NO. BD-2007-001

IN RE: CORNELIUS J. SULLIVAN

S.J.C. Judgment of Term Suspension entered by Justice Cowin on May 8, 2007, with an effective date of June 7, 2007.[1]

MEMORANDUM OF DECISION

These consolidated matters came to me on an information and record of proceedings, together with a vote and memorandum of the Board of Bar Overseers (board). The board recommended that, as a result of professional misconduct, Brenda E. Walsh Sullivan (Walsh) be suspended indefinitely and Cornelius Sullivan (Sullivan) be suspended for a term of three months. The board recommended that Sullivan be required to pass a relevant continuing education course. For the reasons set forth below, I adopt the board' s recommendation.

1. Facts. I summarize the hearing committee's findings of fact supplemented as necessary by the undisputed evidence. The respondents are husband and wife practicing law together in the Mattapan section of Boston under the name "Sullivan & Walsh." In general, the respondents maintain separate IOLTA accounts, practice different areas of law, and have separate clients but use a common operating account. Sullivan was admitted to the Massachusetts bar in 1974, and Walsh was admitted in 1990.

In 1993, Walsh began representing the administratrix of the estate of Mary Reynolds. Walsh collected the assets of the estate and commingled those client funds with the respondents' personal funds. The assets of the estate were not distributed to the beneficiaries until June, 1996. At that time, Sullivan (not Walsh) wrote a letter to the Reynolds heirs providing a detailed accounting of the assets of the estate and stating that the firm owed $91,394.67, "of which I am able to distribute $51,000.00 at any time and the remai[n]der of approximately $40,000.00 in thirty days." It actually took three additional months for Sullivan & Walsh to pay the final $40,000; that amount was paid from the firm's operating account in October, 1996, see infra.[2] Sullivan stated in the letter that the failure to pay out the assets years earlier was "our fault," meaning the fault of Sullivan and Walsh and that the $40,000 had been "erroneously taken as a legal fee" through a "regrettable" accounting error. Sullivan offered that he and Walsh "would be pleased to come down to visit with you [the heirs] at your earliest convenience . . . to answer any questions that you may have about the accounting." At the time of the final distribution, Walsh did not have sufficient funds in her client trust account to satisfy the obligation to the estate. Records of the estate funds were deficient.

In 1996, Walsh became the executrix of the estate of Dominica Manduca pursuant to a will that Walsh drafted. The will provided specific bequests to family members and charitable organizations. Walsh filed the will, opened an account for estate funds, and deposited $51,998.51 of estate funds into the account. Walsh then withdrew $9,500 for disbursements and fees, collected an additional $76,599 of funds belonging to the decedent and deposited those funds in the Sullivan & Walsh operating account. Walsh used $40,000 from the operating account (which now contained funds that were supposed to be held in trust for the Manduca estate) to pay beneficiaries of the Reynolds estate, see supra, paid $5,000 on behalf of the Manduca estate to a charity that was not listed as a beneficiary in the will, and disbursed most of the remaining funds in the operating account for firm or personal purposes. Walsh never notified the Attorney General of the charitable bequests that actually were in the will, although she was required to do so pursuant to G. L. c. 12, § 8G. See Uniform Probate Court

Practice XXXIV (A) (1996) (effective December 1, 1996).

In 1998, Sullivan deposited in the Manduca estate account a check for $11,000 from Sullivan's IOLTA account bearing the notation "[r]epayment of [l]oan." Sullivan at no time had placed funds from the Manduca estate in the IOLTA account. Thus, the funds that he paid to the estate were not the estate's funds, but funds of a different client that were being held in trust. See discussion, infra, regarding the source of those funds.

In 2001, a Manduca heir hired an attorney to investigate the status of the estate. Walsh did not respond to the investigating attorney's inquiries and was ordered by a Probate Court judge to render an inventory and account for the estate on or before July 31, 2002. Walsh failed to comply with that order and the Manduca heir filed a complaint for contempt. Only then did Walsh produce an accounting for the estate in which she claimed $42,500 in legal fees. Walsh admits that the fees were not supported by time records of actual work performed. She concedes, as she must, that the amount was particularly large in light of her failure to file accounts or make distributions.[3]

2. Prior Proceedings. Bar counsel filed a single petition for discipline against both respondents. In regard to the Reynolds estate, bar counsel claimed that Walsh failed to maintain adequate records of the estate; failed to account adequately for estate funds; failed to pay estate funds promptly to heirs; negligently misused estate funds with resulting deprivation in violation of Canon One, DR 1-102 (A) (5) & (6), 382 Mass. 769 (1981), and Canon Nine, DR 9-102 (A), (B) & (C) , 419 Mass. 1303 (1995); and neglected the estate in violation of Canon Six, DR 6-101 (A) (3), 382 Mass. 783 (1981). Bar counsel alleged, in connection with the Reynolds estate, that the second respondent, Cornelius Sullivan (Sullivan), failed to pay estate funds promptly to the heirs in violation of Canon Nine, DR 9 102 (B).

In regard to the estate of Dominica Manduca, bar counsel alleged that Walsh failed to pay the beneficiaries of the will for several years and failed to file estate accounts for certain years in violation of Canon Six, DR 6-102 (A) (3) and Canon Seven, DR 7-101 (A) (1), (2) & (3), 382 Mass. 784 (1981) (until January 1, 1998), and Mass. R. Prof. C. 1.2 (a) & 1.3, 426 Mass. 1310, 1313 (1998) (conduct subsequent to January 1, 1998); failed to notify the Attorney General of charitable bequests as required G. L. c. 12, § 8G, in violation of Canon One, DR 1-2 (A) (5); failed to keep estate funds in a separate interest-bearing account and failed to keep adequate records of the estate funds in violation of Canon Nine, DR 9-102 (A), (B) & (C); commingled client and personal funds in the respondents' operating account in violation of Canon Nine, DR 9-102 (A) & (B), and Mass. R. Prof. C. 1.15 (a), 426 Mass. 1363 (1998); charged a clearly excessive fee in violation of Mass. R. Prof. C. 1.5 (a) & (b), as amended 432 Mass. 1301 (2000); made a false statement of material fact to a tribunal and engaged in a dishonest and deceptive act in violation of Mass. R. Prof. C. 3.3 (a) (1), 426 Mass. 1383 (1998), and Rule 8.4 (c), (d) & (h), as amended 429 Mass. 1301 (1999); knowingly disobeyed a court order and failed to expedite litigation in violation of Mass. R. Prof. C. 3.2, 3.4 (c), 426 Mass. 1382, 1389 (1998), and Rule 8.4 (d) & (h); and intentionally commingled and misused client funds with resulting deprivation. Bar counsel alleged that Sullivan intentionally misused the funds of a separate, unrelated client to pay the Manduca beneficiaries.

A hearing committee found that the respondents had engaged in the misconduct above.[4] An appeal panel affirmed the hearing committee's findings of fact and conclusions of law and agreed that Walsh should be suspended indefinitely and that Sullivan should be suspended for a term of three months and should be required to pass a continuing education course on office practices and client funds. The board accepted the recommendations of the appeal panel.

Before me, the respondents claim that the board's recommendations were improper for various reasons. Walsh claims that the use of one petition to proceed against both respondents violated fundamental fairness and that the sanction recommended by the board is "harsher than warranted." Sullivan argues that substantial evidence does not support the conclusion of the board that he had a role in neglecting the Reynolds estate and commingling funds of the

estate with those of the respondents. Sullivan also contends that substantial evidence does not support the finding that the funds he paid to the Manduca beneficiaries were being held for another client and that the discipline recommended by the board is unwarranted.

3. Discussion. a. Due Process. Walsh argues that " [i]t was a violation of fundamental fairness to link the co-respondents in one petition, to proceed against them simultaneously, and to seek the same penalty of disbarment against both." The only authority cited in support of the argument is Matter of Abbott, 437 Mass. 384, 391-393 (2002), in which the court held that an attorney is entitled to due process in the adjudication of discipline, including the right to notice of pending charges and the right to be heard on those claims.[5] Walsh provides little explanation for how her rights to notice and a hearing were violated by the manner in which bar counsel proceeded. She offers simply that the allegations "caused confusion and [were] unfairly ambiguous as to which respondent was being asked to admit or deny what facts." There is no merit to the argument. Bar counsel's factual allegations were particularized and referred to both respondents by name where necessary.

b. Sanction against Walsh. Walsh maintains that suspension for an indefinite term is an inappropriate sanction because she has no prior disciplinary record; she was a relatively new and inexperienced attorney at the time of the misconduct; she, acknowledged her "error;" and, those who were deprived of funds are satisfied and ultimately received the money owed them. She also maintains that she committed the misconduct with respect to the Manduca estate in her capacity as executrix of the estate and that she believed she had authority to act as she did. I address these issues.

"The 'primary factor' in bar discipline is 'the effect upon, and perception of, the public and the bar. ' " Matter of Kerlinsky, 428 Mass. 656, 664 (1999), cert. denied, 526 U.S. 1160 (1999), quoting Matter of Finnerty, 418 Mass. 821, 829 (1994). The court "must consider what measure of discipline is necessary to protect the public and deter other attorneys from the same behavior." Matter of Concemi, 422 Mass. 326, 329 (1996). "[T]he board's recommendation is entitled to substantial deference." Matter of Tobin, 417 Mass. 81, 88 (1994).

Where 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 (1997). Lack of prior discipline is not special mitigation; it is merely the absence of aggravation, or at best "typical" mitigation, which in any event does not aid Walsh. Matter of Alter, 389 Mass. 153, 157 (1983); See Matter of Johnson, 444 Mass. 1002, 1004 (2005).

While Walsh may have been inexperienced when she initially mishandled the Reynolds estate in 1993, the pattern of misconduct continued beyond that time. Walsh misused the funds of the Manduca estate in subsequent years to end her financial obligation to the Reynolds estate. Years after that, she committed serious misconduct by deceiving the Manduca heirs in order to conceal her actions, refusing to respond to the inquiries of their attorney, and disobeying an order from -- and misrepresenting facts to -- the Probate Court. The course of conduct culminated in 2002 with Walsh's transparent claim that the $42,500 she had converted was a fee for services. Almost ten years of experience plainly did not alter Walsh 's conduct, and her initial inexperience was, at best, "typical" mitigation.

Walsh also did not voluntarily bring the misconduct to the attention of the beneficiaries of the Manduca will or to bar counsel, and she spent years (and apparently much effort) attempting to conceal her actions. She admitted to the misconduct only when it was impossible to deny. That very late concession hardly amounts to special mitigation. The case cited by Walsh is distinguishable. See Matter of Watt, 430 Mass. 232, 235 (1999) (assumed that respondent had no intent to deprive and temporary deprivation occurred only outside Massachusetts).[6]

Finally, Walsh argues that she deprived the Manduca estate (and the beneficiaries) of funds as executrix and not as the lawyer for the estate. She claims that she believed that she had

authority to act as she did. Accordingly, she submits that the presumptive sanction should not apply. To the extent Walsh argues that the conversion was unintentional, the board concluded to the contrary and nothing has been shown to justify overturning that determination. Walsh cites Matter of Barrett, 447 Mass. 453, 463-465 (2006), where an attorney deprived a business of funds in the capacity of fiduciary and not as the client's lawyer and the attorney was suspended for a term less than an indefinite period. Here, however, Walsh's duties as executrix were closely related to her representation of the decedent as a lawyer. Moreover, if there were any doubt that the intentional deprivation of funds from the Manduca estate justified suspension of indefinite length, that doubt is erased by the pattern of misconduct. The deprivation that was intended in this case was of an order of magnitude more serious than in Matter of Askenase, Mass. Att'y Disc. R. 35, 35-37 (2002), which involved a series of real estate transactions that the attorney intended to fund shortly after closing instead of the time at which payment was required. Here, disbursements to heirs were late not by hours or days but by years, and substantial evidence suggests that Walsh intended the deprivation of the Manduca funds to be permanent. The board's recommendation of indefinite suspension is not a disparate sanction.

c. Sullivan and the Reynolds estate. The appeal board concluded that the second respondent, Sullivan (together with Walsh) failed to pay promptly the estate funds to the Reynolds heirs.[7] Sullivan argues that the evidence was insufficient in this regard, and he claims that he was not accountable for the mishandling of the Reynolds estate.

" [S]ubsidiary facts found by the [b]oard and contained in its report filed with the information shall be upheld if supported by substantial evidence, upon consideration of the record. . . ." S.J.C. Rule 4:01, § 8 (4), as appearing in 425 Mass. 1309 (1997). " 'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (6). In considering the evidence we take into account the entire record, and also whatever in the record "fairly detracts from its weight." New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981), quoting Cohen v. Board of Registration in Pharm., 350 Mass. 246, 253 (1966).

The primary evidence supporting the board's findings was a letter written by Sullivan to beneficiaries of the Reynolds estate in 1996, see supra. In the letter, Sullivan provided a detailed accounting of the assets of the estate, suggested that he (with Walsh) would deliver the estate funds (including a 40,000 payment) in thirty days, suggested that he controlled the estate funds (with Walsh), and personally accepted blame for neglect or mishandling of the matter. In short, Sullivan admitted in the letter to facts sufficient to support bar counsel's claim. There is nothing incongruous or unjust about holding Sullivan to his assertions to the heirs for purposes of bar discipline. The letter adequately supports the board's finding.[8] Additionally, Sullivan did not pay the heirs even as promptly as suggested by the letter.

d. Sullivan and the Manduca estate. Sullivan argues that there is insufficient evidence that he deprived another client of funds when he wrote a check from his IOLTA account payable to the beneficiaries of the Manduca estate when the Manduca funds were not in the account. Sullivan claims in unsworn papers filed here that he now recalls the amount from the IOLTA account was a fee from another client, which he would presumably have had authority turn over to the Manduca estate. He does not assert that his "recollection and belief" is supported by evidence in the record and his memory is contradicted by a notation on the check “repayment of loan" and by the fact that the funds were never deposited to his firm's operating account. In addition, this is not the first or even second instance in which Sullivan and Walsh have resorted to labeling as a fee an amount that should have been held in trust and was apparently misused.[9] Sullivan's unsupported, late-blooming, and unsworn assertion is no more reliable than the respondents' other discredited fee claims and does not affect the substantiality of the evidence.

e. Sanction against Sullivan. Sullivan argues that his cooperation with bar counsel and ill

health should be considered as special mitigation and justify a reduction in the appropriate sanction. However, Sullivan's misconduct predated his 1999 and 2003 health problems and there is no evidence that they were materially related. See Matter of Johnson, supra at 1004. Cf. Matter of McIntyre, 426 Mass. 1012 (1998) (respondent was active alcoholic at time of misconduct). Sullivan stipulated to many of the facts alleged by bar counsel, but cooperation of that nature is a "typical" mitigating factor. Matter of McCarthy, 416 Mass. 423, 429 (1993). Neither consideration is entitled to “substantial weight" in determining the level of discipline. Matter of Saab, 406 Mass. 315, 327 (1989).

In Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984), the court stated that an attorney who intentionally misused client funds without intent to deprive carries a "heavy burden" to demonstrate why he should not be disciplined by "a term of suspension of appropriate length. " Here, there are no special mitigating factors. Accordingly, I conclude that the board's recommendation of three months suspension is not a disparate sanction for intentional misuse of client funds without intent to deprive in combination with failure to turn over promptly funds held in trust. See Matter of Norris, 12 Att'y Disc. R. 377, 380-381, 386 (1996) (six months suspension for similar misconduct that was aggravated by misrepresentations to clients) .

4. Disposition. Judgments shall enter as follows: respondent Walsh shall be suspended indefinitely from the practice of law in the Commonwealth and respondent Sullivan shall be suspended for a term of three months from the practice of law in the Commonwealth and shall be required to take and pass a Massachusetts Continuing Legal Education course concerning office practices and client funds.

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

[2] There was no other document suggesting that the $51,000 was actually paid, although there also was no complaint from the heirs that the funds were withheld. As discussed infra, the record supports the view that the $40,000 paid to the Reynolds estate in October was obtained from funds held in trust for the Manduca estate. See infra.

[3] This amount also seems large in relation to the legal work reasonably required.

[4] The hearing committee also concluded that the respondents had not engaged in other misconduct that was alleged by bar counsel. I have not enumerated those charges and do not discuss them.

[5] " [T]he respondent is not entitled to the full panoply of institutional protections afforded to criminal defendants." Matter of Abbott, 437 Mass. 384, 391 (2002).

[6] The decision cited by the respondent at 429 Mass. 1011 was withdrawn by the court. The decision cited above disposed of the matter.

[7] Based on the appeal panel decision as a whole, it does not appear that the appeal panel concluded that Sullivan neglected the Reynolds estate in violation of Canon Six, DR 6-101 (A) (3). That is subject to some uncertainty because of the discussion contrasting Sullivan's behavior with that of the respondent in Matter of Morris, 12 Att'y Disc. R. 377, 380-381, 386 (1996). There is no express conclusion, however, that Sullivan was neglectful.

[8] The record does not reveal precisely how or why Sullivan became responsible for the funds of the Reynolds estate.

[9] Walsh claimed in 2002 that $42,500 she had converted from the Manduca estate was fee. Sullivan claimed in the 1996 letter to the Reynolds heirs that $40,000 not promptly distributed to them had been mistaken for a fee.

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