

IN RE: BERNARD J. MACCALLUM

S.J.C. Order of Term Suspension entered by Justice Spina on February 12, 2008, with an effective date of April 3, 2008.¹

MEMORANDUM OF DECISION

The Board of Bar Overseers (Board) filed an information recommending that Attorney Bernard J. MacCallum (respondent) be suspended from the practice of law for two months. The Board adopted the Hearing Committee's findings of fact and conclusions of law with one exception noted below. I adopt the Board's findings of fact and conclusions of law. See *Matter of Segal*, 430 Mass. 359, 364 (1999). I impose, however, a sanction different from those recommended by the Hearing Committee and the Board.

Background

The respondent was admitted to the Massachusetts bar in 1968 and has been a sole practitioner since 1977.

Count One arises from the respondent's intentional withdrawing of funds from his clients' escrow account without obtaining the consent of his clients. In 2000, Salvatore Ciampa and John McGillivray (the clients) retained respondent to represent them in the sale of real estate. For the purposes of purchasing the real estate, Salvatore Passariello (the buyer) gave a deposit of \$100,000 to the respondent for him to hold in escrow, and the respondent deposited this money into his IOLTA account because his clients had an interest in the money. The respondent withdrew and used some of these funds to pay his office expenses. Although he obtained consent from the buyer to use these funds, he did not seek consent from his clients. Later, when the real estate transaction did not close for various reasons, the respondent returned the entire \$100,000 deposit to the buyer. These acts amounted to an intentional misuse of escrow funds without an intent to deprive and with no deprivation resulting, in violation of Mass. R. Prof. C. 1.15(a) and (b) and Mass. R. Prof. C. 8.4(h).

Count Two arises from the respondent's commingling of personal, business, and client funds in his IOLTA account. The respondent admitted to such commingling and to inadequate maintenance of records for his IOLTA account. These acts and omissions violated Mass. R. Prof. C. 1.15(a).

Count Three arises from the respondent's untimely responses to Bar Counsel. August 20, 2002, Bar Counsel's Office learned that a check drawn on respondent's IOLTA account had been returned for insufficient funds. By letters dated August 22, September 27, and October 10, 2002, Bar Counsel requested from the respondent an explanation about the returned check. The respondent did not reply until October 17, 2002. On November 26, 2002, Bar Counsel sought additional information about the respondent's IOLTA account. The respondent did not respond, and Bar Counsel obtained a subpoena to compel the respondent to appear at a meeting on February 25, 2003. Although the respondent was served with the subpoena, he failed to appear at the meeting. Bar Counsel therefore requested, and the Supreme Judicial Court consequently granted on March 6, 2003, an order of immediate administrative suspension against the respondent. On March 27, 2003, respondent provided the previously requested information and was reinstated to practice law on May 1, 2003. After his reinstatement, the respondent failed to respond timely to additional requests for information from Bar Counsel.

Bar Counsel's Office argued that these acts amounted to a failure to cooperate with Bar Counsel in violation of S.J.C. Rule 4:01, § 3(1), Mass. R. Prof. C. 8.1(b), and Mass. R. Prof. C. 8.4(g) and (h). The Hearing Committee determined that, "[a]lthough the respondent did not respond as timely as we would wish," his actions did not amount to a violation of the rules. The Board of Bar Overseers, however, concluded that these acts amounted to a violation for failure to cooperate with Bar Counsel.²

There is substantial evidence in the record to support the Board's determination that the respondent failed to cooperate with Bar Counsel. The respondent failed to appear at a meeting with Bar Counsel after receiving a subpoena requiring his attendance. He provided certain information requested by Bar Counsel only after his license to practice law had been suspended. He repeatedly failed to respond in a timely fashion to Bar Counsel's requests for information. Furthermore, "the findings and recommendations of the board are entitled to great weight." *Matter of Fordham*, 423 Mass. 481, 487 (1996), cert. denied, 519 U.S. 1149 (1997). I conclude, consistent with the Board's findings and recommendations, that the respondent's acts did amount to a failure to cooperate with Bar Counsel in violation of S.J.C. Rule 4:01, § 3(1), Mass. R. Prof. C. 8.1(b), and Mass. R. Prof. C. 8.4(g) and (h).

In mitigation of Count Three, the respondent has suffered from alcoholism, he has sought treatment for it, and, since his admission into an in-patient facility in April, 2003, he has gradually returned to his normal work habits.

In aggravation of his violations, the respondent's inadequate record keeping, commingling, and misuse of his IOLTA account occurred over a period of time, and the respondent may not be aware of the present requirements of Mass. R. Prof. C. 1.15.

Discussion

The parties dispute what the appropriate sanction should be in this case. The respondent argues that the respondent's license should be suspended for two months which was the sanction recommended by the Board of Bar Overseers, while Bar Counsel argues that it should be suspended for nine months which was the sanction recommended by the Hearing Committee.³

The Board's recommendation is entitled to substantial deference. *Matter of Alter*, 389 Mass. 153, 157-58 (1983). In the Court's review of an attorney discipline matter, the Court must apply "a standard which promotes even-handed results." *Matter of Alter*, 389 Mass. 153, 156 (1983). The standard is to ensure that the sanction ordered "is not markedly disparate from what has been ordered in comparable cases." *Matter of Goldberg*, 434 Mass. 1022, 1023 (2001).

In *Matter of Daniels*, BD-2006-111 (Jan. 8, 2007), the attorney received a nine-month suspension. Like the attorney in the present case, the attorney there commingled client funds, intentionally misused client funds without intent to deprive and no actual deprivation resulting, inadequately kept his records, and failed to cooperate with Bar Counsel. The attorney in that case, however, committed significant additional offenses that the attorney in the present case did not commit. These acts included the negligent misuse of client funds with actual deprivation, engaging in knowing deception, and failing to communicate with her client. Because the attorney in that case committed significant additional offenses, the respondent here should receive a lesser sanction than the attorney there.

In *Matter of Norris*, 12 Mass. Att'y Disc. R. 377 (1996), the attorney received a six-month suspension. Like the attorney in the present case, that attorney was sanctioned for failure to cooperate with Bar Counsel and for appropriation of client funds for his own purposes with no intent to deprive and no deprivation resulting. There is no indication that the attorney in that case commingled money or kept his records inadequately. However, the attorney there committed significant additional offenses that the respondent here did not commit. More

specifically, that attorney neglected his client's case, he caused harm to his clients through his neglect, and he sought to cover up his neglect through misrepresentations to his clients. Because the attorney in that case deceived his clients and caused them harm, the respondent should receive a lesser sanction than the attorney there.⁴

In *Matter of Sumption*, 15 Mass. Att'y Disc. R. 614 (1999), the attorney received a three-month suspension. Like the attorney in the present case, he did not keep proper records, he used his client's money for his own purposes, and he engaged in the intentional abuse of client funds with no intent to deprive and no deprivation resulting. The attorney in that case improperly withdrew funds from his clients' accounts on several occasions, and, similarly, the respondent in this case commingled funds and misused his IOLTA account not merely on a single occasion but over a period of time. The Court in *Sumption*, however, mitigated the sanction because he "had scant experience in the private practice of law and the proper management of trust funds." *Matter of Sumption*, *supra*, at 615. By contrast, the respondent in this case had nearly three decades of experience as a sole practitioner. In addition, while there is no indication that the attorney in *Sumption* failed to cooperate with Bar Counsel, the respondent here did fail to cooperate, although such non-cooperation, I recognize, is mitigated to an extent in light of the respondent's struggles with alcoholism. Because of the additional mitigating factor in *Sumption* and the additional offense in this case, the respondent here deserves a greater punishment than the attorney there.

The appropriate sanction in this case is a four-month suspension of the respondent's license to practice law with reinstatement conditioned on a two-year Lawyers Concerned for Lawyers monitoring agreement and a two-year financial monitoring agreement.

FOOTNOTES:

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

² Aside from this one issue, the Board fully adopted the Hearing Committee's findings of fact and conclusions of law.

³ Both the Hearing Committee and the Board of Bar Overseers recommended that the respondent receive a two-year probationary period for financial monitoring and monitoring under Lawyers Concerned for Lawyers.

⁴ Similarly, the attorney received a six-month suspension in *Matter of Dawkins*, 412 Mass. 90 (1992), and deserved a greater sanction than the respondent here because the attorney in that case, like the attorney here, withdrew client funds for personal purposes, but, in addition, the attorney there caused harm to the client, lied to the client, and had been previously disciplined for unrelated matters. 412 Mass, at 91-96.