NO. BD-2008-024

IN RE: JAMES F. SCOLA

S.J.C. Order of Public Reprimand entered by Justice Cowin on September 2, 2010.[1]

MEMORANDUM OF DECISION AND ORDER

This matter came before me on an information and record of proceedings, together with a vote of the Board of Bar Overseers (board). Pursuant to S.J.C. Rule 4:01, § 12 (4), of the rules of professional conduct, bar counsel filed a petition for discipline against the respondent that was brought before a hearing committee of the board, see S.J.C. Rule 4:01, § 8 (3), second par, as appearing in 435 Mass 1302 (2002). Bar counsel asserted that the respondent violated Mass. R. Prof. C 1.15 (f)(l)(B), Mass. R. Prof. C. 1.15(f)(1)(C), Mass. R. Prof. C. 1.15.(f)(1)(D), and Mass. R. Prof. C. l.15(f)(1)(E), by failing to perform a three-way reconciliation of his IOLTA account every sixty days as required by the rule, failing to maintain proper records of transactions in the account, and issuing checks drawn on the account that created a negative balance; Mass. R. Prof. C. 1.1, Mass. R. Prof. C. 1.2a, and Mass. R. Prof. C. 1.3 by performing a real estate closing but failing to confirm that he had received funds for the closing; and Mass. R. Prof . C.1.4 and Mass. R. Prof. C. 8.4(c) by intentionally misusing client funds to pay for closings of other clients, issuing checks that he knew would be dishonored, failing to inform lenders that he knew his IOLTA account was in deficit, and instructing lenders nonetheless to deposit funds into that account. The hearing committee concluded that the respondent had violated the rules of professional conduct as alleged,[2] and the board adopted the hearing committee's findings. The respondent does not dispute that he engaged in the misconduct found by the board.

At issue is the appropriate sanction to be imposed for the respondent's failure to reconcile properly his IOLTA account, resulting in the misuse of client funds to pay the closing expenses of other clients; failure to stop using and to close his IOLTA account after being notified by bar counsel that the account should be closed; and, ultimately, temporary deprivation to two clients. The board recommended a suspension from the practice of law for one year. Bar counsel seeks an indefinite suspension. The respondent contends that a public reprimand should be imposed. The parties submitted memoranda and supporting documentation and argued before me at a hearing on April 26, 2010. Post-hearing, each side submitted additional memoranda on the appropriate sanction. For the reasons discussed below, I impose a public reprimand.

1. Background and procedural history. We summarize the hearing committee's findings, which were adopted by the board and are supported by the evidence. We supplement these findings by uncontested evidence in the record. The hearing committee's findings were adopted by the board and are supported by the evidence. The respondent was admitted to the practice of law in 1985. He began concentrating on a real estate practice in approximately 2000. In that practice, he used an IOLTA account that had been opened in 1999 by the firm of Borner, Scola, Baruti & Vancini (the "old" IOLTA account). The respondent practiced with that firm from 1999 through 2002, left, and returned in 2005. The firm had five offices in three States, and did most of its accounting from Connecticut. In 2004, the respondent moved the account to Commerce Bank. Several years later, the respondent began a solo practice.

The issue of underfunding in the respondent's old IOLTA began when the account was first opened at Commerce Bank in 2004, and a transaction for $174,382.28 was not funded. Thus,

from the inception of the account, the respondent was, by definition, engaging in misuse of clients' funds. Misuse, in this instance, was the payment of charges associated with one client's real estate closing before the funds were received for that closing, because the "IOLTA account in total had sufficient money to pay those costs based on receipts from other clients for their real estate closings. As the hearing committee found, during this time frame, the respondent was not aware that he was using one client's funds to pay the expenses for another's closing.[3]

At the time of the initial underfunding, the respondent was engaged in a real estate transaction business in which he performed from thirty to seventy-five closings per month. The respondent used a software package for real estate conveyancing ("SoftPro") that, in addition to other real estate functions, manages the financial aspects of each client's transaction. SoftPro generates the required Federal forms, including the HUD-1 settlement form showing all amounts due from or payable to any party to the transaction, or any third party, at closing. The respondent testified that he believed the software package would not allow him to generate checks for closing payments if there were insufficient funds available.

Bar counsel initially asked the respondent to examine his old IOLTA account when a check written on that account was returned for insufficient funds in April, 2006. The respondent investigated the issue and believed that the bounced check resulted from a deficit due to a $7,000 overpayment to a specific seller and $25,000 paid for another closing where the deposit had been misdirected to his firm's IOLTA account in Rhode Island. The respondent notified bar counsel that he had hired an independent accountant to manage his books and to reconcile his IOLTA account and his client account. He later determined that the $25,000 shortfall was the result of overpayments to two other sellers, commenced efforts to collect the amounts, and informed bar counsel of these actions.

In February, 2007, a second check written from the old IOLTA account was returned for insufficient funds. The respondent investigated and determined that the lack of sufficient funds resulted from the failure of a lender to wire payment for a particular refinance closing; that lender went out of business on the day of the closing and never paid the funds.[4] The respondent learned of the lender's failure to make payment and attempted to resolve the problem in a timely manner, but has never collected the money from the lender. The seller involved refused to rescind the transaction.

Although the respondent's investigations after the two instances of insufficient funds uncovered actual problems with the old IOLTA account, he believed erroneously that these investigations had reached the root of the issue. This was not the case. As stated, the true source of the problem arose over four years prior to the first returned check, in 2004 when a transaction was not funded; it was discovered only after a lengthy and costly forensic audit.

The respondent became aware of the larger issues with his old IOLTA account as a consequence of bar counsel's investigation. During this investigation, bar counsel sent a letter to the respondent authorizing him to continue to use his IOLTA account pending the results of the investigation. However, as a result of the forensic audit, bar counsel determined that the old IOLTA account could not be reconciled and had to be closed. On January 24, 2008, bar counsel sent a letter to the respondent instructing him to close the account, and also advised the respondent of the contents of the letter via a telephone call. The respondent continued to use the old IOLTA account for new closings until March 14, 2008, at which point he opened and began using another IOLTA account at the same bank.

The hearing committee found that it was reasonable for the respondent to continue to use the old IOLTA account during the investigation by bar counsel, and that bar counsel had told him to continue doing so. The hearing committee stated that, at whatever time the respondent closed the old IOLTA account, one or more of the respondent's clients would face deprivation; the committee rejected bar counsel's argument that the respondent kept the account open to obtain some additional benefit for himself.

The hearing committee concluded that the errors in accounting were not intentional, that the respondent did not commingle funds, and that he did not take money from the old IOLTA account for his own use or benefit. The hearing committee found that the respondent acted in the good faith belief that his real estate software package appropriately balanced the funds available, and would not allow him to generate checks if the funds were not available. The hearing committee emphasized that the respondent complied with all conditions imposed during the investigation and the temporary suspension, that he "expressed sincere remorse," that he was "unlikely to repeat the misconduct," and that his new IOLTA account has been in balance since it was opened in March, 2008. These findings are well-supported by the record.

The committee found, however, that the respondent improperly failed to close the old IOLTA account after bar counsel's January 24, 2008, letter directing him to do so, and that he did not close the account until March 14, 2008 (the date on which the respondent stopped using the account for new business). Therefore, the committee found that the respondent intentionally misused funds in the old IOLTA account for the closings that took place during that period, and, when the respondent did stop using the account, certain payments made at closings for two clients were returned for insufficient funds.

Arguments of parties to hearing committee. Citing Matter of Abelson, 24 Mass. Att'y Disc. R. 1 (2008), and Matter of Dodd, 21 Mass. Att'y Disc. R. 196 (2005), bar counsel sought an indefinite suspension; bar counsel emphasized the finding of intentional misuse. The respondent sought a public reprimand. He relied on cases involving the misuse of client funds in an IOLTA account to pay closing expenses. In those cases, an attorney recorded closings for which funding had not been received and issued checks drawn on an IOLTA account when there were insufficient funds in the account. See Matter of Franchitto, supra; Matter of Askenase, 18 Mass. Att'y Disc. R. 35 (2002).

Hearing committee's recommendation. The hearing committee recommended that the respondent be suspended from the practice of law-for one year. The hearing committee noted repeatedly in mitigation that the respondent undertook "extraordinary" efforts to make restitution, and that he has made restitution of all amounts involved ($290,000), including interest and legal fees. To do so, the respondent sold his house and took out personal loans. It appears that he has not been able to collect any of the funds from the lender who declared bankruptcy.

The hearing committee emphasized also that the respondent made very significant efforts to assist bar counsel with the investigation and uncovering of the source of the problem. These efforts went far beyond merely cooperating with the investigation. The committee observed that such efforts would ordinarily be described as "typical" mitigating factors, but that, in this case, the efforts were unusual and noteworthy. The hearing committee noted that the respondent had complied with all requests and instructions on reconciling the account, and had taken all steps recommended to him, including the continued employment of the independent accountant. Additionally, the hearing committee found that the respondent was balancing properly his new IOLTA account, and was highly unlikely to repeat the errors made in the old IOLTA account.

Furthermore, the committee accepted that the use of an accountant to reconcile the IOLTA account monthly would not have been adequate to determine the source of the problem. Due to the volume of transactions, and the length of time involved, it was necessary to hire a specialized forensic accountant. The respondent had investigated this option, but could not afford the $100,000 necessary to hire a forensic accountant. The hearing committee noted that, had the respondent obtained a forensic accountant, there would have been $100,000 less available to him to provide restitution.

The hearing committee distinguished the cases primarily relied on by bar counsel, see Matter of Abelson, supra, and Matter of Dodd, supra, and concluded that the respondent's misconduct

was less serious than in those cases. The committee stated that the old IOLTA account was open for "only a short period of time" after bar counsel instructed that it should be closed, and that the misuse of funds resulted from "negligent recordkeeping, not commingling."

The committee determined that the respondent's conduct was similar to, but more serious than, the conduct in the cases cited by him. See Matter of Franchitto, supra; Matter of Askenase, supra. In addition, the hearing committee concluded that the respondent's conduct merited a greater sanction than that imposed in Matter of Champion, 25 Mass. Att'y Disc. R. __ (2009), (public reprimand). In Matter of Champion, supra, the attorney did not verify receipt of funds prior to closing. Consequently, two subsequent closings were not funded because the lender in the earlier closing went bankrupt and did not forward funds to the attorney's IOLTA account. The sanction imposed in that case reflected mitigating factors similar to those here: the attorney acted to correct the deficiency, and the attorney's insurer made restitution. In the Champion case, there was the additional mitigating factor that the attorney was inexperienced and the conduct was an isolated incident.

Parties' appeal to board and board's recommended sanction. Contending that the misuse of funds is the same regardless of whether the conduct took place over nineteen months or two months, bar counsel appealed the hearing committee's recommended sanction to the board and again sought indefinite suspension. Notwithstanding the fact that bar counsel had authorized the respondent to keep using the account, bar counsel claimed that the hearing committee erred in finding that the respondent acted "reasonably" in keeping the old IOLTA account open after the first bounced check and during the investigation in this case.

In addition, bar counsel contested a number of the committee's findings. Bar counsel contended that, after both incidents of insufficient funds, the respondent "took no substantive action" to investigate or rectify the "shortage" in the old IOLTA account. Bar counsel argued that the respondent was liable for not closing the old IOLTA account during the time that bar counsel had instructed him he could keep it open, and claimed that the respondent did so in order to obtain improperly benefits for himself at the expense of his clients. Bar counsel argued also that the hearing committee erred in considering the factors it weighed in mitigation.

While stating that he agreed with "most" of the "analysis and rationale" set forth in the hearing committee's recommendation for discipline, the respondent also challenged the recommended sanction. He sought imposition of a public reprimand. The respondent cited a case where an attorney was given only an admonition when payments on four other closings were not honored due to a failure to keep adequate records. See Admonition No. 02-12, 18 Mass. Att'y Disc. R. 631 (2002). The respondent cited further the short period of time his old IOLTA account remained open after bar counsel told him it should be closed, his lack of prior discipline, and the fact that he was in the process of obtaining an attorney during the time between bar counsel's January 24, 2008 letter directing the account be closed and March 14, 2008, when the respondent stopped using it for new transactions.

The board adopted the hearing committee's findings of fact and its recommendation for discipline.

2. Discussion. Bar counsel claims that the respondent benefitted personally from not closing the old IOLTA account. Bar counsel also states repeatedly that, as the investigation lengthened, the amount of "deficit" in the IOLTA account increased to "approximately 350,000." However, as discussed, supra, the amount that bar counsel determined to be missing was a result of transactions years earlier. As bar counsel's investigation continued back in time, closer to the root of the problem, the amount missing appeared to increase.

The indefinite suspension sought by bar counsel is inconsistent with the actions of the respondent. In seeking to impose such a sanction, bar counsel focuses on the issue of intentional misuse with deprivation resulting, and compares the circumstances in this case to

the actions of the attorney in, for example, Matter of Schoepfer, 426 Mass. 183 (1997). However, the respondent's actions bear no resemblance to the types of intentional misuse for personal gain at issue in that case, or other similar cases cited by bar counsel. Because the facts are so dissimilar, reference to the sanctions imposed in cases such as Matter of Schoepfer, supra, and Matter of the Discipline of an Attorney, 392 Mass. 827 (1984) (Three Attorneys) is not helpful in determining the proper sanction in this case.

The hearing committee determined correctly that the respondent 's conduct was less egregious than that in two cases relied on heavily by bar counsel. In Matter of Abelson, supra, the attorney used his IOLTA account for five years knowing that it was not in balance; knowingly continued to use his IOLTA account after it became overdrawn; failed to keep records identifying individual client transactions so that the account could not be reconciled; and knowingly misused escrow funds that were not deposited properly into the IOLTA account, but rather into his conveyancing account. When confronted with these problems, the attorney closed his practice and failed to make full restitution despite some efforts to do so. He also engaged in additional, unrelated misconduct involving other client matters, including failing to pay a judgment against one of his clients, so that a capias was issued. He failed also to secure his confidential client records after closing his office, resulting in the records being "strewn across the yard of his old office."

In Matter of Dodd, supra, the attorney continued to use an IOLTA account for four years knowing it had insufficient funds; intentionally commingled funds; deliberately withheld payments due on multiple occasions because he knew there was not enough money to make those payments despite having received funding from the lenders; bounced checks multiple times for the same closing; and made payments that should have been made through the IOLTA account by writing checks from other accounts. In contrast, the respondent's software program kept records of payments made on behalf of each client and money due those clients; he did not knowingly issue checks for which there were insufficient funds;[5] he undertook "extraordinary" efforts to make restitution; and did not engage in other misconduct.

The respondent should have, and did not, reconcile the actual balance in his old IOLTA account with his computerized accounting system; he erroneously believed that his real estate computer program would reconcile adequately the balance in his IOLTA account. Careless and inaccurate accounting procedures resulting in the unintentional use of client's funds generally result in a sanction of a public reprimand. See Matter of Watt, 430 Mass 232, 234 (1999), citing Three Attorneys at 835. The respondent also should have, and did not, confirm receipt of funds prior to recording sales at the Registry of Deeds. This type of misconduct also results generally in a public reprimand. See Matter of Askenase, 18 Mass. Att'y Disc. R. 35 (2002) (public reprimand for conducting closing knowing there were inadequate funds due to buyer' s failure to provide funds, issuing a payment check knowing there were insufficient funds in the account to cover the check, and then issuing checks with insufficient funds in two other closings because the original transaction was never funded).

Lastly, the respondent should have closed the old IOLTA account more quickly when instructed to do so by bar counsel. It remained open for approximately six weeks after receipt of the letter from bar counsel, and, at hearing, the respondent offered no reason for not closing the account sooner. Nonetheless, this time frame is not as unduly lengthy as bar counsel suggests, particularly given that the respondent and bar counsel knew that at least one client would be deprived of funds as soon as the account ceased being active. Indeed, the hearing committee found that the account remained open for "only a short" period of time. Additionally, during the same period, the respondent was seeking legal counsel and was investigating the practicality of obtaining a forensic audit.

The respondent's failure to comply with bar counsel's instructions does not rise to the level of misconduct that would justify an indefinite suspension. See Matter of Schoepfer, supra. Given that the respondent and bar counsel were well aware, and had discussed, that ceasing to use the old account or to accept new incoming funds into that account would result in deprivation

to at least one client, it is evident why the respondent would have sought to obtain legal representation before taking this step. While the respondent violated disciplinary rules by intentionally continuing to use the old IOLTA account during this period, his conduct went on for only a "short period" and did not result in gain to him.

In considering the appropriate sanction, the hearing committee found that the respondent has experienced significant consequences because of his conduct. As a result of his improper accounting of the old IOLTA account, the respondent lost his certification from the title insurance companies. Therefore, he can no longer represent lenders, the bulk of his prior practice. Consequently, his income has been reduced. He has also endured significant personal financial loss from his efforts to make restitution.

In these circumstances, I conclude that a public reprimand is the appropriate sanction. The hearing committee's recommended sanction apparently rests on its finding that the respondent intentionally misused funds because of the transactions made after bar counsel sent the letter instructing the respondent to close his old IOLTA account. During the six-week period at issue, lenders continued to wire money to the old IOLTA account for new transactions; the respondent does not argue that he had issued instructions that those funds should be wired to a different account. However, the hearing committee erred in deciding, without setting forth its reasoning, that the respondent's conduct was more egregious than the conduct at issue in Matter of Franchitto, 448 Mass. 1007 (2007), and Matter of Askenase, supra.

For instance, in Matter of Franchitto, supra at 1008-1010, a public reprimand was imposed where an attorney failed to account properly for his IOLTA account and misused clients' funds to pay expenses of other clients. In that case, there were fewer subsequent closings than in the present case after the attorney became aware of the underfunding. However, the board found more serious misconduct than in this case because the attorney had engaged in fraudulent conduct knowing that he would not be able to fund the later closings. In addition, the board stated in that case that the attorney had previously been suspended from the practice of law. Neither of these last two factors are present in this case.

In Matter of Askenase, supra, a public reprimand was imposed when an attorney had deliberately conducted multiple closings for the same client on the same day on several occasions. He did so while aware that funding for the first closing had not been received and that such funding was dependent on the proceeds of the second closing. Nonetheless, he issued checks drawn on his IOLTA account at the first closing. When, during the last such transaction, the second closing never took place, the attorney then commingled funds by depositing his own funds in his IOLTA account to cover checks that he had already issued. In this case, the respondent did not engage in such a pattern of intentionally conducting closings for which funds had not been received and did not commingle funds.

Similarly, the hearing committee stated, without explanation, that the respondent's conduct was more serious than the conduct at issue in Matter of Champion, 25 Mass. Att'y Disc. R. __ (2009). In that case, restitution had been made and was considered a significant mitigating factor. However, unlike in the present case, the insurance company, rather than the attorney personally, paid restitution.

3. Disposition. A judgment shall enter imposing a public reprimand on the respondent.

FOOTNOTES:

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

[2] The board found that the violations of Mass. R. Prof. C. 1.4 and Mass. R. Prof. C. 8.4(c) were limited to the time

period after January 24, 2008, when bar counsel instructed the respondent to stop using the IOLTA account at issue; bar counsel had argued that the period of intentional misuse was far more extensive. The board's findings are supported by the evidence.

3 The board found explicitly that there was no commingling.

4 Failure to ascertain the receipt of funds before going on record at the Registry of .Deeds is itself a violation of' disciplinary rules. See Mass. R. Prof, C. 1.1, Mass. R. Prof. C. 1.2a, and Mass. R. Prof. C. 1.3. See also G. L. c. 183, § 63B ("good funds" statute); Matter of Franchitto, 448 Mass. 1007, 1008 (2007).

5 When the respondent stopped using his old IOLTA account, he did issue checks with knowledge insufficient funds existed for those checks. As the hearing committee found, this was inevitable and anticipated by all concerned.