NO. BD-2008-049

IN RE: OSAMWONYI E. OSAGIEDE

S.J.C. Judgment of Indefinite Suspension entered by Justice Corwin on June 13, 2008, with an effective date of July 14, 2008.[1]

BOARD MEMORANDUM

A hearing committee found that the respondent, Osamwonyi E. Osagiede, had failed to pursue his clients' goals, to keep them informed about their cases, to maintain required financial records, and to render accountings. In addition, the respondent commingled client funds with his own and misused client funds – negligently for the most part, but intentionally in one instance, and with deprivation resulting. The committee recommended that he be indefinitely suspended. We heard oral argument on the respondent's appeal on March 10, 2008. For the reasons set out below, we deny the appeal.

Findings of fact and conclusions of law. We adopt and incorporate by reference the hearing committee's findings of fact and conclusions of law, which correspond to charges made in a five-count petition for discipline. What follows is a summary sufficient for purposes of this appeal, with some details reserved for discussion of particular issues.

Count one concerns the respondent's handling of a Citizens Bank IOLTA account. Sometime in 2003, the respondent closed his operating account and began using the IOLTA account to pay business and personal expenses. A dishonored-check notice issued by the bank in 2003 prompted intervention by bar counsel, who explained the need for having separate trust and business accounts as well the requirement that he maintain adequate records of his handling of client funds. The respondent opened a separate business account, but within a couple of months he resumed his prior practices. He also failed to keep adequate records for the IOLTA account, and he used a debit card to withdraw cash from it.

As a consequence of these practices, the respondent misused the funds of at least four clients, and he eventually paid those clients by using other clients' funds as they were deposited. The committee found this misuse to have been "at least negligent." The committee ruled that these actions violated Mass. R. Prof. C. 1.15(a), as then in effect, and Mass. R. Prof. C. 8.4(h). The committee deemed it unnecessary to decide whether the misuse was intentional or had caused deprivation because of its finding, under the fifth count (discussed below), that the respondent had intentionally misused a client's funds with intent to deprive and with deprivation resulting.

Count two arises from the respondent's mishandling of another IOLTA account, this one opened at the Bank of America in August of 2004. Again, the respondent failed to maintain adequate records of receipts and disbursements in the account, and the committee found violations of Mass. R. Prof. C. 1.15(b), as in effect after June 30, 2004, and Mass. R. Prof. C. 8.4(h).

Count three concerns an operating account the respondent opened in August 2003 at Fleet Bank and later moved to Bank of America. The respondent opened this account after bar counsel advised him it was improper to commingle trust funds with his own. On several occasions between September 2004 and February 2006, the respondent or his secretary deposited client funds into the account. The committee did not credit the respondent's testimony that these deposits were his secretary's error. Again, he failed to maintain

adequate records. The committee ruled that his commingling and inadequate recordkeeping violated Mass. R. Prof. C. 1.15(b) and 1.15(f), as then in effect, and 8.4(h).

Count four concerns the respondent's handling of a second Bank of America business account, this one used primarily as a payroll account. The respondent deposited client funds into this account, and he failed to maintain adequate records. The committee found violations of Mass. R. Prof. C. 1.15(b) and (f), as then in effect, and Mass. R. Prof. C. 8.4(h).

Count five describes the conduct the committee found to constitute the intentional misuse of client funds. In early 2006, the respondent settled a client's personal injury claim for $2,900. When, on or about March 3, the settlement check arrived, the respondent deposited it into his payroll account, thus commingling the funds with his own. He later spent the funds for his own purposes.

On March 18, the respondent went to Nigeria to participate in a political campaign. The committee did not credit his testimony that he had tried to reach the client before his departure. While the respondent was away, the client called the office to inquire about the check, and the respondent was apprised of the call. The client then contacted the insurer and learned that the settlement check had been sent to the respondent on February 28. An appointment was made for the client to pick up his share of the settlement at the respondent's office on April 19, 2006.

There was conflicting testimony as to when the client received a check for his share of the proceeds of the settlement. The client testified that when he appeared at the respondent's office on April 19, (1) the respondent gave him a check in the amount of $1,913.42; (2) that the check was post-dated to April 28 and drawn on the respondent's business account (not the payroll account into which the respondent had deposited the check); and (3) that when the client asked why the check could not be cashed at once, the respondent explained that he had had his own bills to pay and the money was not yet in the account. The respondent, on the other hand, testified that the check was not postdated at all, but was given to the client on April 28, not on April 19.

The committee believed the client, not the respondent. It found that the respondent had knowingly and intentionally misappropriated the client's settlement proceeds for his own purposes, and that the client was deprived of his funds at least from April 19 until the client cashed the check on April 28. Such conduct, the committee found, violated Mass. R. Prof. C. 1.2(a), 1.4, 1.15(c) & (d), and 8.4(c) & (h).

Sanction. The committee observed that indefinite suspension or disbarment is the presumptive sanction for the intentional misappropriation of client funds whenever it is accompanied by either intent to deprive or resulting deprivation. See Matter of Schoepfer, 426 Mass. 183, 187-188, 13 Mass. Att'y Disc. R. 679, 685-686 (1997); 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). Because the respondent had failed to meet his heavy burden of demonstrating why the presumptive sanctions should not be imposed, the committee recommended his indefinite suspension. See Matter of Bryan, 411 Mass. 288, 292, 7 Mass. Att'y Disc. R. 24, 29 (1992) (indefinite suspension preferred over disbarment where lawyer made restitution).

The respondent's appeal. The respondent's objections to the hearing committee's report and recommendation reduce to three principal arguments: that he did not intentionally misuse the client funds at issue in the fifth count, that the client was not deprived of his funds, and that the committee failed to give appropriate weight to mitigating factors in recommending the sanction. None of his objections has merit.

1. The committee did not err in finding intentional misuse under the fifth count. The respondent himself endorsed the settlement check and deposited it to his payroll account. Given the warnings he had received regarding the handling of client funds, it is hardly

"bootstrapping," as the respondent suggests, to infer that such obviously intentional commingling must have been done consciously and for a reason. The reason, the committee justifiably inferred, was that he knew did not otherwise have enough funds to meet his own personal and business obligations – which happens to have been true. In this context, his deliberate mis-deposit – to a payroll account, after all – is itself strong additional evidence to support the committee's determination that his "testimony that he did not know he was using his client's money because he relied solely on his 'mental notes' to keep track of the balance of his IOLTA account [was] not credible." Report ¶ 52(d).

Further, the finding of intentional misuse is buttressed by his own admission to the client when he gave him the postdated check. After listening to a classic swearing contest, the committee credited the client's testimony regarding that exchange: that the respondent had delivered a postdated check on April 19 and instructed the client not to deposit it until April 28 because, having used the funds to pay other bills, there would not be sufficient funds to cover the check until then. The hearing committee is the sole judge of the credibility of witnesses testifying before it, see S.J.C. Rule 4:01, § 8(4), and the board may not disturb its credibility determinations absent clear error. In this regard, the Court has likened a committee's credibility findings to those of a jury, and they must be upheld unless it "can be said with certainty" that they are "irreconcilable with the committee's other findings." 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).

The respondent has identified no such irreconcilable clash in the findings on this issue. Instead, he latches on to a statement made by the committee as somehow indicating that its credibility findings were improperly influenced by other evidence and findings. In addition to stating that it credited the client's testimony over the respondent's ("we found [the client] credible generally"), the committee cited additional grounds for believing the client, one of them being that his admission was "consistent with both the respondent's pattern of misusing client funds and his general disregard for his fiduciary duties concerning client funds." Report ¶ 48. The respondent views this statement as "character evidence" used to show that he acted in conformity with past misconduct. See, e.g., Commonwealth v. Walker, 442 Mass. 185, 202 (2004).

It was not error to rely on such evidence. As bar counsel points out, the committee referred not to particular acts of past misconduct as such but to the respondent's long-established "pattern of misusing client funds," an acknowledged exception to the proposition that evidence of other wrongs is not admissible to show character or propensity to commit the offense in issue. See id. at 201-203; M.S. Brodin & M. Avery, HANDBOOK OF MASSACHUSETTS EVIDENCE § 4.4.6, at 159 (2007). That pattern was established by evidence submitted here – properly and without objection – to prove other charges in the matter, not to prove uncharged conduct. And the respondent did not object to its admissibility for all purposes.

Moreover, the putative "propensity evidence" was but one of many factors buttressing the committee's determination to credit the client. It was in fact true – as the client testified the respondent told him – that the client's funds had been used to pay the respondent's other expenses, and in fact there were not sufficient funds in the account to pay the client on April 19. The respondent has not explained how the client could have known this if he had not told him – or, for that matter, what motive the client might have had to manufacture such a (fortuitously accurate) story. The client's account of the conversation happens also to be entirely consistent with what he wrote in his initial grievance to bar counsel within a month after their conversation. Given all these circumstances, we see no basis for disturbing the hearing committee's finding. It is clear that the committee's finding is bottomed on a firm decision to credit the client over the respondent. We have stressed in the past our unwillingness to "disregard the standard of review whenever a committee also adverts to nontestamentary evidence to buttress its credibility determinations." Matter of Doe, 15 Mass. Att'y Disc. R. 799, 805 (1999).

2. The respondent's argument that the client suffered no deprivation from the misuse of his funds cannot be reconciled with the committee's finding regarding the payment made to the client. We have no need to go into the timing of the respondent's trip to Nigeria, what he told the client before he left, or when the client first demanded delivery of his money. As we have determined, the committee properly found that he gave the client a postdated check because he did not have sufficient funds to cover the check when delivered. It follows ineluctably that the client was deprived of his funds at least from the date the check was delivered (April 19) until the date it was negotiable (April 28). See Matter of Carrigan, 414 Mass. 368, 373 n.6, 9 Mass. Att'y Disc. R. 54, 59 n.6 (1993) (deprivation occurs whenever a lawyer "uses client funds for unauthorized purposes after the time these funds are due and payable." There was deprivation, even if only for nine days. As a consequence, the respondent bears the "heavy burden" of demonstrating why the presumptive sanction of indefinite suspension or disbarment should not be imposed. See Schoepfer, supra; Three Attorneys, supra.

3. The committee did not err in weighing the aggravating and mitigating circumstances in the course of selecting a sanction. It was appropriate to weigh in aggravation that the respondent had committed multiple ethical violations, see, e.g., Matter of Saab, 406 Mass. 315, 326, 6 Mass. Att'y Disc. R. 278, 289-290 (1989), and that his misconduct continued after and in spite of bar counsel's warnings. See Matter of Kerlinsky, 428 Mass. 656, 666, 15 Mass. Att'y Disc. R. 304, 314-315 (1999). The record also supports the committee's conclusion that the respondent lacked appreciation for his fundamental ethical responsibilities concerning the handling of trust funds, a factor that may be considered in aggravation. See Matter of Clooney, 403 Mass. 654, 657-658, 5 Mass. Att'y Disc. R. 59, 63-64 (1988); Matter of Grossman, 21 Mass. Att'y Disc. R. 312-322 (2005).

Nor are there grounds for objection with regard to the hearing committee's handling of the respondent's claimed mitigation. The committee was right to give no mitigating force to the respondent's status as a sole practitioner. See Matter of Neitlich, 413 Mass. 416, 425, 8 Mass. Att'y Disc. R. 167, 177 (1992). The committee did not err in declining to give substantial weight to other factors the Court has described as "typical" mitigating circumstances, such as the respondent's humble origins, community service, pro bono activities, and the devotion of his practice to the service of an underserved community. See, e.g., Matter of Alter, 389 Mass. 153, 156, 3 Mass. Att'y Disc. R. 3, 6-7 (1983); Matter of Finn, 433 Mass. 418, 17 Mass. Att'y Disc. R. 200 (2001); Matter of Abelson, S.J.C. No. BD-2008-001, slip op. at 9 (March 26, 2008).

The only mitigating circumstance that warrants fuller treatment is the respondent's claim that a suspension would inflict severe financial hardship in his case. As we are aware of no case in which the Court has declined to suspend an attorney on such a ground, we would be inclined merely to note that the committee considered and rejected the claim. The respondent argues, however, that the committee relied on, and that bar counsel improperly focused on, his national heritage in doing so. We see no manifestation of bias or prejudice on the part of bar counsel or the hearing committee.

In testimony elicited by his own counsel, the respondent repeatedly referred to Nigeria as "home," and he testified at length about his continuing involvement in Nigerian politics and his hope that he would be appointed to office there. The committee adverted to this testimony in determining that he had not met his burden of proving that a suspension would cause severe hardship: "Given the respondent's education and accomplishments as an educator and a journalist, . . . and his deep involvement in Nigerian politics for which he was prepared to move back to Nigeria if necessary . . . , the respondent has not carried the burden of proving that a suspension would cause severe hardship." Report ¶ 63.

According to the respondent, "had another attorney, one who was born and raised in the United States, been in Attorney Osagiede's shoes, the Panel would have found that that attorney would suffer a substantial hardship if indefinitely suspended because he or she had nowhere else to go." It follows, so the argument goes, that the committee's findings on hardship were "based entirely on his status as a Nigerian citizen, his national origin." We

disagree.

The point made by the hearing committee was simply that suspension would work no special hardship in his case because he has skills and experience in other fields, including a political career he was pursuing in Nigeria. As bar counsel observes, the committee's argument would apply equally to an American-born lawyer with similar career options on Beacon Hill or in Washington. There is no indication that bar counsel or the committee harbored or acted on a bias because of his national origin.

When all the mitigating and aggravating circumstances are considered, it is evident that the respondent has not discharged his "heavy burden" to show why we should not recommend the presumption sanction for his misconduct: indefinite suspension or disbarment. Where restitution has been made, indefinite suspension is usually favored. See Matter of Bryan, 411 Mass. 288, 292, 7 Mass. Att'y Disc. R. 24, 29 (1992). An argument could be made that disbarment is called for, given the aggravating circumstances – particularly the respondent's willful failure to heed bar counsel's earlier advice about the handling of client funds. See Matter of Abelson, supra, slip op. at 11-12. It is important, however, to encourage lawyers to make restitution. Accordingly, we join the hearing committee in recommending indefinite suspension.

Conclusion

For the foregoing reasons, we adopt and incorporate by reference the hearing committee's findings of fact, conclusions of law, and recommendation to file an Information with the Supreme Judicial Court recommending that the respondent, Osamwonyi E. Osagiede, be indefinitely suspended 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.