NO. BD-2006-082

IN RE: JUDITH REUTER O'DONNELL

S.J.C. Order of Indefinite Suspension entered by Justice Cordy on January 29, 2007, with an effective date of February 28, 2007.[1]

MEMORANDUM AND ORDER

This case came before me on an information filed by the Board of Bar Overseers, with a recommendation of the board that the respondent, Judith Reuter O'Donnell, be suspended indefinitely from the practice of law. I have reviewed the entirety of the record and the filings in this case, and held a hearing on January 24, 2007. Upon consideration of these materials, I have concluded that indefinite suspension is the appropriate sanction.

1. Background. O'Donnell was admitted to practice in Massachusetts on January 18, 2001. Since then, she has engaged in solo practice in Westborough, without any administrative staff. She has performed a variety of legal work, including family law and real estate transactions. The allegations of disciplinary violations against her stem from a series of real estate transactions in 2003.

The first of these transactions occurred in February, 2003. O'Donnell was engaged by Lori and Greg Rota to represent them in the sale of their Grafton home to Washington and Lorinne Izquierdo. On February 3rd, the Izquierdos transferred a deposit of $19,250 to O'Donnell for her to hold in escrow.. She deposited the funds into her IOLTA account. Later, she transferred approximately $9,000 from her IOLTA account to her business and personal accounts without client authorization or other justification. Then, on February 19th, O'Donnell deposited approximately $7,500 of her own funds and a $2,500 client retainer (for a total of $9,000) into the IOLTA account. At the closing, she issued a check to the Rotas for $19,250.

In March of 2003, Linda and Neil Callahan engaged O'Donnell to represent them in the sale of their Westborough home to Bruno and Lauren DiPlacido. The DiPlacidos gave O'Donnell a deposit check for $31,400 on March 10th, which she deposited into her IOLTA account. Over the next month, she transferred $8,200 of that deposit from her IOLTA account into her business and personal accounts, again without authorization or other justification. Then on April 8th, she wrote a check drawn on the IOLTA account to the town of Ashland for $8,930.18, in satisfaction of an obligation incurred on behalf of another client. Thus, by the middle of April, O'Donnell had used approximately $16,000 from the Callahan-DiPlacido escrow funds for purposes unrelated to that transaction, including personal and business purposes.

On March 31, 2003, Elaine Haney engaged respondent to represent her on the sale of one home and the purchase of another, both in Ashland. Haney and O'Donnell signed a written fee agreement, which provided for a retainer of $1,250, "which shall be applied against legal services performed by [O'Donnell] for [Haney]. If legal services, above and beyond the normal closing, are required, the client will be charged at the hourly rate of $150.00." Haney then gave O'Donnell a check for $1,250 on April 2, 2003, which O'Donnell deposited into her business account. This amount was consistent with O'Donnell's fees in similar transactions. O'Donnell never billed Haney for any additional amounts, nor did she inform her that such amounts were due. O'Donnell kept no records of the time spent working on the Haney transactions.

Haney signed a purchase and sale agreement with Bridgett Maillet on May 8, 2003; and

O'Donnell received $24,000 from Maillet to hold in escrow as a deposit. The money was deposited in her IOLTA account. Then on May 14, the Callahan-DiPlacido transaction closed. O'Donnell distributed $31,400 to the Callahans from her IOLTA account. There had been no intervening deposit of client funds from the Callahan-DiPlacido transaction, meaning that O'Donnell had used not less than $17,000 of Maillet's deposit to pay the Callahans.

In August 2003, Matthew Marcey hired O'Donnell to represent him in the sale of his Westborough home. On August 12, Samba and Vihaya Emani contracted to buy the home. They gave O'Donnell a deposit check for $15,000, which she deposited into her IOLTA account. The closing on the Marcey-Emani sale took place on August 29, 2003, the Friday before the Labor Day holiday. At the time of the closing, Marcy's real estate agent, Douglas Stone, became entitled to a commission of $15,000. Marcy authorized O'Donnell to pay Stone that amount from the proceeds of the closing.

On the next Tuesday, September 2, 2003, the Haney-Maillet closing took place. O'Donnell gave Haney a check for $24,000, representing the deposit received from Maillet in May. At that time, because of earlier withdrawals for business and personal purposes, O'Donnell's IOLTA account did not have sufficient funds to cover the check to Haney. O'Donnell knew there were insufficient funds. Later that day, she transferred $4920 from her business account and made an additional deposit of $4080 into her IOLTA account, for a total of $9000. Haney negotiated the $24,000 check on September 5, 2003, leaving a balance of $2779.20 in O'Donnell's IOLTA account. There were thus insufficient funds to cover any check which may have been written to pay Stone.

O'Donnell testified that she put a $15,000 check payable to Stone in the mail to him on September 2nd. Stone left her a voice mail indicating he had not received the check on September llth. On Monday, September 15, 2003, respondent left a reply message for Stone, indicating that her account had been "flagged" by the bank and that she would investigate. In fact, no such action had taken place. On October 2, 2003, O'Donnell had a check for $15,000, drawn on her business account, delivered by hand to Stone's office. This was exactly one month after Stone had become entitled to that amount. The funds to cover the check came from a withdrawal made by O'Donnell's husband from his 401(k) account and then deposited into her business account.

After an inquiry by bar counsel, O'Donnell stated through her attorney that she and Haney had agreed that Haney would not negotiate the $24,000 check. O'Donnell claimed not to have known of the check's negotiation, and the insufficiency of funds in her IOLTA account, until September 25th. She claimed to have then contacted Haney, who agreed to "remit the excess funds she had received as a result of depositing the $24,000 check." This was the source, O'Donnell said, of the $15,460.07 deposit into her operating account on September 30. Haney testified that she had never agreed not to negotiate the $24,000 check; and that she and O'Donnell had never had any other conversation on the subject, either before or after Haney negotiated the check.

Testifying under oath before the hearing officer, O'Donnell said that she and Haney had an understanding that Haney would not negotiate the check. Rather, she said, Haney had authorized her to withdraw approximately $15,000 from the $24,000 as attorney's fees, and that she had done so pursuant to that authorization. O'Donnell said further that she intended to write Haney a check for the approximately $8000 difference. After realizing that Haney had negotiated the check, O'Donnell says she called Haney on September 25th, and that during that call Haney agreed to remit to her the "excess funds" - i.e., the purported $15,000 in attorney's fees - which O'Donnell had withdrawn over the course of the summer. Haney testified that there was no such agreement, and that no conversation took place on September 25th.

2. Discussion. O'Donnell's actions constitute clear and multiple violations of the Rules of Professional Conduct, S.J.C. Rule 3:07. By intentionally withdrawing escrow funds that she was

holding in her IOLTA account on behalf of clients and using them for business and personal purposes, she intentionally converted funds, in violation of R. Prof. C. 1.2(a), 1.15(a) & (b), and 8.4 (c) & (h). She also commingled funds, a violation of R. Prof. C. 1.15(a) & (b). Her statements to Stone were false representations of a material fact to a third party, violating R. Prof. C. 4.1(a), and involved misrepresentation and deceit, violating R. Prof. C. 8.4(c). Finally, O'Donnell's false written statements (made through counsel) and false testimony about Stone's and Haney's funds constituted violations of R. Prof. C. 4.1(a) and R. Prof. C. 8.4(c).

The special hearing officer found that O'Donnell's statements to Stone about the check being in the mail, and the bank's "flagging" the account, were a fabrication; that she knew that there were insufficient funds to cover any check to Stone, and needed time to raise the cash needed to pay him the amount due. The hearing officer also found that O'Donnell fabricated the purported agreement that Haney would not negotiate the check, and compounded that lie by repeating and expanding it while under oath. Particularly egregious was the claim that she was due attorney's fees beyond the $1250, which was apparently her standard fee for a closing.[2]

I am deeply troubled that, when caught by the consequences of her own mismanagement and misuse of IOLTA funds, O'Donnell's response was to lie and to mislead. The wrongfulness of this behavior is not mitigated by O'Donnell's efforts, ultimately successful, to find other funds and pay Stone the amount due him. Payment of those funds was a legal duty, which should have been performed - indeed, absent O'Donnell's blatant misuse and mismanagement of her IOLTA account, would have been performed – a month earlier than it actually was.

The presumptive sanction in cases of intentional deprivation of client funds, even if temporary, is indefinite suspension or disbarment. See Matter of Schoepfer, 426 Mass. 183, 187-188 (1997). See also Matter of Johnson. 444 Mass 1002, 1003-1004 (2005). Suspension is preferred to disbarment where, as here, restitution of funds deprived has been made. See Matter of Bryan, 411 Mass. 288, 291-292 (1991). In deciding the appropriate sanction, I have considered O'Donnell's relative inexperience and obvious administrative difficulties. I have also noted that O'Donnell clearly did not intend to deprive either her clients or Stone permanently of their funds,, and that .she ultimately returned all of the money she took. However, O'Donnell's persistent deceit and misrepresentations in the course of the disciplinary proceeding and the investigation that preceded it outweigh any mitigating effect these factors may have. The presumptive sanction is appropriate in this case.[3]

It is therefore ORDERED AND ADJUDGED that respondent be, and she hereby is, suspended indefinitely from the practice of law.

FOOTNOTES

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

[2] Under the fee agreement, to earn an additional $15,000 in fees, O'Donnell would have had to have worked 100 hours "above and beyond the normal closing." There is no evidence that the Haney closing required any additional work, much less the incredibly large amount of time implied by O'Donnell's claim that she was due $15,000 in fees.

[3] I consider the lying under oath an aggravating factor to the primary charge here, misuse of client funds resulting in deprivation. It counsels against any downward variation from the presumptive sanction which might otherwise be warranted. As a separate offense, the presumptive sanction for lying under oath is a two-year suspension. See Matter of Shaw, 427 Mass. 764 (1998) .