NO. BD-2006-111

IN RE: NORA M. DANIELS

S.J.C. Order of Term Suspension entered by Justice Greaney on January 8, 2007, with an effective date of February 7, 2007.[1]

BOARD MEMORANDUM

A hearing committee recommended that the respondent, Nora M. Daniels, be suspended for six months and a day. The committee found that the respondent had (i) intentionally misused client funds without deprivation or intent to deprive; (ii) negligently misused client funds with deprivation and restitution; (iii) commingled funds; (iv) made a knowingly false statement to obtain a lien waiver; (v) neglected a matter and failed to keep the client informed; (vi) used a misleading firm name; and (vii) failed to cooperate in Bar Counsel's investigation. Both parties have appealed.

We unanimously adopt the hearing committee's subsidiary findings of fact and adopt its conclusions of law, except as specifically modified below. By a vote of five to four, we recommend that the respondent receive a nine-month suspension. The dissenters favor a longer suspension.

The Facts

The following summarizes the committee's findings of fact.

The respondent was admitted to practice in Massachusetts on December 22, 1987. For most of the time pertinent to the charges, she was a solo practitioner with little or no staff support.

Counts One, Two and Four: O'Brien Matters

Count One: In March of 1996, Mary O'Brien retained the respondent to represent her concerning an assault allegedly committed by an employee of Boston College.

The respondent performed some preliminary work, but then allowed the statute of limitations to lapse. There was little prospect for substantial recovery, but the respondent failed to tell O'Brien that she had decided not to pursue the matter. When O'Brien inquired about the status of her case, the respondent did not reply. O'Brien then demanded her file. Successor counsel obtained it after two more demands.

The committee rejected Bar Counsel's allegations that the respondent knowingly misrepresented the status of the case to O'Brien. It also rejected the respondent's testimony that she told O'Brien that she would not pursue the matter, and it concluded that a letter the respondent put into evidence, addressed to O'Brien and declining representation, was a fabrication.

O'Brien eventually sued the respondent for malpractice, and the matter settled in 2004.

Count Two: On May 10, 1996, O'Brien hired the respondent as successor counsel to represent her husband, James, who had been hit by a car while crossing the street. James died on May 12, 1996, and O'Brien was appointed administratrix of his estate. The respondent amended the complaint filed by prior counsel, Alford & Bertrand, to substitute O'Brien as plaintiff in

her capacity as administratrix, and to add a claim for wrongful death. Among other damages, the amended complaint sought payment of funeral and burial expenses.

Alford & Bertrand served a notice of lien on the driver's insurer, Safety Insurance, and the respondent received a copy. Alford & Bertrand also sent the respondent a letter stating that the firm's costs for the O'Brien matter totaled $245.60. The respondent invoiced O'Brien for the costs, which O'Brien paid. On October 2, 1996, Alford & Bertrand sent the respondent an itemization of costs and fees, along with a release of lien conditioned on payment of $1,383.10. The respondent notified Alford & Bertrand that she was holding $245.60 for costs in her client funds account. By 1998, the respondent had used some or all of that money without payment to Alford & Bertrand.

In early February 1999, the case settled. The settlement included three components: $5,000 from the defendant directly, $20,000 from Safety Insurance under fault-based insurance coverage, and up to $8,000 for unreimbursed funeral and medical bills under no-fault (PIP) coverage. Safety had previously declined to pay funeral expenses and relented only after mediation.

When the respondent received the defendant's $5,000, and the $6,245.50 in PIP benefits for funeral expenses, she deposited them into her personal account.

On May 24, 1999, the respondent gave O'Brien a check for $17,202.57, the amount the respondent calculated to be O'Brien's share of the settlement. O'Brien had requested the settlement money because she was going away on vacation. The committee rejected the respondent's testimony that she asked O'Brien to hold the check and to call her before depositing it, and it accepted O'Brien's testimony to the contrary.

O'Brien's check was drawn on the respondent's IOLTA account. When O'Brien deposited it the same day, the payor bank drew on trust funds of another client (the Larsen estate). The respondent knew that the Safety check had not yet arrived, and she wrote to Safety the next day requesting the check and enclosing Alford & Bertrand's waiver of lien.

The committee found that this misuse of trust funds did not result in deprivation.

The respondent prepared an accounting of the settlement proceeds. This accounting charged O'Brien a one-third fee on the entirety of the settlement, including the PIP benefits Safety had paid for funeral expenses. In addition, she charged against O'Brien's share the $245.60 that O'Brien had already paid. The respondent did not pay back the $245.60 until March 2004, when O'Brien settled her malpractice case against the respondent.

Around June 8, 1999, the respondent received the $20,000 payment from Safety. The check was payable to, among others, Alford & Bertrand. The respondent obtained Alford & Bertrand's consent to endorse it, and she deposited the check into her IOLTA account. The firm's consent was conditioned, however, on the respondent's paying Alford & Bertrand the $1,383.10 referenced in Alford & Bertrand's conditional release of lien. On June 10, 1999, the respondent paid herself $2,797.43 from her IOLTA account, i.e., the difference between the $20,000 Safety check and the amount of the check to O'Brien. The respondent did not pay Alford & Bertrand until November 3, 1999, after Alford & Bertrand had made several demands and filed a complaint with the Board of Bar Overseers. The committee rejected the respondent's testimony that both she and O'Brien had questioned Alford & Bertrand's fees. When the respondent finally paid Alford & Bertrand, no O'Brien funds remained in her IOLTA account. The respondent instead used earned fees she had accumulated there.

Count Four: The respondent submitted a written request for waiver of the Medicare lien on the James O'Brien settlement to Associated Hospital Service of Maine, the agency handling the Medicare lien. The written request omitted two facts. First, the respondent knowingly failed to disclose that Safety Insurance had agreed to pay Mr. O'Brien's funeral expenses. Second,

she failed to disclose that O'Brien owned land in Maine. O'Brien had disposed of the land in a will the respondent had drafted about three years earlier, but the committee did not find that the respondent actually remembered the land when she requested the lien waiver, and it rejected the charge that this omission was knowing or intentional. The committee found that the respondent should have consulted with O'Brien before submitting the waiver request but failed to do so, and did not get O'Brien to sign it.

Medicare granted the waiver, finding undue hardship in reliance on the supposedly unpaid funeral expenses. The committee found, however, that Bar Counsel had not proved that the waiver would have been declined had the respondent disclosed O'Brien's Maine real estate and Safety's payment of funeral expenses.

Count Three: Client Funds Violations

During 1998 and 1999, the respondent made a number of payments from her IOLTA account on behalf of clients by using either other clients' funds or earned fees accumulated in the IOLTA account. The respondent made some of these payments before she received deposits on behalf of the clients for whose benefit the payments were made. In other instances, when the respondent made disbursements from the IOLTA account there were no corresponding client funds in the account to cover the disbursements because she had deposited the clients' money into a different account. Where the disbursements were not covered by accumulated fees, they were paid with other clients' funds, which she later reimbursed from her own funds on the advice of Bar Counsel.

The committee found that the respondent's misuse of funds was negligent and caused no actual deprivation.

The respondent also deposited $54,031.92 in estate funds into her IOLTA account but did not transfer the funds to an interest-bearing account until being advised to do so by Bar Counsel some two and a half years later.

Count Five: Misleading Firm Name

From 1994 to 1999, the respondent used the name "Daniels & Smoczek" or "Law Offices of Daniels & Smoczek" on her letterhead, in court pleadings and in the Massachusetts Lawyers Diary and Manual. She had no partners or associates, and "Smoczek" was her birth name. The committee found that this was a false or misleading communication.

Count Six: Non-Cooperation With Bar Counsel

In September of 1999, Bar Counsel forwarded Alford & Bertrand's complaint to the respondent and asked for a reply. From then until September of 2001, when the respondent obtained counsel, the respondent failed to cooperate with Bar Counsel's investigation. The respondent completely failed to respond to some eight letters from Bar Counsel, and she responded incompletely or late to another five letters. Bar Counsel issued two subpoenas, one to the respondent's bank and another to the respondent herself.

Conclusions Of Law

The O'Brien Matters

Count One: The committee concluded that by her neglect of a client matter, failure to keep the client informed, and delay in returning the client's file, the respondent violated Canon Six, DR 6-101(A)(3) (duty not to neglect entrusted matter), and Canon Seven, DR 7-101(A)(1), (2), and (3) (duties of zealous representation), with respect to conduct occurring before January 1, 1998, and Mass. R. Prof. C. 1.3 (diligence) and 1.4 (communication with client) with respect to conduct occurring on or after January 1, 1998.

The committee rejected the charge, under Canon One, DR 1-102(A)(4) (dishonesty), and Mass. R. Prof. C. 8.4(c) (same), that the respondent had intentionally misrepresented the status of the Boston College case to O'Brien.

Count Two: The committee concluded that the respondent's intentional misuse of another client's trust funds to make payment to O'Brien before the Safety settlement check arrived, albeit without intent to deprive or actual deprivation, violated Mass. R. Prof. C. 1.15(a), (b) and (d) (segregation, accounting and turnover of client funds) as well as 8.4(c) (dishonesty) and 8.4(h) (conduct reflecting adversely on fitness to practice). It concluded further that the respondent: (i) violated Mass. R. Prof. C. 1.15(a) by depositing trust funds (the PIP payment) into a non-IOLTA account and by accumulating earned fees in the IOLTA account; (ii) violated Mass. R. Prof. C. 1.15(a), (b) and (d) by failing to maintain in her IOLTA account the $245.60 O'Brien paid for Alford & Bertrand's costs, by taking double payment from O'Brien, and by failing to make timely repayment, conduct the committee found to constitute negligent misuse of trust funds with temporary deprivation resulting; and (iii) violated Mass. R. Prof. C. 1.15(b) and 1.3 (diligence) by failing to pay Alford & Bertrand promptly.

The committee rejected Bar Counsel's charge under Mass. R. Prof. C. 1.5(a) that the respondent had collected an illegal or clearly excessive fee by taking one third of Safety's payment of $6,245.50 in PIP benefits for funeral expenses.

Count Four: The committee concluded that the respondent violated Mass. R. Prof. C. 8.4(c) by knowingly failing to disclose Safety's payment of funeral expenses when she requested a Medicare lien waiver, and violated Mass. R. Prof. C. 1.3 by failing to discuss the waiver with O'Brien. It rejected Bar Counsel's charge under Mass. R. Prof. C. 8.4(c) that the respondent's failure to disclose the Maine property was intentional.

Client Funds Violations (Count Three)

The committee concluded that the respondent violated Mass. R. Prof. C. 1.15(e) (certain funds must be deposited into an interest-bearing account) by failing to deposit estate funds in the amount of more than $54,000 into an interest-bearing account for more than two and a half years. The committee also concluded that the respondent violated Mass. R. Prof. C. 1.15(a), (b) and (d) and 8.4(h) by negligently using trust funds for purposes not related to the client, by depositing unearned retainers in non-IOLTA accounts, and by allowing earned fees to accumulate in the IOLTA account. The committee rejected Bar Counsel's charge that this conduct violated Mass. R. Prof. C. 8.4(c).

Misleading Firm Name (Count Five)

The committee concluded that the respondent's use of the firm names "Daniels & Smoczek" or "Law Offices of Daniels & Smoczek" violated Mass. R. Prof. C. 7.1 (false or misleading communications), 7.5(d) (false implication of partnership), 8.4(c) with respect to conduct on and after January 1, 1998, and, as to conduct occurring before January 1, 1998, violated Canon Two, DR 2-102 (professional notice containing deceptive statement or claim).

Failure To Cooperate With Bar Counsel Investigation (Count Six)

The committee concluded that the respondent's failures to respond completely and promptly to Bar Counsel's inquiries violated Mass. R. Prof. C. 8.4(g) (failure to cooperate with Bar Counsel's investigation without good cause) and S.J.C. Rule 4:01, § 3(1) (failure to respond to Bar Counsel's request for information).

Mitigation And Aggravation

The committee found that the health problems suffered by the respondent's family were "somewhat mitigating" as to her negligent conduct, but not enough to warrant a substantial

change in sanction.

In aggravation, the committee noted that the respondent had engaged in a pattern of misusing client funds and had committed multiple violations of rules of professional conduct.

Bar Counsel's Appeal

Aside from challenging the committee's recommended sanction, Bar Counsel makes three main arguments on appeal. We address these in turn, rejecting any other arguments not specifically addressed.

First, Bar Counsel argues that the respondent took a clearly excessive or illegal fee from O'Brien by collecting a contingent fee on PIP benefits. The respondent's contingent fee agreement allowed the respondent to receive a one-third fee from "the gross amount tendered, offered and/or collected." It is unsettled whether a contingent fee for collecting uncontested PIP benefits is flatly prohibited in all circumstances. See MBA Committee On Professional Ethics, Opinion No. 77-7 (1977). Here, Safety contested payment of funeral expenses up through the mediation, creating the contingency on the basis of which the fee was properly earned. See id. Bar Counsel finds ambiguity in certain language in the fee agreement which, she argues, must be resolved in the client's favor. The agreement permitted the respondent to charge "ten percent (10%) of the total amount of medical billings processed through [the respondent's] office." The disputed Safety payment was for funeral expenses, not "medical billings processed." We discern no ambiguity.

Second, Bar Counsel argues that the hearing committee should have weighed in aggravation the respondent's use in evidence of a fabricated disengagement letter to O'Brien. We agree. The respondent's fabrication was an act that "impairs or has the potential of impairing the integrity of a process which itself is designed to uphold the integrity of the bar." Matter of Provanzano, 5 Mass. Att'y Disc. R. 300, 305 (1987). Her lack of candor before the hearing committee may properly be considered in aggravation. Matter of Hoicka, 442 Mass. 1004, 1006, 20 Mass. Att'y Disc. R. 239, 243 (2004) (rescript); Matter of Eisenhauer, 426 Mass. 448, 456, 14 Mass. Atty. Disc. R. 251, 261, cert. denied 524 U.S. 919 (1998); Matter of Friedman, 7 Mass. Att'y Disc. R. 100, 103 (1991); American Bar Association Standards for Imposing Lawyer Sanctions, § 9.22(f) (1992).

Third, we agree with the respondent that the committee properly declined to find lack of candor in the respondent's discussion of her prior experience with the disciplinary process and of her interactions with the Medicare lien agent concerning waiver of the Medicare lien. Bar Counsel and the respondent each offered plausible interpretations of this testimony. The committee is the final arbiter of credibility. S.J.C. Rule 4:01, § 8(4); Matter of Hoicka, 442 Mass. at 1006, 20 Mass. Att'y Disc. R. at 243; Matter of Saab, 406 Mass. 315, 328, 6 Mass. Att'y Disc. R. 278, 291-92 (1989). Implicit in this role is authority to determine whether uncredited testimony evidences lack of candor. Matter of Hoicka, 442 Mass. at 1006, 20 Mass. Att'y Disc. R. at 243; Matter of Norris, 12 Mass. Att'y Disc. R. 377, 383 (1996). There is no basis for disturbing that determination here.

The Respondent's Appeal

Aside from challenging the committee's recommended sanction, the respondent makes two main arguments on appeal. We address these in turn, rejecting also any other arguments not specifically discussed.

First, the respondent argues that there was insufficient evidence to support a finding that she intentionally misused client funds. We disagree. The respondent gave O'Brien a check for $17,202.57 drawn on her IOLTA account knowing that the insurance proceeds needed to fund this payment had not yet arrived. Even if the respondent had mistakenly thought that the first $11,245.50 to arrive had been deposited in her IOLTA account, she would still have been

aware that the check to O'Brien was under funded. She had to have known that the shortfall would be covered with other funds in the IOLTA account, and the committee found that it was. The amount of the unfunded check was too large for the respondent to suggest plausibly that she believed it would be covered by miscellaneous earned fees that she had accumulated in the IOLTA account.[2] Her actions were hardly "inadvertent or careless." Matter of Watt, 430 Mass. 232, 235, 15 Mass. Att'y Disc. R. 624, 627 (1999). The committee properly drew "an inference … from all the circumstances," Matter of Zimmerman, 17 Mass. Att'y Disc. R. 633, 646 (2001), and did not err by finding intentional misuse.

The respondent's subsidiary argument, that there was no evidence of a conscious purpose or motive to use client funds for her own personal benefit or to cause harm, is pertinent only to the appropriate sanction for her intentional misuse. "The intentional use of clients' funds normally calls for 'a term suspension of appropriate length.' … If additionally 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, 426 Mass. 183, 187, 13 Mass. Att'y Disc. R. 679, 685 (1997) (cit. omitted.), quoting from Matter of the Discipline of an Attorney, 392 Mass. 827, 836, 4 Mass. Att'y Disc. R. 155, 166 (1984). The respondent's intentions for the money after misappropriating it are relevant to fixing the specific sanction, but they do not undercut the committee's determination that the misappropriation was intentional.

Second, the respondent argues that there was insufficient evidence to support the finding that she did not disclose Safety's agreement to pay funeral expenses when she requested the Medicare lien waiver. Her argument fails to the extent it relies on her own testimony, which the committee was not required to credit even if uncontradicted. Matter of Saab, 406 Mass. at 329, 6 Mass. Att'y Disc. R. at 292. The committee properly considered the absence of the settlement memorandum from the file of the Medicare lien agent as some evidence of non-disclosure. Further, the respondent concedes that the agent's file did not reference a settlement amount greater than $25,000, i.e., it did not reflect Safety's agreement to pay, in addition, more than $6,000 for funeral expenses. Respondent's Brief at 11. Also, the written lien waiver request did not disclose that the settlement included payment of funeral expenses, and it listed the funeral bills as debts of the estate. The request affirmatively represented that, "[t]here are no other insurance proceeds or assets of the defendant(s) available." R. 66, 67. The committee did not err in concluding that the respondent engaged in knowing deception.

The Appropriate Sanction

We recommend that the respondent be suspended for nine months.

The respondent suggests that the committee did not adequately weigh factors in mitigation, but she does not identify any specific factor that received insufficient weight. It appears, however, that the respondent's focus is on (i) the absence of personal financial motive and ultimate harm, (ii) the respondent's personal problems and family health issues, and (iii) her state of mind.

While personal financial motive and harm are usually considered aggravating factors,[3] their absence is not a basis for departing downward from a sanction that is warranted without them. See Matter of Alter, 389 Mass. 153, 157, 3 Mass. Att'y Disc. R. 3, 8 (1983) (absence of ultimate harm is a "typical" mitigating factor).

We agree with the committee that, while the problems the respondent and her family faced might palliate somewhat the violations characterized by neglect, they do not mitigate her intentional violations, especially given the absence of any causal nexus between those problems and the misconduct. See Matter of Johnson, 444 Mass. 1002, 1004 (2005) (rescript); Matter of Otis, 438 Mass. 1016, 1017 n.3, 19 Mass. Att'y Disc. R. 344, 346 n.3 (2003) (rescript).

The presumptive sanction under Schoepfer for intentional misuse of client funds, with no intent to deprive and no actual deprivation resulting is "a term suspension of appropriate length." 426 Mass. at 187, 13 Mass. Att'y Disc. R. at 685. The respondent's negligent misuse of O'Brien's funds, with actual deprivation (Count Two), standing alone, also warrants a term suspension. See, e.g., Matter of Newton, 12 Mass. Att'y Disc. R. 351 (1996). The respondent's misleading omission on the Medicare waiver request concerning funeral expenses might itself merit suspension. Compare Matter of Connolly, 11 Mass. Att'y Disc. R. 43 (1995) (3-month suspension for assisting client to defraud employer of relocation benefits by preparing a false HUD statement, signed under oath) with Matter of Lederman, Pub. Rep. No. 2005-29 (attorney falsely portrayed himself as representing the wife in a divorce to obtain confidential information from the wife's mortgage company, and also engaged in unrelated conflict of interest).

The committee properly pointed out that, in all likelihood, each of the remaining charges, standing alone, would not warrant more than a public reprimand.[4]

In Matter of Norris, 12 Mass. Att'y Disc. R. 377 (1996), the attorney was suspended for six months for intentionally misappropriating client funds without intent to deprive and without actual deprivation, for neglecting a matter, for misrepresentation, and for failing to cooperate with Bar Counsel. Here, the committee found all of these violations, as well as a pattern of commingling and negligent misuse of funds. In Matter of Walker, 17 Mass. Att'y Disc. R. 585, 591-94 (2001), an attorney received a six-month suspension for a single instance of negligent misuse of client funds with resulting actual deprivation, followed by restitution. Although Walker had two prior disciplinary matters and the respondent has none, Walker's negligent misuse was not as extensive, and was not compounded by intentional misuse, misrepresentation, and failure to cooperate. Further, the violations in Norris and Walker were not aggravated by submission of fabricated evidence at the disciplinary hearing. We conclude, therefore, that a suspension longer than six months is appropriate.

We do not agree with Bar Counsel that the respondent's reinstatement should occur only after a "formal reinstatement process" following a suspension of a year and a day. Bar Counsel's brief at 8. The hearing committee found that the respondent committed multiple violations, but most of them were not intentional, and even multiple intentional violations do not make a reinstatement petition mandatory. Norris, supra (intentional misappropriation and misrepresentation).

After comparing the respondent's conduct to that in similar cases in which a six-month suspension was imposed, and taking into consideration the respondent's multiple violations and the other aggravating factors, we conclude that a nine-month suspension is appropriate.

Conclusion

An Information shall be filed with the Supreme Judicial Court recommending that the respondent, Nora M. Daniels, be suspended from the practice of law for nine months. Four members recommend a suspension for a longer term.

FOOTNOTES

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

[2] The committee found that in other instances when the respondent paid to or for the client before receiving covering funds she had been only negligent. Report 54, 59, 62. The outcome here is different because (i) the respondent actually knew that the final O'Brien settlement check had not arrived when she drew on the IOLTA account, and (ii) in those other matters the respondent used fees accumulated in the IOLTA account to cover small checks.

[3] See, e.g., Matter of Wise, 433 Mass. 80, 92, 16 Mass. Att'y Disc. R. 419, 430 (2000) (vindictive motive and self-interest were aggravating factors); Matter of Pike, 408 Mass. 740, 745, 6 Mass. Att'y Disc. R. 256, 261-262 (1990) (self-interest aggravated conflicts case and, together with harm, warranted suspension); Matter of Kane, 13 Mass. Att'y Disc. R. 321, 327-28 (1997) (harm, together with misrepresentation, may aggravate case of neglect and warrant suspension); Matter of An Attorney, 21 Mass. Att'y Disc. R. 761, 767-68 (2005) (discussing harm as a factor aggravating conflict of interest); ABA Standards, § 4.32 (harm may warrant suspension in case of obvious conflict).

[4] The respondent's pattern of commingling and inadequate record keeping, resulting in the negligent misuse of client funds on several occasions, but without an intent to deprive and no deprivation resulting, where the respondent did not take any funds for her own benefit, standing alone, would warrant at least a public reprimand. Schoepfer, supra at 185, n. 2; Matter of Tassinari, 14 Mass. Att'y Disc. R. 742, 743-44 (1998); Matter of Barrat, 11 Mass. Att'y Disc. R. 6, 8-9 (1995); Matter of Callahan, 11 Mass. Att'y Disc. R. 23, 24-25 (1995); Matter of Himmelstein, 11 Mass. Att'y Disc. R. 112, 114-115 (1995). The respondent's use of a deceptive letterhead, standing alone, warranted an admonition. See AD-99-43, 15 Mass. Att'y Disc. R. 729, 730 (1999). Public reprimand is the typical sanction for cases involving failure to cooperate, coupled with prior discipline and other misconduct, such as neglect. See, e.g., Matter of Sabino, 17 Mass. Att'y Disc. R. 494, 496 (2001); Matter of Shulman, 17 Mass. Att'y Disc. R. 506, 507, 509 (2001); Matter of Rosencranz, 17 Mass. Att'y Disc. R. 487, 489 (2001); Matter of Huggins, 15 Mass. Att'y Disc. R. 268, 270 (1999). The respondent's neglect of, and failure to communicate with, her client regarding the Boston College matter would warrant an admonition or, at most, a public reprimand. See Matter of Van Ness, PR No. 2005-17 (2005); Matter of Kane, 13 Mass. Att'y Disc. R. 321, 327 (1997).