NO. BD-2007-087

IN RE: GALE ROSALYN JOHNSON

S.J.C. Judgment of Indefinite Suspension entered by Justice Greaney on October 30, 2007, with an effective date of November 30, 2007.[1]

BOARD MEMORANDUM

The respondent, Gale Rosalyn Johnson, appeals from the report of a special hearing officer, who recommended that she be indefinitely suspended for the serial, intentional misuse of the funds of three clients. The sole issue raised by the respondent on appeal is whether the special hearing officer erred in rejecting her claims in mitigation. She seeks a suspension for two years, with leave to practice as a paralegal during the suspension, and reinstatement based on certain conditions, including supervision and counseling. Bar counsel contends that an indefinite suspension is warranted. Oral argument was held before the full board at its April 9, 2007 meeting. For the reasons set forth below, by a vote of eight to one,[2] we adopt and incorporate by reference the special hearing officer's findings of fact and conclusions of law, and recommend that the respondent be indefinitely suspended.

Facts

We summarize below the findings of the special hearing officer with respect to the allegations in the petition. The findings regarding claims in mitigation are summarized in the discussion of the respondent's issues on appeal.

The respondent was admitted to the Massachusetts bar in 1972. After law school, she attended Boston University Law School for a year in a master's program in taxation. After her admission to practice, she worked for the National Labor Relations Board. Two years later, she began teaching as an assistant professor at Suffolk University Law School, where she taught trusts and estates, and family and labor law for four to five years. In 1978, she began her solo private practice, which was initially a labor law practice and then focused on family law and discrimination cases. Throughout her private practice, her office has been located in part of her home. Her practice has been successful; her gross annual revenue in 2001 and 2002 was between $250,000 and $300,000.

The respondent has a record of service to the bar. She taught continuing education courses for MCLE. She served as a delegate at large for the MBA, and as a member and then Chair of the MBA's Fee Arbitration Board. She has also provided pro bono services to charitable groups.

Findings Pertaining to Misuse of Client Funds

In February 2003, the respondent was retained to represent a client named Ward in a dispute concerning the out-of-state probate estate of the deceased father of Ward's grandnephew, a minor. In December 2003, a settlement was reached, and on December 23, 2003, the estate's attorney sent the respondent a check for $56,536.50 made payable solely to Ward, as guardian. The special hearing officer credited the respondent's testimony that she kept the check because she believed she was required to hold it until the settlement agreement had been executed by all the parties, and she told this to Ward. In late January 2004, the respondent called counsel to request a copy of the signed agreement, but did not reach him.

The respondent was scheduled to enter the hospital for knee replacement surgery in early February 2004. At that time, she knew that a foreclosure sale of her home was scheduled for February 20, 2004. The previous July, the respondent had received a notice of foreclosure and had entered into a forbearance agreement in which she had immediately paid $30,000 (borrowed from friends) and agreed to pay about $7,000 per month to make up the arrearage, but she had not paid in the previous two months, resulting in this other notice of foreclosure.

On February 7, 2004, without Ward's authorization, the respondent signed his name to the settlement check and deposited it into her IOLTA account. Before this deposit, the balance in her IOLTA account was $44.27. On February 9, 2004, the day she entered the hospital for knee replacement surgery, she wrote a check for $28,000 to herself from the IOLTA account and used this money to pay the arrearage on her mortgage, thus forestalling the foreclosure.

On February 29, 2004, after she was released from the hospital, Ward told her that he had called the probate court and had been informed that the settlement agreement was on file. On March 6, 2004, the respondent wrote a check for $550 to herself from the IOLTA account, again misusing Ward's funds. On March 10, 2004, the respondent sent a check for $25,000 to Ward, as partial payment of the settlement. At this point, the balance in the IOLTA account was $3,030.77. Between March 10 and May 3, 2004, the respondent used the balance of the Ward funds by writing a series of checks payable to herself, other clients, and third parties. By May 3, the balance in the IOLTA account was $35.56.

On May 11, 2004, Ward filed a complaint with bar counsel, which bar counsel sent to the respondent on May 19, with a cover letter stating that the respondent's answer was due by June 8, 2004. The day before her answer was due, the respondent deposited a check for $56,013 into her IOLTA account; these funds were the settlement proceeds in the case of another client named Marinello. Before this deposit, the balance in the IOLTA account was $65.89. That same day, after making the deposit, the respondent sent Ward a check drawn on her IOLTA account for $31,536.50, which was payment in full of the balance owed him. With the check, the respondent sent a bill itemizing her services in the Ward matter. Thus, the respondent paid Ward by using the Marinello funds.

After making the payment to Ward, the balance in the IOLTA account on June 15, 2004 was $14,411.39, without any payment having been made to or for Marinello. On June 17, 2004, the respondent disbursed $10,000 of the settlement funds to Marinello. After that payment, the balance in the IOLTA account was $1,442.39. The respondent continued to misappropriate funds from the Marinello settlement, and by July 21, 2004, her IOLTA account was in overdraft, without any further payments having been made to Marinello.

In August and September 2004, the respondent paid Marinello a total of $36,832.42, the balance due Marinello, through four checks drawn on her IOLTA account. The respondent made the last two of the four payments to Marinello, which totaled $29,600, after meeting with bar counsel on August 17, 2004, and learning that bar counsel was aware that the Marinello funds had been the source of the final repayment to Ward.

The respondent was able to pay Marinello out of her IOLTA account only by misappropriating the funds of another client named Monkiewicz, which were the proceeds from the sale of real estate in the amount of $258,461.14 and were deposited into the IOLTA account on August 6, 2004. Before this deposit, the balance in the IOLTA account was $106.64.

From the Monkiewicz sale proceeds, in early August 2004, the respondent wrote checks to Monkiewicz or on her behalf totaling $192,461.14. The amount remaining in the IOLTA account from the sale proceeds should have been $65,611. Between August 6 and August 25, 2004, the respondent spent a substantial amount of the remaining Monkiewicz sale proceeds through a series of checks drawn on the IOLTA account payable to the respondent (totaling about $35,000), or third parties, including the payments to Marinello. By August 25, 2004, the balance in the IOLTA account was $3,414.41, with Monkiewicz still owed $65,611.

During an August 17, 2004 meeting with bar counsel, in which the respondent learned that bar counsel knew of her misuse of the Ward and Marinello funds, the respondent stated, under oath, that she had the money to repay Marinello because she was owed the remainder of the Monkiewicz funds (over and above the $192,000 previously disbursed) as her contingent fee in that matter. At a second meeting with bar counsel, on November 18, 2004, the respondent admitted, again under oath, that this earlier statement that she had a contingent fee agreement in the Monkiewicz matter was false. The special hearing officer found that the respondent made the August 17th misrepresentation to conceal her misappropriation of the Monkiewicz funds and to mislead bar counsel into believing she had a legitimate source of funds available to repay Marinello.

On or about September 12, 2004, the respondent paid $5,500 to Monkiewicz. On September 27, 2004, the respondent obtained a personal loan and paid $22,000 to Monkiewicz. In November 2004, the respondent refinanced her home for $637,500 and, from the proceeds of the refinancing, repaid the personal loan and the balance due Monkiewicz.

Conclusions of Law

The special hearing officer concluded that the respondent's intentional misuse of her three clients' funds, with intent to deprive them of the funds at least temporarily and with actual deprivation resulting, violated Mass. R. Prof. C. 1.15(a) and (b), as appearing in 426 Mass. 1301, 1363 (1997), effective January 1, 1998, through June 30, 2004, and Mass. R. Prof. C. 8.4(c) and (h). The respondent's endorsement of Ward's name on the settlement check without his authorization, and her knowingly false statement to bar counsel concerning her fee agreement with Monkiewicz also violated Mass. R. Prof. C. 8.4(c) and (h).

Factors in Aggravation

The special hearing officer found in aggravation that the respondent had previously received an admonition for borrowing money from a client during a trip to a gambling casino. After a complaint was filed with bar counsel, the respondent sent a check to repay the client, but it was returned for insufficient funds. She later repaid the client plus interest and costs. AD-95-33, 11 Mass. Att'y Disc. R. 370 (1995). Also in aggravation, the special hearing officer found that, at the time the respondent engaged in the misconduct at issue here, she had violated a probation agreement with bar counsel by failing to provide accounting reports.[3] In further aggravation, the special hearing officer found that the respondent had engaged in multiple disciplinary offenses and a pattern of misconduct. Matter of Saab, 406 Mass. 315, 6 Mass. Att'y Disc. R. 278 (1989).

Factors in Mitigation

The special hearing officer found in mitigation that the respondent had made restitution to her clients. Based on Matter of Alter, 389 Mass. 153, 157, 3 Mass. Att'y Disc. R. 3 (1983), he concluded that the respondent's service to the bar and pro bono activities were considered by the Supreme Judicial Court to be "typical" as opposed to "special" mitigating factors, and therefore, did not warrant a decrease in the presumptive sanction enunciated in Matter of the Discipline of an Attorney (and two companion cases) (Three Attorneys), 392 Mass. 827, 4 Mass. Att'y Disc. R. 155 (1984) and reaffirmed in Matter of Schoepfer, 426 Mass. 183, 13 Mass. Att'y Disc. R. 679 (1997). As discussed below, the special hearing officer rejected the respondent's other claims in mitigation.

Respondent's Appeal

At the disciplinary hearing, the respondent claimed in mitigation that, for a number of years, she has suffered from major depression, anxiety, and attention deficit disorder; that, at the time of the misconduct, she suffered from a number of serious personal problems; and that, as

a result, she went into a "fugue" state in which she was unaware that she was misusing client funds.

The following is a chronological list of the personal difficulties and stressors the respondent experienced during the relevant time: (1) on June 17, 2003, while boarding a gambling boat, the respondent fell, shattering her tibia and severely injuring her knee, requiring extensive surgery; she returned home about a month later, requiring a home health aide for assistance; she had to live on the first floor of her house and was confined to a wheelchair for about a year; she had to take painkilling medication, including narcotics, for a substantial period of time; (2) on her return from the hospital in July 2003, she received a notice of foreclosure on her home; (3) that same month she also received notice of an action to ban her dogs from the city due to their barking and lack of care during her hospitalization; (4) in September 2003, after removal of some lymph nodes, the respondent was diagnosed with non-Hodgkin's lymphoma;[5] (5) in January 2004, the respondent received another notice of foreclosure; (6) around the same time, the respondent was advised that her ninety-seven year old mother, who had lived with her, would have to be placed in a nursing home due to the respondent's inability to care for her; and (7) in February 2004, the respondent had knee replacement surgery.

On appeal, the respondent contends that the special hearing officer erred by (1) rejecting her expert's testimony; (2) failing to assess facts claimed as causal mitigation; (3) failing to find causal mitigation on the facts presented; and (4) recommending an indefinite suspension, where the sanction should have been lessened due to mitigation.

Standard

In Matter of Schoepfer, 426 Mass. at 188, 13 Mass. Att'y Disc. R. at 685, the Supreme Judicial Court, reaffirming its presumptive sanctions for misuse of client funds, recognized that mitigation based on disability could be appropriate, even in cases involving intentional misuse, but that the attorney claiming mitigation would be required to prove the facts warranting a lesser sanction:

> An offending lawyer has a heavy burden to demonstrate that these principles should not be applied to him. There may be special mitigating facts that justify less severe discipline. Our rule is not mandatory. If a disability caused a lawyer's conduct, the discipline should be moderated, and if that disability can be treated, special terms and considerations may be appropriate.

(Citations omitted.)

Under the ABA's Standards for Imposing Lawyer Sanctions, a mental disability or chemical dependency may be considered in mitigation when (a) there is medical evidence that the respondent suffered from a mental disability or chemical dependency; (b) the disability or chemical dependency caused the misconduct; (c) the respondent's subsequent recovery from the disability or dependency is demonstrated by a meaningful and sustained period of recovery; and (d) the recovery arrested the misconduct and thus recurrence is unlikely. ABA Standards, §9.32(i). Under BBO Rule 3.28, the respondent has the burden of proving matters in mitigation by a preponderance of the evidence.

Thus, when a disability is asserted in mitigation, the sanction should be moderated only where the disability caused the misconduct. Matter of Johnson, 444 Mass. 1002, 1004, 21 Mass. Att'y Disc. R. 355, 359 (2005) (rescript) ("[W]hile there was evidence that the respondent increased his alcohol consumption in the years prior to the misconduct, he did not show that it was a cause of the disciplinary violations."); Matter of Schoepfer, 426 Mass. at 188, 13 Mass. Att'y Disc. R. at 685; Matter of Gonick, 15 Mass. Att'y Disc. R. 230, 234 (1999) ("Disbarment or indefinite suspension is therefore appropriate, absent clear evidence that a disability caused the respondent's conduct.").

Expert Evidence, Disabilities, and Causal Connection to Misconduct

The special hearing officer rejected the respondent's claim that her personal problems, enumerated above, and physical and mental disabilities, operating together, caused her misuse of client funds. He specifically did not credit the respondent's testimony that she was unaware of what she was doing when she took the Ward funds to stave off foreclosure. In addition, he did not credit the testimony of the respondent's psychologist that, due to her personal problems and physical and mental disabilities, she was under extreme pressure and suffered from a "fugue" or dissociative state, which caused her to misuse client funds. Finally, he did not credit the psychologist's testimony that because the same stressors were no longer present, the respondent was unlikely to repeat her misconduct.

These findings were credibility determinations, which are the sole province of the hearing officer, S.J.C. Rule 4:01, § 8(4); Matter of Hoika, 442 Mass. 1004, 1006, 20 Mass. Att'y Disc. R. 239, 243 (2004) (rescript); Matter of Saab, 406 Mass. at 328, 6 Mass. Att'y Disc. R. at 291-92, and may not be disturbed absent clear error. Matter of Provanzano, 5 Mass. Att'y Disc. R. 300 (1987).

It is well settled that the special hearing officer was not obliged to credit uncontradicted testimony, see Matter of Saab, 406 Mass. at 328-29, 6 Mass. Att'y Disc. R. at 292, even where it was expert testimony. See Matter of Minkel, 13 Mass. Att'y Disc. R. 548, 552 (1997). See also P.J. Liacos, M.S. Brodin & M. Avery, Handbook on Massachusetts Evidence, § 7.6.3, at 388-89 (7th Ed. 1999); Commonwealth v. DeMinico, 408 Mass. 230, 235 (1990). Thus, the special hearing officer did not err in declining to credit the psychologist's testimony, although undisputed. Matter of Minkel, 13 Mass. Att'y Disc. R. at 552.

Moreover, the special hearing officer's credibility findings were fully supported by other evidence. The psychologist's opinion was based solely on the respondent's own statements about her mental condition, because he did not see her during the relevant period. In addition, at the hearing, the psychologist disclosed that, in opining that the respondent was in a fugue state when she took the Ward funds in February 2004, he was unaware that her misuse of clients' funds was not limited to that one time, but, in fact, occurred on multiple occasions between February and August 2004.

In addition, during the period of misuse, the respondent engaged in activities that belied a fugue state: (1) the respondent's serial misuse of client funds was systematic and calculated, and showed that she was aware throughout the time of the amounts in the account and the amounts owed her clients; (2) the respondent's repayments occurred each time only **after** she knew bar counsel was aware of her misuse; (3) in May 2004, the respondent represented herself in court to contest the banning of her dogs from the city; (4) on June 7, 2004, the respondent compiled an itemized bill for Ward; (5) on June 18, 2004, the respondent sent a detailed letter to bar counsel responding to Ward's complaint; and (6) the respondent handled the Marinello settlement and the Monkiewicz closing.

Thus, the special hearing officer's findings that the respondent was not in a fugue state during the relevant period and that her intentional, serial misuse of client funds was not causally related to her serious physical and mental problems[6] were fully supported by the evidence, as was his finding that the respondent's long-standing financial problems caused her misconduct.[7] See Matter of Johnson, 444 Mass. at 1004, 21 Mass. Att'y Disc. R. at 358-359 (lawyer failed to demonstrate causal relationship between circumstances and misconduct; court noted his financial problems were longstanding and his misappropriations started before the death of a family member); Matter of Schoepfer, 426 Mass. at 188, 13 Mass. Att'y Disc. R. at 685; Matter of Luongo, 416 Mass. 308, 9 Mass. Att'y Disc. R. 199 (1993) (despite evidence of treatment, no mitigation where alcoholism was not a cause of disciplinary violations); Matter of Jutras, 8 Mass. Att'y Disc. R. 119 (1992); Matter of Ward, 8 Mass. Att'y Disc. R. 257 (1991).

Appropriate Sanction

The respondent contends on appeal that the facts she has presented in mitigation are more serious than those in Matter of Guidry, 15 Mass. Att'y Disc. R. 255 (1999), in which bar counsel stipulated that Guidry's severe personal problems mitigated the sanction for his intentional misuse of client funds. We agree with the special hearing officer that this cases is more analogous to Matter of Johnson, 444 Mass. at 1004, 21 Mass. Att'y Disc. R. at 358, in which the Supreme Judicial Court rejected Johnson's claims in mitigation based on a comparison with those in Guidry:

> We have reviewed the record in the Guidry case, and conclude that the mitigating circumstances in that case are distinguishable from those in this case for at least the following reasons: (1) the "grave and acute" problems and the "consequent financial crisis they caused occurred during the time of the misappropriation", and their escalation interfered with his ability to repay his clients; (2) bar counsel recommended a term suspension, given the facts of the case; and (3) Guidry made restitution before the clients filed their complaint with bar counsel.

We might have found the respondent's circumstances fairly similar to those in Guidry had she misappropriated the Ward trust money only the one time to stave off foreclosure. However, that is not the case presented here. The respondent continued to misuse Ward funds for other personal purposes. Then, she not only used Marinello funds to pay Ward the money owed, but also used additional Marinello funds for her own purposes. The respondent paid Marinello with Monkiewicz's funds and, yet again, used more of Monkiewicz's money for her own purposes. This serial misuse of client funds distinguishes this case from Guidry.

The presumptive sanctions for intentional misuse of client funds, with deprivation resulting, set out in Matter of Schoepfer, 426 Mass. 183, 13 Mass. Att'y Disc. R. 679, are disbarment and indefinite suspension. The choice between the two turns primarily on whether, as here, the respondent has made restitution. Matter of Bryan, 411 Mass. 288, 7 Mass. Att'y Disc. R. 24 (1991). We see no reason to depart from the presumptive sanction based on the facts presented here.[8]

Conclusion>

For all the foregoing reasons, we adopt and incorporate by reference the special hearing officer's findings of fact and conclusions of law. An Information shall be filed with the Supreme Judicial Court recommending that the respondent, Gale Rosalyn Johnson, be indefinitely suspended 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 The one Board member voted for a lesser sanction.

3 In 2001, as a condition of dismissal of two complaints, the respondent had agreed to a one-year accounting probation and, with certain exceptions, to desist from gambling with clients.

4 The respondent's psychologist defined a "fugue state" as "a dissociative state" and "[n]ot an amnesia. Literally, kind of a fog, so she was not thinking clearly and not fully aware of what she was doing."

5 At least for several years thereafter, she was monitored by her doctor, was asymptomatic, and did not need treatment.

[6] The fact that these problems occurred around the time of the misconduct, standing alone, would be insufficient to establish a causal connection. MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1993) (fact that one event followed another does not prove a causal link); Warren v. Mystic Valley Gas Co., 1 Mass.App.Ct. 820 (1973) (rescript) (proximity in time does not establish causation).

[7] The respondent purchased her home in 1978 for $80,000. In 1991, she refinanced her home for about twice that amount. In 1995, a complaint for foreclosure was filed. The respondent she refinanced again in 2000 for $301,000. By July 2003, she again in default, owed about $344,000 and there were federal tax liens on the property totaling about $180,000. After receiving the foreclosure notice in July 2003, when she returned home after her knee injury, she borrowed $30,000 from friends and entered into a forbearance agreement. Due to the respondent's failure to make payments in late 2003, she received another notice of intent to foreclose in February 2004, which the respondent forestalled by using $28,000 of the Ward funds. Moreover, her history of gambling significant sums contributed to these substantial financial problems. On appeal, the respondent complains that the hearing report improperly "focuses" on her gambling as the cause of her misconduct. The respondent misstates the special hearing officer's findings in this regard. In essence, the respondent contends that her gambling is irrelevant in this matter because she did not use client funds for gambling or to pay gambling debts. We agree with the hearing officer that, although gambling was not directly involved in her misconduct, it evidently has exacerbated her longstanding financial problems and therefore was relevant.

[8] We agree with the special hearing officer that, on petitioning for reinstatement, the respondent should be prepared to show that she has addressed her financial, gambling, and psychological problems.