

IN RE: GAIL M. THALHEIMER.

NO. BD-2008-016

S.J.C. Order of Indefinite Suspension entered by Justice Cordy on July 23, 2008.¹

MEMORANDUM OF DECISION

Gail M. Thalheimer, the respondent attorney, is before this court on an Information filed by the Board of Bar Overseers (board), which seeks her indefinite suspension from the practice of law. The board recommends this sanction for Thalheimer's intentional misappropriation and deprivation of client funds, intentional commingling and misuse of her IOLTA client funds, failure to comply with account record keeping requirements, and simultaneous representation of two clients with conflicting interests. The matter came before me for a hearing on May 28, 2008.

I have carefully reviewed the respondent's and the board's memoranda, the record of proceedings before the hearing committee (committee) and the board, and the respondent's affidavits submitted after the hearing. I agree with the board that there was sufficient testimonial and documentary evidence to establish that Thalheimer engaged in the misconduct charged, and that much of it was intentional. I also agree with the board that Thalheimer's lack of candor before the committee and continued violation of the rules while under investigation by Bar Counsel are significant and were appropriately considered as aggravating circumstances. Consequently, I order the respondent suspended from all forms of the practice of law indefinitely,

1. Background. The following facts were found by the committee. Gail M. Thalheimer was admitted to the Massachusetts bar on June 19, 1985. At all relevant times, Thalheimer practiced out of her office in Brockton, Massachusetts concentrating on representation of personal injury plaintiffs. From 2001 until April 2003, she maintained an IOLTA account at Citizens Bank for handling client funds. Thalheimer also had a separate office checking account at the same bank.

On June 2, 2005, Bar Counsel filed a petition for discipline against the respondent in four counts. Count one charged Thalheimer with settling a case without the client's authority, forgery, conversion, and deprivation of client funds; count two alleged that respondent intentionally commingled client and personal funds and misappropriated clients'

funds; count three involved her failure to comply with record-keeping requirements for a client trust account; and count four charged that she simultaneously represented two clients with conflicting interests.

A. Count One. The committee found that Florence Odufuwa retained the respondent on February 7, 2001 to represent her in connection with an automobile accident. On December 19, 2001, Thalheimer filed a complaint for Odufuwa, but neglected to answer the defendants interrogatories. Shortly before Odufuwa's case would have been dismissed for failure to answer the interrogatories, Thalheimer settled with the defendant. According to Odufuwa's testimony, credited by the committee, the respondent did not inform her of the offer nor receive authorization to accept it. The committee also found that without Odufuwa's consent, Thalheimer forged Odufuwa's signature on the settlement release, deposited the settlement check in her IOLTA account, and disbursed checks payable to herself and Odufuwa's health care providers.² Thalheimer wrote a check payable to Odufuwa for the balance due to her but Odufuwa was never notified and the check was never cashed.³ Comparing the balance due to Odufuwa and the negative balance in respondent's IOLTA account, the committee determined that respondent had intentionally misappropriated all of Odufuwa's money by December 23, 2002 and deprived her of it for more than two and a half years. Based on its findings, the committee held that Thalheimer intentionally misappropriated client funds with resulting deprivations along with other misconduct.⁴

B. Count Two. The committee found that between January 2002 and April 2003, respondent intentionally misappropriated IOLTA funds to pay her personal debt and, on at least seven occasions, to cover earlier client obligations. These withdrawals caused constant shortages in the IOLTA account. Throughout this period, Thalheimer attempted to alleviate the problem by commingling her own funds with client funds. The committee held that this conduct, the intentional misappropriation of client funds and commingling of funds, was in violation of the Massachusetts Rules of Professional Conduct.⁵

C. Count Three. In addition to her IOLTA account at Citizen's Bank, Thalheimer also maintained an IOLTA account at Sovereign Bank. Bar Counsel's investigation revealed that respondent's records for the account were incomplete, included unattributed items, and were missing others. Thalheimer admitted that she failed to perform the requisite three-way reconciliations or retain the pertinent reports for nearly a year. Consequently, the committee

found respondent to have violated multiple sections of the accounting and recording rules.⁶

D. Count Four. The committee addressed last the respondent's simultaneous representation of two clients with directly adverse interests. In 1999, James Dumeus and Sandy Chikel were injured in an automobile accident; Chikel was the driver and Dumeus was a passenger in Chikel's car. Despite believing Chikel to be principally responsible for Dumeus' injuries, respondent agreed to represent both clients. In 2001, Thalheimer ceased representing Chikel and, without Chikel's informed consent, initiated a suit on behalf of Dumeus against Chikel. Subsequently, recognizing the successive conflict, Chikel's defense attorney demanded that respondent withdraw. Thalheimer ignored the request and continued to try and settle with Chikel's insurance company. Ultimately, the court disqualified the respondent. However, she did not inform Dumeus that he needed new counsel and failed to withdraw until Bar Counsel advised Dumeus that respondent had been disqualified. Based on these facts, the committee found that Thalheimer's representation of both Chikel and Dumeus violated the rules governing concurrent and successive conflicts of interest.⁷

2. Discussion. Respondent maintains that there was no evidentiary basis for the committee to conclude that she intentionally misappropriated and misused client funds, and at most, her conduct was negligent. The evidentiary record disagrees. Beyond the disbelief of respondent's testimony, which was clearly within the committee's purview under S.J.C, Rule 4:01, § 8(4), there was the respondent's admissions and records to support the committee's finding that her conduct with respect to count two was intentional.

Respondent testified that she had standard procedures in place for the disbursement of settlement funds to clients.⁸ Contrary to those procedures, the respondent made a series of withdrawals from and deposits to the IOLTA account without identifying the client or subject matter on the checks and check stubs.⁹ Respondent's departure from this routine coincided with her need to pay off a personal gambling debt which had left her office account overdrawn. As noted by the committee, five improper withdrawals from her IOLTA account occurred at times when there was a shortfall in her office account and her overdraft protection was exhausted. I agree that Thalheimer's deviation from her standard practices coupled with her need to repay personal debts support the committee's finding that respondent was well aware of the shortfall in the account and that the conduct was intentional.

Thalheimer's records also support the committee's holding. Bar Counsel compiled several charts which were introduced as exhibits at the hearing comparing the amount of money owed to clients with the amount actually in the IOLTA account.¹⁰ Respondent claims that the shortfalls and surpluses in the account can be explained by her habit of drawing against undeclared deposits,¹¹ the evidence however, suggests that respondent was attempting to replace the client funds she had used to pay her debts and to cover earlier client obligations. In spite of her standard practice, Thalheimer made several deposits to the IOLTA account without drawing her own fee. The committee properly concluded that the repeated deposit and retention of her personal funds to cover shortfalls in the IOLTA account demonstrated that respondent was aware of the deficiencies and intentionally misappropriated client funds. Contrary to Thalheimer's assertions, there was sufficient evidence to substantiate the committee's findings that the respondent's conduct in regards to count two was not merely negligent, but intentional.

In addition to its findings on the respondent's state of mind, the committee concluded that her lack of candor to be an aggravating factor. The committee found that during the hearing Thalheimer gave contradictory and intentionally false testimony concerning her interactions with Odufuwa.¹² The finding was supported by respondent's inconsistent statements, Bar Counsel's ability to easily contact Odufuwa, the fact that Odufuwa still used the same phone number that respondent had written in her file, and the lack of evidence that respondent mailed a check to Odufuwa.¹³ Notwithstanding the aggravating circumstances and other misconduct, the committee recommended that respondent be indefinitely suspended, rather than disbarred, in light of the fact that she made restitution of the funds misappropriated from Odufuwa. See Matter of Bryan, 411 Mass. 288, 292 (1992) (mitigation of sanction for restitution is an important incentive).

I now turn to the appropriate level of discipline. The presumptive sanction in cases of intentional misuse and deprivation of client funds, even if temporary, is indefinite suspension or disbarment. See Matter of Schoepfer, 426 Mass. 183, 187-188 (1997). See also Matter of Johnson, 444 Mass. 1002, 1003-1004 (2005). Despite the existence of aggravating circumstances, the committee consciously chose not to raise the sanction to disbarment and the board concurred. This choice was grounded in the belief that it is important to encourage lawyers to make restitution of misappropriated funds. See Matter of Bryan, 411 Mass. 288,

292 (1992). I defer to the board's recommendation in these circumstances.

It is therefore ORDERED AND ADJUDGED that respondent be, and she 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 Respondent stated under oath that Odufuwa came to her office without prior notice on three occasions when none of her employees were present to discuss the settlement, sign the settlement release, and authorize the endorsement of the settlement check. The committee found these assertions to be "intentionally false."

³ Respondent claimed that she was unable to contact Odufuwa because she moved several times and used multiple names. Despite this, in 2005, Bar Counsel successfully found Odufuwa using the same telephone number Thalheimer had written in Odufuwa's file.

⁴ The committee found Thalheimer violated Mass. R. Prof. C. 1.15(a), (b), (d), and (e) as then in effect, 1.2(a), 1.4, 8.1(a), and 8.4(c), (d) and (h).

⁵ Respondent's conduct specifically violated Mass. R. Prof. C. 1.15(a), (b), (d), and (e), as then in effect, and 8.4(c), (d) and (h).

⁶ Specifically, Thalheimer violated Mass. R. Prof. C. 1.15(f) and 1.15(f)(1)(C)-(E) as in effect since July 1, 2004.

⁷ The committee found that respondent violated Mass. R. Prof. C. 1.4(a), 1.7(a) and (b), 1.9(a), and 1.16(a) and (d).

⁸ Among other things, respondent testified that when distributing client funds her employees would note the client matter on the checks.

⁹ Thalheimer continued to withdraw funds unsupported by any corresponding deposits which eventually totaled over \$42,000.

¹⁰ See specifically Exhibits 77 and 78.

¹¹ Respondent testified and submitted affidavits after the hearing asserting that because of her history and financial records Citizen's Bank allowed her to draw funds against checks at the time they were deposited. The fact that the committee chose to discredit Thalheimer's testimony on this point is insignificant to findings as to her state of mind when she misused client funds.

¹² See e.g. Note 1 supra.

¹³ Thalheimer's employee testified that it was respondent's standard practice when mailing a check to a client to include a cover letter and settlement sheet itemizing disbursements. Odufuwa's file did not contain a copy of such a cover letter.