NO. BD-2008-011

IN RE: DAVID J. HOPWOOD

S.J.C. Order of Term Suspension entered by Justice Ireland on March 7, 2008, with an effective date of April 7, 2008.[1]

BOARD MEMORANDUM

The parties cross-appeal from the report of a special hearing officer who found that the respondent, David J. Hopwood, converted an unearned retainer, failed to turn over files and the unearned portion of the retainer on discharge, engaged in deceptive conduct, and failed to cooperate with bar counsel's investigation. The hearing officer recommended that the respondent be suspended for a year and a day and that reinstatement be conditioned on restitution. The respondent challenges the hearing officer's findings and conclusions. Both parties object to the recommended sanction. Following oral argument before the full board and upon consideration, we adopt the hearing officer's findings of fact and conclusions of law for the reasons set forth below. We modify the proposed sanction and recommend instead that the respondent be suspended for one year.

Findings of Fact

During 2003 the respondent represented Avalon Painting Company in various matters, including collection of receivables. That December, the Danvers Savings Bank declared two Avalon loans in default. While Avalon was out of business by the end of 2003, it still had about $390,000 in receivables securing the Danvers loans. Avalon's principal, Andre Silva, referred one of Danvers' vice-presidents, Alan Byrne, to the respondent to collect the receivables.

The respondent agreed with Byrne to collect Avalon's receivables to pay the two loans, and to share with Byrne all information concerning the accounts being collected. On December 30, 2003, the respondent, Silva, and Byrne executed a fee agreement. Danvers agreed to pay the respondent a retainer of $6,500 and an hourly rate of $185, the retainer to be earned as fees and costs were incurred. In return, the respondent agreed to "represent Danvers Savings Bank" in the "collection of accounts receivable of Avalon . . . for the benefit of two (2) outstanding loan obligations to Danvers . . . ." The agreement states that the parties had discussed the possibility of conflicts of interest as between Avalon and Danvers and that "[i]f a conflict arises in the future the parties agree that [the respondent] will withdraw from representation of [Danvers] and or Avalon [sic]."

Danvers issued a $6,500 check payable to the respondent and bearing the notation "RETAINER". The check was accompanied by an IRS form 1099-MISC. The hearing officer found that the respondent knowingly drew against the retainer far in excess of his earned fees. By late January 2004, the respondent had spent $4,525 of the Danvers retainer, while earning no more than $2,923. By early February, the respondent had spent it all while having earned less than half the total amount of the retainer.

For two or three months after executing the fee agreement, Byrne unsuccessfully tried to communicate with the respondent. Meanwhile, the respondent collected only a single receivable in the approximate amount of $1,500. Byrne decided to terminate the respondent. Sometime before March 31, 2004, Byrne told the respondent that he wanted another attorney, Astrid Daly, to handle the collections. The respondent agreed to send Daly the files, and he told her they were coming. When they did not arrive, Daly asked Byrne to write to the

respondent.

On March 31, 2004, Byrne sent the respondent a fax instructing him to forward the files, his research, and an accounting of fees billed against the retainer. The respondent made no substantial efforts to collect Avalon's receivables after that day.

Sometime in April 2004, the respondent told Daly that he would send the files immediately. On April 27, 2004, however, he asked Byrne for a meeting with Byrne and Daly. Byrne again instructed the respondent to forward the files to Daly. On May 7, 2004, Byrne declined the respondent's further request for a meeting. Byrne demanded the files by May 10, 2004.

On May 14, 2004, the respondent sent Byrne and Daly a fax stating that "I will be mailing the cases to Daly Monday, May 17, 2004." He did not send the files. Instead, on May 24, 2004, the respondent sent Byrne a copy of a letter addressed, but not actually sent, to Daly, in which he falsely stated that he was simultaneously sending the requested files. The letter suggested that Daly meet with him to discuss them.

Byrne left several voice messages for the respondent and on May 28, 2004, sent him a letter demanding that he refund Danvers' retainer. In early June, Daly left telephone messages that the respondent did not return. On June 8, 2004, Daly sent another fax demanding the files and a refund. The respondent did not reply.

Byrne complained to bar counsel. On June 15, 2004, bar counsel sent a copy of Byrne's complaint to the respondent and requested a reply. On June 24, 2004, the respondent promised to reply in writing. When he had not done so by July 19, 2004, bar counsel notified him that continued failure could result in a subpoena and his administrative suspension.

On July 20, 2004, the respondent received a letter, drafted by Byrne and signed by Silva, that directed him to deliver the Avalon files immediately. The respondent wrote to Silva the same day and accused him of obstructing the turnover of the files. He again requested a meeting, this time to include Silva, Byrne, Daly, and himself.

At some point near the end of July of 2004, the respondent turned over Avalon's files to Silva, and Silva turned them over to Byrne. The respondent then sent Danvers his last bill, which indicated that he had earned fees in the cumulative amount of $6,142 and was holding a balance of $358. He did not refund the balance of the retainer.

Bar counsel served the respondent with a subpoena duces tecum that ordered him to give testimony and produce documents on August 12, 2004. The respondent failed to appear. He failed to keep the promise he made that day to provide the requested information to bar counsel. On September 17, 2004, the Supreme Judicial Court administratively suspended him for his non-cooperation. The hearing officer found that the respondent had had ample time to cooperate before his suspension.

The respondent sent bar counsel some of the requested documents, and with bar counsel's assent the Court reinstated him on October 20, 2004.

On July 25, 2005, bar counsel requested that the respondent appear for a sworn recorded statement and bring with him all of his files concerning Danvers and Avalon. When the respondent appeared on August 23, 2005, he gave a sworn statement but refused to show bar counsel the documents he had brought. Bar counsel served a letter demanding the documents. The respondent did not produce them. Bar counsel filed the petition for discipline on October 5, 2005.

The respondent defaulted. He then obtained leave to answer late and eventually filed an answer on January 3, 2006.

The disciplinary hearing began on July 24, 2006. The respondent failed to appear and his counsel participated under reservation. As of that day, the respondent still owed Danvers the unearned portion of the retainer. The hearing officer indicated that a motion to reopen filed by August 14, 2006, would receive favorable consideration, but the respondent did not file one.

The Supreme Judicial Court administratively suspended the respondent for failing to appear at the hearing. Around September 22, 2006, the respondent sent the hearing officer copies of materials he had submitted to the Court in seeking reinstatement and attempting to explain his failure to appear at the hearing or to file a motion to reopen. The hearing officer accepted these materials, over bar counsel's opposition. Together, these filings disclosed that the respondent did not appear because he had been arrested on two default warrants the night before the hearing was to begin. The hearing officer also accepted the respondent's excuse that a flood in his office around the August 14 deadline prevented him from filing a timely motion to reopen thereafter, but the hearing officer questioned why the motion had not been filed before then.

In aggravation, the hearing officer found that respondent had not cooperated in the disciplinary process, that he had substantial experience in the practice of law at the time of his violations, and that he had committed multiple disciplinary violations. Further, he had continued to commit violations during bar counsel's investigation.

The hearing officer rejected the respondent's arguments that Avalon's and Silva's exercise of control over the Avalon collection files excused or mitigated his conduct. Rejecting also bar counsel's argument that the respondent's conduct was aggravated by self-interest, the hearing officer found that the respondent delayed turning over the Avalon files because he thought he had conflicting obligations to Danvers and to Silva, who was personally at risk under Avalon's defaulted loans.

Conclusions of Law

The hearing officer found that the respondent had violated Mass. R. Prof. C. 1.15(b), as in effect before July 1, 2004, and Mass. R. Prof. C. 1.15(c), as in effect on and after July 1, 2004, by failing to refund the unearned retainer and to render an accounting on demand; that he had violated Mass. R. Prof. C. 8.4(c) and 8.4(h) by intentionally misusing the retainer before it was earned; that he had violated Mass. R. Prof. C. 8.4(c) by sending letters falsely indicating that he was sending the Avalon files to Daly; that he had violated Mass. R. Prof. C. 1.16(d) by failing to hand over his client files and to refund the unearned portion of the retainer after discharge; and that he had violated Mass. R. Prof. C. 8.1(b), 8.4(d), and 8.4(g) by intentionally failing without good cause to cooperate with bar counsel's investigation.

The Respondent's Appeal

In addition to his objections to the proposed sanction, the respondent's appeal rests principally on two arguments: (1) that the hearing officer misconstrued the nature of the retainer, because it ceased being client funds on payment to him; and (2) that the hearing officer interpreted his obligations towards Danvers too expansively in view of his prior and concurrent representation of Avalon and Silva, which required him not to deliver Avalon's files because they might have contained damaging information. Neither argument has merit.

The fee agreement provided that the retainer was to be drawn as fees were earned and expenses were incurred. The retainer did not become the respondent's property immediately on payment; it was an advance of client funds he was obligated to hold separately until he earned them. See Matter of Garabedian, 415 Mass. 77, 80-81, 84, 9 Mass. Att'y Disc. R. 121, 124-125, 128 (1993). Cf. Mass. R. Prof. C. 1.15(c), as in effect before July 1, 2004 (property in which an attorney and another have mixed interests shall be held separately until severance and accounting). The hearing officer did not err in concluding that the respondent

violated Rule 8.4(c) when he spent the unearned retainer. See Matter of Shea, 22 Mass. Att'y Disc. R. 684, 685-686 (2006). Nor did those funds lose their character as client funds merely because Danvers sent the respondent a Form 1099 with the retainer.[2]

The respondent fares no better in arguing that his failure to turn over the Avalon files was justified by his conflicting obligations to Danvers and Avalon. The hearing officer credited Byrne's testimony that before signing the fee agreement the respondent orally agreed to make full disclosure to Danvers. The respondent has articulated no basis for rejecting the hearing officer's credibility determination on the point. See Matter of Barrett, 447 Mass. 453, 460, 22 Mass. Att'y Disc. R. 58, 67 (2006), quoting Matter of Hachey, 11 Mass. Att'y Disc. R. 102, 103 (1995) (hearing officer's credibility findings may not be rejected "unless it can be said with certainty" that a particular finding has no support in the record or is "wholly inconsistent with another . . . finding"). Further, Danvers could not make informed decisions about the collection matters unless the respondent shared information in Avalon's files, which was needed to evaluate the receivables. The fee agreement did not permit the respondent to retain files in order to protect Avalon and Silva at Danvers' expense, as the respondent argues. It merely required him to withdraw when faced with a conflict; it did not relieve him of his other obligations to Danvers when he did so.

The Appropriate Sanction

The respondent's misconduct warrants suspension. His violations were intentional, and they were aggravated by their multiplicity and by his substantial experience. See Matter of Luongo, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 203 (1993); Matter of Saab, 406 Mass. 315, 326, 6 Mass. Att'y Disc. R. 278, 289-90 (1990); American Bar Association Standards for Imposing Lawyer Discipline, § 9.22(c), (i). The respondent compounded his misconduct by continuing it after bar counsel commenced an investigation, by failing to cooperate with the investigation, and by failing to appear at the disciplinary hearing. See Matter of Kerlinsky, 428 Mass. 656, 666, 15 Mass. Att'y Disc. R. 304, 315 (1999); Matter of Cronin, 22 Mass. Att'y Disc. R. 161 (2006) (failure to cooperate an aggravating factor where lawyer was administratively suspended); ABA Standards, supra, § 9.22(e). Cf. Matter of Harrington, 18 Mass. Att'y Disc. R. 294 (2002) (suspension for failing to return file, to return client's calls, and to cooperate with bar counsel, and for default); Matter of Cronin, 22 Mass. Att'y Disc. R. 161 (2006) (suspension for failure to turn over files, for failure to cooperate with bar counsel, for neglect of two matters, and for default); ABA Standards, supra, §§ 4.12, 4.62, 7.2 (suspension generally appropriate for knowing misuse of client property, for knowing deception of a client, or for knowing conduct that violates a duty owed as a professional, where injury or potential injury results).

We do not believe, as bar counsel suggests, that the respondent's intentional misuse of the retainer presumptively warrants disbarment or indefinite suspension under Matter of the Discipline of an Attorney (and two companion cases) (Three Attorneys), 392 Mass. 827, 836-837, 4 Mass. Att'y Disc. R. 155, 166-167 (1984), and its progeny. Neither the Court nor the board has held or even opined that misuse of a retainer is to be treated with the same severity as the classic conversion of client funds addressed in Three Attorneys and clarified in Matter of Schoepfer, 426 Mass. 183, 187-188, 13 Mass. Att'y Disc. R. 679, 685-686 (1997). To the contrary, in Matter of Garabedian, 415 Mass. 77, 9 Mass. Att'y Disc. R. 121 (1993), the Court did not even invoke that line of cases in imposing a three-month suspension for, among other misconduct, the "brief conversion" of a retainer that clearly constituted client funds. See also Matter of Owens, 19 Mass. Att'y Disc. R. 351 (2003) (two-year suspension for misusing an unearned retainer, making misrepresentations to courts, deceptively commingling client funds, refusing to return client funds; violations concerned multiple clients); Matter of Barach, 22 Mass. Att'y Disc. R. 36 (2006), Appeal Panel Report at 12-13 (adopted by full board); Matter of Shea, 14 Mass. Att'y Disc. R. 708, 724 (1998), citing In re Lochow, 469 N.W.2d 91, 97 (Minn. 1991) (distinguishing conversion cases and imposing one-year suspension as norm for misuse of retainers). Until such time as the Court directs otherwise, we will continue to recommend suspension for a term of appropriate length for similar misconduct involving

retainers.

In determining how long a suspension is appropriate here, we note that the respondent's misconduct was not as extensive as that in cases where the misuse of retainers brought suspensions longer than a year. Contrast Matter of Barach, supra (two-year suspension for failing to return an unearned retainer, charging clearly excessive fees to a vulnerable client, making misrepresentations to bar counsel, falsifying time records, and violating record-keeping rules); Matter of Owens, supra (two-year suspension for misusing an unearned retainer, making misrepresentations to courts, deceptively commingling client funds, refusing to return client funds; violations concerned multiple clients); Matter of Shea, 14 Mass. Att'y Disc. R. 708, 725 (1998) (three-year suspension for multiple counts of negligent misuse, including misuse of a retainer, misrepresentations, failure to cooperate in investigation, neglect, failure of zealous representation, and excessive fee).

The totality of the circumstances at issue here resembles more closely those present in cases where the misuse of retainers or the failure to return them on discharge was sanctioned by shorter terms of suspension. See Matter of Garabedian, supra (three-month suspension for brief conversion of retainer, misrepresentations, and neglect of three matters); Matter of Farnas, 20 Mass. Att'y Disc. R. 137 (2004) (year-and-a-day suspension for failure to return unearned retainer, neglect, commingling, and failure to cooperate); Matter of Brown, 17 Mass. Att'y Disc. R. 93 (2001) (year-and-a-day suspension for failure to account for or return unearned retainer, failure to turn over file, neglect, failure to communicate with client, failure to cooperate, and default); Matter of Morgan, 17 Mass. Att'y Disc. R. 437 (2001) (year-and-a-day suspension for multiple instances of failure to return unearned retainers, failure to turn over files, neglect, failure to communicate with client, and failure to cooperate). Consequently, we conclude that a one-year suspension is appropriate provided the respondent makes restitution as the hearing officer recommended. We do not impose the additional day recommended by the hearing officer because we do not believe that the respondent's misconduct is so grievous that he needs to demonstrate his fitness to resume the practice of law. The requirement that he take and pass the Multi-State Professional Responsibility Examination will help assure that he is cognizant of his ethical obligations in this respect. See S.J.C. Rule 4:01, § 18(1)(b)(ii).

Conclusion

For all of the foregoing reasons, we adopt and incorporate by reference the special hearing officer's findings of fact and conclusions of law, but modify her proposed disposition. An Information shall be filed with the Supreme Judicial Court recommending that the respondent, David J. Hopwood, be suspended from the practice of law for a year, with reinstatement conditioned on his making restitution to the Danvers Savings Bank in the amount of $358.

FOOTNOTES:

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

[2] The respondent's bills to Danvers (Ex. 19, 20, and 30) and the large amounts he withdrew belie his alternative claim that his improper withdrawals were taken to pay litigation costs.