in her files. Segadelli wrote back that he would not take any action without a retainer. As a result, the matter remained relatively inactive until June, 1990, when Akman paid Segadelli's retainer. Segadelli thereafter filed a petition for formal administration, which was allowed in December, 1991. The respondent took no further action in the matter thereafter.

However, one year earlier, on December 10, 1990, the respondent had withdrawn $500 in cash from the trustee account she had opened in the name of the estate. The respondent testified that she "believed" this was used to pay Levenson's July, 1989, bill, but the committee discredited her testimony because the bill, in the amount of $542.50, had been paid by Akman. The committee credited Akman's testimony that he had told her that the firm had paid Levenson's bill.

On March 9, 1992, the respondent withdrew another $500 from the estate's trustee account, by bank check payable, at the respondent's direction, to Attorney Bradley C. Pinta. This check constituted payment to Pinta for legal services rendered to the respondent personally and unrelated to the matter concerning the estate. The respondent testified that she was entitled to these funds as her fee in the estate matter, but the committee discredited her testimony and credited the testimony of Akman that the respondent was told that the clients were to be represented for no fee. Moreover, the committee found that she needed the money at that time to pay Pinto, and had ceased handling matters for the estate nearly two years earlier.

After Segadelli was appointed co-administrator of the estate, he wrote to Akman and asked him to account for and to send him the funds held for the estate. Initially, Akman reported that he held no funds, but later suggested that Segadelli contact the respondent. Akman sent the respondent a copy of his letter to Segadelli. He also telephoned her and told her to send the funds to Segadelli, which she agreed to do. In February, 1993, Segadelli wrote to the respondent and requested that she send him the funds she was holding for the estate and heirs. The respondent wrote back saying she had not been involved in the case since 1989, and that no fees had been paid to the Akman firm and that Levenson's bill had not been paid. She did not report that any funds had been withdrawn. She indicated she would not send any funds until the clients authorized her to do so, in writing. She also demanded proof of his appointment as co-administrator. On January 4, 1994, the client wrote to the respondent, confirming that she had been discharged in 1989, releasing her from further obligations, and directing her to send the escrowed funds to Segadelli. She still did not send the funds or disclose that she had withdrawn funds. The hearing committee found that the respondent

intentionally misappropriated $1,000 in client or fiduciary funds, with detriment, and concealed her misappropriation from the clients.

In February, 1994, Segadelli filed a bar discipline grievance alleging that the respondent had failed to release the escrowed funds. On March 16, 1994, bar counsel sent the respondent a copy of the grievance and requested both a reply and her account statements from receipt of the funds to date. By letter dated May 13, 1994, the respondent provided the requested documentation but did not state that any funds had been withdrawn. The photocopy of the passbook she provided bar counsel did not show any withdrawals, and in fact had been altered to show a balance of $1,788.90. The alterations had to have been made between May 11, 1994, when the original passbook had been updated, and May 13, 1994, when the respondent sent the information to bar counsel. At first she admitted that the passbook was always in her custody and she would not have allowed someone else to take it. She later claimed that others, whom she did not identify, had access to the passbook. The hearing committee found that the respondent intentionally created an altered passbook copy to conceal from bar counsel her misappropriations.

Between May, 1994, and July 16, 1998, bar counsel's investigation lay dormant. On that day (July 16. 1998) bar counsel telephoned Segadelli, who said he still had not received the escrowed funds. Bar counsel sent a letter to the respondent asking for an account and documentation of all funds held for the estate from the date of receipt to the date of distribution. Bar counsel also subpoenaed the bank's records for the trustee account, and upon receipt thereof, on August 26, 1998, learned for the first time that the respondent had withdrawn funds. The respondent provided bar counsel with an accurate copy of the passbook on that date. She deposited personal funds[5] to the account on September 28, 1998, to restore it (with interest) and remitted the balance of the account to Segadelli on October 28, 1998.

The hearing committee concluded that the respondent intentionally misused and converted $1,000 of the escrowed funds, failed to safeguard and promptly pay over or deliver the funds, and failed to account adequately for the funds, in violation of Canon One, DR 1-102 (A)(4) (dishonesty, fraud, deceit, or misrepresentation), and (6) (conduct adversely reflecting on fitness to practice), 382 Mass. 769 (1981), and Canon Nine, 9-102 (A), (B) (lawyers shall keep client funds separate from his funds, shall safeguard client property, shall pay over client funds when due), 382 Mass. 795 (1995), and DR 9-102 (C), see Petition of the Mass. Bar Ass'n & the Boston Bar Ass'n, 395 Mass. 1 (1985), as amended, 414 Mass. 1301 ((1995), and after December 31, 1998, Mass. R. Prof. C. 1.15 (a) and (b) (lawyer shall safeguard and keep separate client funds and shall notify client upon receipt of funds), 426 Mass. 1363 (1998), Rule 8.4 (c) (dishonesty, fraud, deceit, or misrepresentation), and Rule 8.4 (h) (conduct adversely reflecting on fitness to practice), 426 Mass. 1429 (1998).

The hearing committee also concluded that the respondent submitted fabricated evidence to bar counsel and intentionally misrepresented the condition of the trustee account to bar counsel in order to conceal her misappropriation from bar counsel, her clients, and the estate representatives, heirs, or beneficiaries, in violation Canon One, DR 1-102 (A)(4), (6), supra, and after December 31, 1997, Mass. R. Prof. C. 8.4 (c), (h), supra.

I conclude that the findings of the hearing committee, adopted by the board, are supported by substantiated evidence. See Matter of Segal, 430 Mass. 359, 364 (1999); S.J.C. Rule 4:01, § 8 (4) (subsidiary findings shall be upheld if supported by substantial evidence). I adopt the findings of the committee.[6]

The respondent challenges the findings of conversion as "clearly erroneous," on the ground that the committee ignored or discredited the more credible contrary testimony of the respondent. In particular, the respondent claims that she "clearly testified to her memory that she had used the withdrawal [$500 cash on December 10, 1997,] to pay Attorney Levenson and . . . due to . . . the passage of time between 1990 and the trial [October, 2002,] records had been lost or discarded." She further claims that according to her clear testimony she was

entitled to charge the clients a fee, and that Akman's testimony to the contrary was, at best, equivocal.

The hearing committee is "the sole judge of the credibility of the testimony presented at the hearings." Matter of Saab, 406 Mass. 315, 328 (1989), quoting S.J.C. Rule 4:01, § 8 (3), as appearing in 381 Mass. 784 (1980). The respondent never explained why she would have paid Levenson's bill nearly one and one-half years after it had been presented, in the wrong amount, and in cash. Levenson's services had been rendered to the firm, and the hearing committee credited Akman's explanation that for this reason the firm paid the bill directly, and that he did not want to charge this client. Akman had asked the respondent to forward the bill to him, which she did, and it was paid with a check drawn on the firm's account. Akman's testimony, which was credited by the hearing committee, was corroborated by other evidence, and the respondent presented an implausible explanation through her testimony. The hearing committee was warranted in rejecting the respondent's testimony.

The respondent's claim that Levenson's bill could have been paid twice was entirely speculative, and it was not raised before the hearing committee. It was raised for the first time on appeal to the board, after assistant bar counsel pointed out in her proposed findings that the respondent had not even suggested that Levenson had been paid twice. In addition, the respondent's claim that, because Levenson's records are "unavailable" she has been prevented from corroborating her testimony that she paid his bill, was never raised before the hearing committee. Although the respondent listed him as a potential witness, she never called him or made any showing that he was unavailable to testify. There was no showing that any of his records, assuming they existed, had been lost or destroyed.

The respondent's claim of entitlement to a fee was contradicted not only by Akman, who she says should have been discredited, but also by her clients, who testified they never entered into the fee agreement claimed by the respondent. Moreover, the hearing committee found that the respondent did no work of substance after her termination, and no work at all on the case for nearly two years before making the withdrawal in question in March, 1992. She acknowledged in correspondence to Attorney Segadelli that she had not been involved in the matter since 1989. In her initial response to bar counsel's request for an account and documentation of funds held for the estate, the respondent made no mention of any deduction for her fee. The hearing committee was warranted in rejecting the respondent's testimony based on testimony and documentary evidence from multiple sources, which, taken together, create a powerful inference that her testimony was not credible.

2. Mitigation issues. The respondent contends that she was prejudiced by the lengthy delay in these proceedings because records may have been lost that could have corroborated her testimony, and the prejudice should be considered in mitigation of any sanction. The burden is on the respondent to show substantial prejudice from the delayed investigation. Delay alone is insufficient to mitigate the sanction. See Matter of Kerlinsky, 406 Mass. 67, 75 (1989), cert. denied, 498 U.S. 1027 (1991) (loss of evidence); Matter of Gross, 435 Mass. 445, 451-452 (2001) (substantial prejudice may be shown if "attorney subjected to considerable period of public opprobrium while awaiting formal discipline"). The respondent has failed to meet her burden. She never raised before the hearing committee the issue of lost documents or faded memories as to the two $500 withdrawals. Rather, she testified as to events from her clear memory, and the hearing committee found that the respondent failed to show actual prejudice from the delay. Moreover, in 1994, when bar counsel requested documentation and an accounting of the funds from the respondent, she provided falsified documents. If there were other, true records, they should have been provided at that time. There was no claim by the respondent, at that time, that records had been lost or destroyed. While inexcusable, the delay in this case (at least part of the delay can be attributed to the respondent's presentation of falsified documents) does not serve to mitigate the sanction, but rather should be addressed administratively, between the full court and the board.

The respondent next contends that if bar counsel had prosecuted this case in a timely fashion,

the sanction imposed in comparable cases, see Matter of Alter, 389 Mass. 153, 156 (1983), at the time the investigation began was no more than a six-month suspension. The presumptive sanction for intentional misappropriation of client funds, with intent to deprive or with actual deprivation, is disbarment or indefinite suspension. Matter of Schoepfer, 426 Mass. 183, 187 (1997). This has been the "standard" discipline for such cases since 1984. Id. See In the Matter of the Discipline of an Attorney, 392 Mass. 827, 836-837 (1984) ("Three Attorneys" case).

The respondent correctly points out that there are opinions from the time bar counsel's investigation began where only modest sanctions had been imposed for misuse of client funds. See, e.g., Matter of Carrigan, 414 Mass. 368 (1993) (six-month suspension); Matter of Dawkins, 412 Mass. 90 (1992) (six-month suspension); Matter of Driscoll, 410 Mass. 695 (1991) (public censure); Matter of Deragon, 398 Mass.127 (1986) (public censure). These cases are difficult to justify, particularly where they acknowledged the presumptive sanction of disbarment or indefinite suspension, but provided no justification for departure from the standard. See Matter of Carrigan, supra at 374; Matter of Dawkins, supra at 93; Matter of Driscoll, supra at 702 (Greaney, J., dissenting); Matter of Deragon, supra at 133 (Wilkins, J., dissenting). The Supreme Judicial Court has specifically acknowledged that these opinions are inconsistent with the Three Attorneys standard. See Matter of Schoepfer, supra at 186-188.

The misconduct in Schoepfer occurred between 1986 and 1988, and the court's decision was released in 1997. The respondent is in a similar situation as the attorney in the Schoepfer case. The court in Schoepfer stated: "The uneven disposition of past disciplinary cases concerning the misuse of clients' funds requires us not to try to decide whether the sanction we impose is reasonably consistent with sanctions heretofore imposed in similar cases. [Emphasis added.] See Matter of Alter, [supra at 156]." Matter of Schoepfer, supra at 188. That observation applies as well to this case. The respondent must have been aware of the Three Attorneys standard at the time, and that she could have been disbarred or indefinitely suspended, because there were other cases where the presumptive sanction had been imposed. See Matter of Elias, 418 Mass. 723, 725 (1994); Matter of Luongo, 416 Mass. 308, 309 (1993). An indefinite suspension is required in this case to "provide a strong deterrent to lawyers engaging in such practices, and a clear showing to the public that their interests as clients are matters of major concern and will be protected." Matter of Schoepfer, supra at 188.

3. Sanction. The respondent's conduct in misappropriating client funds is aggravated by her lack of appreciation for her misconduct. It also is aggravated by her concealment of her acts from her clients, successor counsel and bar counsel, including her fabrication of records to conceal her wrongful conduct from bar counsel. There is no reason to depart from the presumptive sanction of indefinite suspension.

For the foregoing reasons, the respondent is hereby indefinitely suspended from the practice of law.

By the Court,

Francis X. Spina
Associate Justice

ENTERED: December 2, 2005

FOOTNOTES:

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

[2] The correct standard is whether the subsidiary findings are supported by substantial evidence. See Matter of Segal, 430 Mass. 359, 364 (1999), S.J.C. Rule 4:01, § 8 (4).

[3] In March, 1989, the attorney for the voluntary administrator of the estate presented the respondent with papers, including the estate tax return and asset schedules, indicating that the majority of the decedent's assets were held jointly with his lady friend, and that the estate was insolvent.

[4] At about that same time Akman closed the firm's Massachusetts offices and terminated the respondent's salaried employment. Thereafter, Akman's firm handled all Massachusetts union cases through referrals to attorneys on retainer to the firm. The respondent was one such attorney, until November, 1998.

[5] The hearing committee found that an additional $248.88 had been withdrawn (and replaced, with interest) due to an error that is not the result of any professional misconduct.

[6] This also applies to the findings as to the unrelated charge of commingling.