

IN RE: BARRY C. ABELSON

S.J.C. Order of Indefinite Suspension entered by Justice Cordy on March 26, 2008, with an effective date of May 31, 2008.¹

MEMORANDUM AND ORDER²

This matter is before the court on an Information with the Vote and Recommendation of the Board of Bar Overseers (board) filed on November 19, 2007. A special hearing officer recommended indefinite suspension as the appropriate sanction in this case, and both parties appealed to the board, Barry Abelson seeking a lesser sanction, and bar counsel seeking disbarment. The board, by a seven to one vote,² adopted the special hearing officer's findings of fact, legal conclusions, and recommendation that Abelson be indefinitely suspended. The parties continue to disagree as to the appropriate discipline to impose. After a hearing on March 11, 2008, and for reasons stated in this Memorandum of Decision, it is ORDERED that Abelson be and hereby is indefinitely suspended from the practice of law.

1. Background. Abelson was admitted to the Massachusetts bar on October 1, 1971. In the early 1980's, he developed an extensive conveyancing practice in which he was associated with another attorney, Frank Scarpaci. Scarpaci was convicted of Federal criminal offenses in 1992 and disbarred in 1993. Abelson cooperated in the investigation with respect to Scarpaci, and was found not to have been involved in his wrongdoing. Abelson continued the conveyancing practice, acting as settlement agent on behalf of lenders for residential real estate purchases and refinancings, and served as an agent for the Commonwealth Land Title Insurance Company (title insurer) to underwrite and issue title insurance policies and administer escrow funds for real estate transactions.³ His conveyancing practice essentially ended in November, 2001, when a series of overdrafts in his IOLTA account led the title insurer to terminate its relationship with him and retrieve its files. Subsequently, Abelson reconstituted his practice into criminal defense work.

a. Counts One, Two, and Three. The misconduct charged in these counts relates to an IOLTA account which Abelson began using in 1996.⁴ Between 1996 and 1999, Abelson repeatedly used this account for real estate transactions, knowing that it was not balanced. On the advice of the title insurer, Abelson eventually retained an accounting firm, but that firm was unable to reconcile his accounts because of the lack of client or transaction identifiers. Nonetheless, Abelson failed to open a new IOLTA account for future transactions; continued to use the unbalanced account; and failed to implement further procedures recommended by the title insurer.

In 2001, the account became overdrawn, and, as the special hearing officer found, Abelson deposited personal funds into that account, and continued to use it. After he notified the title insurer of the situation, it terminated its agency agreement with him. Abelson cooperated in the termination. He closed his office, and the title insurer paid \$346,210.94 in claims resulting from the shortfall in Abelson's IOLTA account.

The special hearing officer concluded that Abelson's inadequate record keeping, failure to reconcile the IOLTA account, and his transfer of personal funds into the account violated Mass. R. Prof. C. 1.15(a); and that his depositing of trust funds into an account that he knew to be imbalanced, caused clients and third parties to be deprived of funds in violation of Mass.

R. Prof. C. 1.15 (b), and 8.4 (c) and (h).⁵ The special hearing officer also found that Abelson's failure to thoroughly represent his clients, and his failure to remit funds as set forth on HUD-1 settlement statements, violated Mass. R. Prof. C. 1.1, 1.2 (a) and 1.3.⁶

The special hearing officer further found that Abelson routinely kept escrow funds in his IOLTA account and that the placement of such funds in such an IOLTA account, rather than in individual interest bearing trust accounts violated Mass. R. Prof. C. 1.15(e).⁷ The special hearing officer concluded that Abelson's knowing misuse of those funds, with actual deprivation resulting, violated Mass. R. Prof. C. 1.15 (a) and (b) , and 8.4 (c) and (h).

b. Count four. Abelson was retained to defend a title action in Land Court. He failed to notify the client of the relevant dates or court events; failed to submit a joint pre-trial memorandum; and did not appear at trial. A default judgment was entered. Abelson then appeared without his client (and without informing his client of the situation), filed an opposition to the motion for final judgment and sought a removal of the default. Judgment entered against his client. He agreed to settle the case by personally paying the plaintiff's attorney \$8,725 for fees, but failed to pay all of the monies due. Abelson eventually informed his client of the judgment against him. His client later paid the plaintiff's counsel most of the remaining balance due. The special hearing officer found that Abelson's failure to diligently represent his client, to keep his client informed, and to comply with the court request for a joint pretrial memorandum, as well as his failure to pay the fees as agreed, violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3 and 1.4.⁸

c. Count five. A former client filed a small claims action against Abelson. Abelson failed to respond, and judgment was entered against him for \$4,314.64. The former client filed an application for summary process and a summons was served on Abelson, who failed to appear. Abelson was found to be in contempt for failing to satisfy the judgment and for failing to appear. A *capias* was issued. He finally appeared, and agreed to pay \$400 a month on the judgment, but had only paid \$1,200 over a year later. The special hearing officer found that Abelson's failure to appear or comply with orders for payment violated Mass. R. Prof. C. 8.4(d)⁹ and (h) .

d. Count six. In November 2001, Abelson stopped practicing real estate law at his office. The property was sold, and he arranged to have his possessions removed. He discarded some files in a large container, and when it was full, left boxes of files stacked next to the container. Several days later, bar counsel went to the premises and observed client files left outside, strewn across the yard. The special hearing officer concluded that Abelson's failure to safeguard client files violated Mass. R. Prof. C. 1.15(a).

2. Discussion. To determine what the sanction should be, I must decide whether the board's recommendation is "markedly disparate" from the sanctions imposed in similar cases. Matter of Alter, 389 Mass. 153, 156 (1983). Bar counsel argues that the recommended indefinite suspension is too lenient a sanction; Abelson argues that it is too stringent. The presumptive sanction for the intentional misuse of client or trust funds where a lawyer intended to deprive, even temporarily, a client or third party of funds, or when the party has actually been deprived of funds, regardless of the lawyer's intent, is disbarment or indefinite suspension. Matter of Schoepfer, 426 Mass. 183, 187 (1997). The board recommended indefinite suspension, and its recommendation is entitled to substantial deference. Matter of Tobin, 417 Mass. 81, 88 (1994).

As to the nature and seriousness of his conduct, Abelson asserts that the special hearing officer erred in finding that his misuse of client funds was knowing and intentional and in failing to find that the title insurance and accounting companies were in part responsible for the problems in the IOLTA account. As regards to sanctions, Abelson asserts that the special hearing officer and the board failed to consider several factors in mitigation.

As the board explained, this case resembles Matter of Dodd, 21 Mass. Att'y Disc. R. 196 (2005), in which an attorney had actual knowledge of problems with his IOLTA account based on his failure to keep adequate records and failure to reconcile the account, but continued his practice. The court held that there was substantial evidence to support the Board's finding that the attorney acted intentionally in commingling client funds and depriving some clients of funds to which they were entitled. *Id.* Here, it is clear from the special hearing officer's findings that Abelson knew that his IOLTA account was not in balance, and continued to use it. By the time the account went into overdraft, if not before, he knew that new funds would be used to pay unrelated transactions. He placed personal funds into the account, and continued to use it. The conclusion that his misuse of funds was intentional is fully supported by the evidence.

Abelson's argument that others were partly responsible for the problems in his IOLTA account, turns on credibility judgments. The board properly gave "due deference" to the hearing officer's role as "the sole judge" of the credibility of the witnesses testifying. S.J.C. Rule 4:01, § 8(4). Further, as the board explained, an attorney remains responsible when he delegates duties to ensure that the resulting conduct complies with professional standards. See Mass. R. Prof. C. 5.3.

As to mitigation, I see no error in the board or special hearing officer's conclusions. Although Abelson cooperated with law enforcement officials and the board in the investigation against Scarpaci, he was expected to do so under S.J.C. Rule 4:01, § 3, and as an officer of the court; this does not warrant a reduction in sanction. Further, the special hearing officer found no evidence supporting Abelson's assertion that his account was just a continuation of that with which Scarpaci was involved and had corrupted. As the board explains, Abelson failed to establish a causal link between the Scarpaci incidents and this wrongdoing, which occurred years later. Abelson raises his distress and psychological condition as mitigating factors, but failed to present expert testimony or records supporting any disability, or evidence that any such condition was casually related to such condition. See Matter of Luongo, 416 Mass. 308, 311 (1993) (no causal connection between claimed mitigating factor and misconduct); Cf. Matter of Dodd, *supra* at 209.

Abelson also stresses the importance of his current work as a criminal defense attorney, serving an underprivileged community, and urges that he be permitted to continue employment in that area of practice. No matter how worthy and sincere this work appears, the court has not typically viewed this as warranting a reduction in sanction. Matter of Finn, 433 Mass. 418, 425 (2001) (legal service to under-served community not appropriate mitigating factor). Although I might be persuaded in a closer case that the value of the services Abelson has provided and would continue to provide outweighed the importance of a modest sanction, the conduct at issue here represents too serious a breach of the rules of professional responsibility for such an offset to be properly considered.

Similarly, Abelson emphasizes his community service activities, but such efforts, while commendable, are not ordinarily considered special mitigating factors warranting a sanction reduction, Matter of Kennedy, 428 Mass. 156, 158-159 (1998) (community service, favorable reputation, and pro bono representation, although commendable, do not alone offset the consequences of serious unethical conduct), and, in any event, would likewise not offset the underlying misconduct in this case.

Bar counsel argues that the imposition of indefinite suspension, as opposed to disbarment, was disparate, and that, in choosing between the two, a significant consideration is whether restitution has been made. Matter of Bryan, 411 Mass. 288, 291 (1991) ("absence of restitution is a factor in choosing between disbarment and indefinite suspension"). Bar counsel argues that because full restitution has not been made, and because, to the extent restitution was paid, it came after the filing of the petition, the sanction should be disbarment.¹⁰ Counsel also contends that Abelson's additional wrongdoings, established in counts four through six, weigh in favor of disbarment.

The board deemed bar counsel's view of mitigation "overly narrow." The board found that this case presents several mitigating factors. It concluded that Abelson's misconduct arose from his negligent record keeping, rather than from personal greed; and at no time did he use client funds for his own purposes, but instead used them to pay obligations to other clients and third parties. See Matter of Bille, 21 Mass. Att'y Disc. R. 54 (2005); Matter of Franchitto, 448 Mass 1007 (2007). The board also emphasized that Abelson did not conceal his actions, and cooperated with the title insurer when it decided to terminate its agency and close his account. Lastly, the board found that Abelson made efforts at restitution and appeared to be unable to repay more due to his financial situation.

I find the board's recommendation to be reasonable. The presumptive sanction for the intentional misuse of funds is either indefinite suspension or disbarment. The sanction of indefinite suspension does not represent a form of downward departure from an otherwise presumed sanction. Here, although Abelson has not made full restitution, he has made efforts at restitution, and appears to be financially unable to do more. Compare Matter of Shea, 14 Mass. Att'y Disc. R. 708, 724-725 (1998) (attorney claimed could not afford restitution but took out loan to replace windows on his home). Moreover, although he did commit other unethical acts, which could counsel towards disbarment, Matter of Luongo, supra at 311 (consideration of cumulative effect of violations proper), there are mitigating factors, identified by the board, that weigh in favor of indefinite suspension. Finally, the board's recommendation is entitled to substantial deference. Matter of Tobin, supra at 88, particularly where it has recommended one of the alternative presumptive sanctions.

I am satisfied that the findings of the special hearing officer, adopted by the Board, were supported by substantial evidence, Matter of Segal, 430 Mass. 359, 364 (1999), and that there was no error in their legal conclusions. I am also satisfied that indefinite suspension is not markedly disparate from judgments in comparable cases. Matter of Alter, supra at 156.

It is therefore ORDERED AND ADJUDGED that respondent be, and he 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 The one dissenter voted for disbarment.

³ Commonwealth Land Title Insurance Company issued reliance letters to lenders that the company would stand behind Barry C. Abelson's administration of escrow funds.

⁴ Abelson argues that the account was merely the continuation of an account over which Scarpaci had had control. The special hearing officer found otherwise.

⁵ Mass. R. Prof. R. 1.15 (a), as appearing in 426 Mass. 1301, 1363 (1997), effective 1/1/98 through 6/30/04, provides: "a lawyer shall hold property of clients or third persons that is in a lawyers possession in connection with a representation separate from the lawyers own property. Funds shall be kept in a separate account maintained in the State where the lawyers office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of the receipt, maintenance, and disposition of such account funds and other property shall be kept by the lawyer from the time of receipt to the time of final distribution and shall be preserved for a period of 6 years after termination of the representation."

Mass. R. Prof. C. 1.15(b) as appearing in 426 Mass. 1301, 1363 (1997), effective 1/1/98 through 6/30/04, provides: "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client

or third person is entitled to receive and upon request by the client or third person shall promptly render a full accounting regarding such property."

Rule 8.4 deems it professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (h) engage in any other conduct that adversely reflects on his or her fitness to practice law.

⁶ Rule 1.1 of professional conduct provides that: "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 1.2 (a) states: "a lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these rules. . . ." Rule 1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client. A lawyer should represent the client zealously within the bounds of the law."

⁷ Mass. R. Prof. R. 1.15 (e), as appearing in 426 Mass. 1301, 1363 (1997), effective 1/1/98 through 6/30/04, provides: "each lawyer who has a law office in this Commonwealth and who holds trust funds shall deposit such funds, as appropriate, in one of two types of interest-bearing accounts, either a (i) pooled account ('IOLTA account') for all trust funds which in the judgment of the lawyer are nominal in amount, or are to be held for a short period of time, or (ii) for all other trust funds, an individual account with the interest payable as directed by the client. . . ."

⁸ Rule 1.4 of professional conduct provides that (a) a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; and (b) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

⁹ Rule 8.4 (d) deems in professional misconduct to engage in conduct that is prejudicial to the administration of justice.

¹⁰ The special hearing officer recommended indefinite suspension over disbarment based at least in part on his finding that Abelson made continuous efforts at restitution.

Please direct all questions to webmaster@massbbo.org.

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