NO. BD-2008-056

IN RE: DENNIS M. RYAN

S.J.C. Judgment of Term Suspension entered by Justice Ireland on June 20, 2008, with an effective date of July 21, 2008.[1]
(S.J.C. Judgment of Reinstatement with conditions entered by Justice Ireland on November 19, 2009.)

BOARD MEMORANDUM

A hearing committee found that the respondent, Dennis M. Ryan, had engaged in misconduct by (1) charging an excessive fee for tardy legal work performed on behalf of the administratrix of an estate, and (2) commingling and negligently misusing funds belonging to another client. Two of the committee members recommended a three-month suspension; the third urged an eighteen-month suspension. On appeal, bar counsel asks that we adopt the dissenting member's recommendation while the respondent champions that of the majority. Following oral argument before the full board, we recommend, by a 7-2 vote, that the respondent be suspended for nine months, and that he be required seek out and follow the recommendations of the director of Law Office Management Program regarding the operations of his law office. The two dissenting board members prefer a suspension for six months and a day.

Findings of fact and conclusions of law

We adopt and incorporate by reference the hearing committee's findings of fact and conclusions of law, to which neither party has objected. What follows is a précis sufficient for purposes of this appeal, while we reserve some facts for discussion during our treatment of particular issues.

Count One. The respondent undertook to represent the administratrix of her mother's estate. While the respondent did not have much experience in the probating of estates, this one appeared to be simple, consisting principally of the decedent's residence. Calculating his fee based on a percentage of the estate value, the respondent asked for and received a check in the amount of $14,000 as a flat fee for the work.

The estate proved somewhat more complicated. Additional assets including six bank accounts and some bonds were discovered, and the client also sought legal assistance in keeping her substance-abusing brother from dissipating his share of the estate.

After receiving his fee, the respondent did little work over the next year and a half. He prepared but failed to record an affidavit attesting that no estate taxes were due. His failure to attend to the filing of 2000 state and federal tax returns for the estate and the decedent resulted in the assessment of federal and state penalties in the amounts of $9,566 and $1,653, respectively. He was also was late with certain probate court filings.

The client fired him. In a letter accompanying the case file he promptly forwarded to the client, the respondent wrote, "I am sorry that I was not able to finalize the estate. I think that I took on more cases than my office could handle." The client demanded that he refund the entire $14,000 fee and accept responsibility for the interest and penalties imposed for the late tax filings. In another letter, the respondent denied any wrongdoing, refused to refund the entire fee, enclosed a check for $1,000, and agreed to assume responsibility for the late

tax returns. He never rendered an accounting for the flat fee or returned the unearned balance.

Successor counsel for the administratrix learned that the respondent had filed no probate accounting, had not applied for a federal tax identification number, had not filed personal and fiduciary tax returns, had not taken appropriate steps to shield retirement funds from potential tax consequences, and had kept large amounts of cash in non-interest-bearing accounts. Within a week after her new lawyer filed his appearance, the administratrix filed her first account, which was allowed about two weeks later. The respondent resolved a subsequent malpractice action by paying the estate $53,000, which constituted a refund of fees and payment of damages caused to the estate.

The hearing committee found that the respondent's failure to file the tax returns violated Mass. R. Prof. C. 1.1, 1.2(a), and 1.3; that his failure to communicate with the client about the preparation of the returns violated Mass. R. Prof. C. 1.4(b); and that his delay and incompetence in formulating a plan to help the client complete the administration of the estate violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3, and 1.4(a) and (b). While the committee found that bar counsel had not shown that a $14,000 flat fee would have been excessive if the respondent had brought the estate to a legal conclusion, the fee became excessive, and thus violative of Mass. R. Prof. C. 1.16(d), once he sought to retain the unearned portion of the fee after discharge without having completed the work.

Count Two. The respondent represented a woman in connection with three separate automobile accidents, one in Randolph in 1999, one in Weymouth in 1999, and one in Braintree in 2000. He represented her effectively in the Randolph and Weymouth matters, and he apparently represented her competently in the Braintree matter until his client discharged him.

- With regard to the Randolph accident he succeeded in getting criminal DWI charges dismissed, her license restored, an insurance surcharge removed, and her record sealed.
- With regard to the Weymouth accident, the respondent also got criminal charges dismissed. He secured payment of $8,000 in personal injury protection (PIP) benefits from her insurer, which initially had balked when a small amount of alcohol was detected in her bloodstream at the time of the accident. Further, after noticing suspicious discrepancies in a police officer's three accident reports, the respondent referred her to a civil rights lawyer who brought and settled a civil rights claim on her behalf. The respondent then proceeded to settle a civil claim against the owner of the other car for $8,400 and against the driver of the other car for $25,000.

There was some confusion over the amount of fees the client owed the respondent for his work on the three accidents. Some of the work was billed on an hourly basis, some on a contingency basis, and the respondent collected one quarter of the PIP recovery in the Weymouth matter. The client objected to the respondent's bills, which had duplicative charges and erroneously included non-billable time from one matter as billable time in another. The respondent adjusted his charges accordingly.

On February, 25, 2002, the respondent received the last payment on the client's account, the $25,000 settlement for the Weymouth accident. He deposited the check into his IOLTA account. He then learned that Tufts, one of his client's health care providers, was asserting a lien against the Weymouth settlement in the approximate – and surprisingly large – amount of $16,500. The respondent realized that if he paid the lien and the client's other outstanding bills, there would be nothing left for her. He later learned that the Tufts claim was swollen by charges for treatments his client was receiving for yet another accident, an undisclosed 2001 event on which the client was represented by different counsel.

The respondent viewed the Tufts lien as unenforceable because it had not been perfected. He did not openly contest it lest he provoke Tufts to perfect it. Instead, he left the entire

$25,000 in his IOLTA account without withdrawing his own earned contingent fee or disbursing the net settlement proceeds to his client. He did not provide the client with a full accounting of the settlement funds for over eighteen months. In March 2003, however, the respondent withdrew $5,000 from the IOLTA account, a withdrawal he attributed at the time to payment of the client's legal fees without identifying the particular matter to which he applied it. The IOLTA account was already commingled by virtue of his failure to withdraw other earned fees, and he failed to maintain adequate records of receipts and disbursements for the account. As a consequence, when he later withdrew funds to pay his own taxes, he unwittingly drew the account down to an amount that was $1,620.97 below what he should have been holding for the client.[2] The committee found, and the parties agree, that the respondent negligently misused client funds to the extent of this shortfall.

On April 15, 2003, the client filed a grievance with bar counsel in which she accused the respondent of various misdeeds. Almost none of these charges was proved. (The client did not appear to give testimony at the hearing of this matter.) On May 30, the respondent sent her the first of four invoices in which he laid out his understanding of the net amount of fees she owed him for all her cases, with the exception of the contingent-fee portion of the $25,000 settlement paid in the Weymouth matter.[3] One of the invoices represented that he had not yet disbursed any of the proceeds of the $25,000 settlement from the Weymouth accident; because the respondent knew that his IOLTA account balance had dropped below $25,000 when he withdrew money to pay his taxes, the committee concluded that this representation was false. In three letters to bar counsel, two in May and one in August, the respondent falsely represented that he was still "holding" the entire settlement proceeds of $25,000. The committee found that the representations in these three letters were knowingly false and that his subsequent efforts at the hearing to defend them as truthful demonstrated a lack of candor to bar counsel and the committee.

On August 18, 2003, bar counsel advised the respondent that his bank statements suggested he was not holding all of the settlement proceeds, and bar counsel requested copies of his IOLTA records. The respondent then deposited $17,500 of his own funds into the account. After several revisions of his invoices, the respondent disbursed the client's funds, net of fees and medical bills. He did not pay the defective Tufts lien. The committee found that the client had been paid everything to which she was entitled.

The hearing committee concluded that the respondent:

- violated Mass. R. Prof. C. 1.15(a) and (d)(2), as in effect before July 1, 2004, by failing to remove earned fees from his IOLTA account and thus commingling personal and client funds;
- violated Mass. R. Prof. C. 1.15(b) by failing to pay the client her share of the settlement within a reasonable time after receipt of the funds;
- violated Mass. R. Prof. C. 1.5(c) by failing to provide the client with an accounting of her settlement funds upon conclusion of the contingent fee matter;
- violated Mass. R. Prof. C. 8.4(c) by misrepresenting that he was holding the proceeds of the $25,000 settlement when he was not;
- violated Mass. R. Prof. C. 1.15(a), (b), and (d) by negligently misusing the client's funds; and
- violated Mass. R. Prof. C. 8.1(a) and 8.4(c) and (h) by misrepresenting to bar counsel in May and August 2003 that he was holding $25,000 in settlement funds on behalf of the client when he was not.

Findings in mitigation and aggravation. In mitigation of the misconduct, the committee made findings as to the respondent's reputation for good moral character, the inadvertence of his accounting errors, and the size of his small practice. As the committee noted, however, these are factors the Court has characterized as "typical" mitigating circumstances that should not be given great weight. See Matter of Alter, 389 Mass. 153, 156, 3 Mass. Att'y Disc. R. 3, 6-7 (1983). In aggravation, the committee observed that he had demonstrated a lack of candor

before it, had given deliberately false testimony at the hearing, and had prior discipline for unrelated misconduct, an admonition in 1998. See AD 98-84, 14 Mass. Att'y Disc. R. 969 (1998).

Disposition. The hearing committee appears to have viewed this case as turning principally on whether, in the second matter, the respondent's negligent misuse of client funds was the "cause" of the deprivation suffered by his client. While the presumptive sanction for intentional commingling and negligent misuse without deprivation is public reprimand, see Matter of Schoepfer, 426 Mass. 183, 187-188, 13 Mass. Att'y Disc. R. 679, 685-686 (1997), the Court has imposed term suspensions when deprivation resulted from such conduct. See, e.g., Matter of Newton, 12 Mass. Att'y Disc. R. 351 (1996) (two-year suspension); Matter of Zelman, 10 Mass. Att'y Disc. R. 301 (1994) (same); Matter of Barnes, 8 Mass. Att'y Disc. R. 8 (1992) (three-year suspension, last year stayed).

There is no disputing the committee's finding that, as the Court has defined the term, deprivation occurred here: the respondent "use[d] client funds for unauthorized purposes after the time these funds [were] due and payable." Matter of Carrigan, 414 Mass. 368, 373 n.6, 9 Mass. Att'y Disc. R. 54, 59 n.6 (1993). The majority reasoned, however, that the client's deprivation was caused not by the misuse itself but by the respondent's indecision over the Tufts lien and uncertainty as to the amounts the client owed him for legal fees: given the lien, he would have withheld the funds from her even if he had not negligently spent them, and hence the client's deprivation cannot be viewed as "resulting" from his negligent misappropriation. Finding no causal relationship between the misuse and the deprivation, the majority proceeded to treat the second count as involving negligent misuse without deprivation, which presumptively warrants a reprimand under Schoepfer. The majority then added to the decisional mix the misconduct described in the first count and the other aggravating circumstances, which led them to recommend suspension. Relying on Matter of Walker, 17 Mass. Att'y Disc. R. 585 (2001), the majority concluded that three months was the appropriate term.[4]

We note first, as a conceptual matter, that the majority's reasoning that the misuse was not a "but-for" cause of the deprivation flows rather uneasily from the facts found, particularly given the committee's finding that the respondent "should have disbursed the money sooner," Report ¶ 100(a), and his "unequivocal and forceful" testimony regarding his certainty as to the invalidity of the lien. He "took great pride," in fact, in having legally avoided the Tufts claim. See id. at 28 n.22. Fortunately, we need not square these findings, as we decline the invitation to base disposition on a mechanistic quest for a causal link between the misuse and the deprivation, or on an inquiry into the timing and certainty of the respondent's belief in the validity of the lien.

Deprivation does appear to have almost talismanic significance in cases involving intentional misappropriation, where a finding of actual deprivation – just as much, in fact, as intent to deprive – will usually mean the difference between a term suspension and indefinite suspension or disbarment. See Matter of Schoepfer, 426 Mass. at 187-188, 13 Mass. Att'y Disc. R. at 685-686. The obvious rationale for such treatment is that one who flagrantly breaches a client's trust by intentionally using trust funds does so at his or her professional peril, and catastrophic consequences will follow so grievous a breach of a lawyer's fiduciary obligations even if deprivation is accidental.

Cases involving negligent misuse do not stem from such a profound breach. In cases involving negligent takings, deprivation should not be viewed as a distinct analytical element to be applied when choosing a sanction, but simply as an unremarkable instance of the need, in all bar discipline cases, to consider the harm suffered by the client when a lawyer engages in misconduct. See Matter of Newton, 12 Mass. Att'y Disc. R. at 359 ("Injury to the client should be weighed in aggravation of the respondent's misconduct, and where there has been injury, the Court has usually imposed a suspension for takings that were not intentional."), citing Matter of Barnes, supra; Matter of Zelman, supra; Matter of Stavisky, 7 Mass. Att'y Disc. R.277

(1991). Given the totality of the circumstances here, and regardless of whether one can detect a direct causal connection between the respondent's negligent misuse and his client's deprivation, we agree with the committee that the respondent's misconduct, viewed in the aggregate and in conjunction with the aggravating factors, warrants suspension. See Matter of Rattigan, 14 Mass. Att'y Disc. R. 600, 610-611 (1998).

We also agree with the dissenting hearing officer that a suspension of three months' duration is inadequate. In its entirety, the misconduct here is more egregious than that in Matter of Walker, supra, on which the majority relied in making its recommendation. At a time when Walker was out of state and because he had not yet opened an IOLTA account near his new office, he directed his secretary to deposit a settlement check into his operating account – thus intentionally commingling the funds with his own – and to make the appropriate disbursements. The secretary deposited the check and made disbursements, but she did not pay one of the clients its share of the proceeds. Upon his return and unaware of the omission, Walker spent down the operating account and was later unable to pay the client when the mistake was discovered. The Court distinguished Newton because that attorney had failed totally to have separate accounts, and Zelman and Barnes because those lawyers had attempted to conceal their misuse. See 17 Mass. Att'y Disc. R. at 592-593. Those lawyers, in other words, had engaged in additional misconduct. Viewing Walker's lapse as an isolated mistake with no other misdeeds or aggravating circumstances except prior discipline, the Court suspended him for six months.

While both Walker and the respondent had previously received private discipline, the respondent's conduct was demonstrably more egregious than Walker's. The respondent did not limit his misconduct to an isolated instance of commingling and subsequent negligent misuse. Here there were additional violations, under the first count, for the harmful neglect of an estate and the charging of an excessive fee. And the negligent misuse in the second count was itself compounded by routine commingling, shoddy bookkeeping, intentional misrepresentations to the client and to bar counsel that he was still "holding" the client's funds intact, and false testimony before the hearing committee. The majority themselves made note of his lack of candor before them. The respondent's actions in the aggregate may not have involved misconduct as pervasive as that at issue in Newton and its progeny, but any sanction less than that given Walker would be a markedly disparate. See, e.g., Matter of Alter, 389 Mass. 153, 156, 3 Mass. Att'y Disc. R. 3, 6-7 (1983).

We believe the appropriate balance in these circumstances would be struck by suspending the respondent for nine months. The suspension would be three months longer than that given Walker, and it would require him to take and pass the Multistate Professional Responsibility Examination before returning to the practice. We also recommend that he be required to seek and implement the advice of the director of the Massachusetts Law Office Management Program regarding the operation of his law office. Further instruction in the Rules of Professional Conduct and in effective techniques for the management of his office will help allay concerns that the respondent's errors will be repeated in the future.

Conclusion. For the foregoing reasons, we adopt and incorporate by reference the hearing committee's findings of fact and conclusions of law, but we reject its proposed disposition. An Information shall be filed with the Supreme Judicial Court recommending that the respondent, Dennis M. Ryan, (1) be suspended from the practice of law for nine months, and (2) be ordered to undergo an audit of the operations of his law office by the director of LOMAP and to implement his recommendations for improvement.

FOOTNOTES:

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

[2] In fact, the respondent's account fell below what he owed this client for one day – on April 15, 2003—when the bank debited the checks he had written to himself the day before. The next day the account rose above $70,000 and never fell below $67,000 until after he had paid the client all she was owed. See Ex. 62.

[3] The respondent submitted comprehensive sets of invoices in May, August, September, and October 2003. The invoices applied funds inconsistently and stated differing amounts of net outstanding fees. Because the respondent had completed all of his hourly-fee work for the client by September 2001, no additional hourly fees account for the variances.

[4] The dissenting committee member recommended an eighteen-month suspension because he viewed the misconduct as worse than Walker's but not as bad as that in Newton, Zelman, or Barnes, and because the respondent has a disciplinary history.