NO. BD-2008-110

IN RE: JAMES P. LONG

S.J.C. Judgment of Suspended Term Suspension entered by Justice Botsford on November 21, 2008.[1]

BOARD MEMORANDUM

The parties have filed cross-appeals from a hearing committee's recommendation that the respondent, James P. Long, receive a public reprimand conditioned on his completing at least six hours of "ethical training relevant to his law practice." The respondent asks us to dismiss the petition or, at worst, to admonish him; bar counsel seeks an outright suspension for a term of six months. There being no request for oral argument, the board considered the matter on the papers at its meetings on September 8 and October 20, 2008. While we adopt the hearing committee's findings of fact and conclusions of law, we modify its proposed disposition to recommend that the respondent be suspended for two months and that the suspension be stayed for one year to permit him to complete at least six hours of continuing legal education in courses approved by bar counsel.

Findings of Fact and Conclusions of Law

We summarize below the committee's findings and rulings under both counts, reserving some details for later discussion of the issues.

Count One. The respondent represented a client named Glynn at closings on sales of condominium units he had developed. Glynn needed to borrow $11,000 to buy out a partner's interest in another, unrelated real estate project to develop waterfront property in Quincy. Glynn asked the respondent to help him obtain short-term financing to raise the funds. The respondent secured financing from the Alliance Equity Fund (Alliance), which was owned by a family trust in which the respondent and his family held the beneficial interests. In addition, the respondent was the sole trustee of the trust as well as the business manager of Alliance. From time to time he also acted as the attorney for Alliance.

The client agreed to borrow $11,000 from Alliance for less than a month and offered to pay the respondent $1,000 for his efforts in obtaining the financing. Payment in full would be due on or before September 26, 2003. The respondent accepted the offer. Because the anticipated term of the loan was so short, the $1,000 fee reflected an effective rate of interest and expenses would exceed the highest rate allowed under the Massachusetts usury statute, G.L. c. 172, § 49(a), unless notice of the transaction is filed with the Attorney General. The respondent was unaware of this statute and its requirement that lenders register with the Attorney General before making a loan at such a rate, and he did not explain this requirement to Glynn. He did not advise Glynn to obtain the advice of independent counsel before accepting the loan or seek the client's consent to any potential or actual conflict concerning the transaction. The hearing committee found that the respondent was not acting in his capacity as Glynn's counsel in brokering the loan through Alliance, but it found that the respondent did act as Alliance's attorney in negotiating, authorizing, distributing, drafting documents for, and collecting the loan on its behalf.

Pursuant to their oral agreement and on instructions from Glynn, the respondent forwarded $11,000 of Alliance's funds, via his client funds account, to pay off Glynn's partner and complete the buyout of the Quincy waterfront development. The respondent then sent Glynn

a standard-form promissory note, which Glynn said he would sign upon receipt. Glynn never signed it.

On September 24, two days before the note came due, the respondent represented Glynn at the closing on a sale of a condominium unit. In that capacity, the respondent took possession of two checks totaling about $43,000 because the closing proceeds were not yet ripe for distribution.

On October 2, Glynn expressed some second thoughts about his purchase of the Quincy waterfront development, and he asked the respondent to collect the now overdue $11,000 loan from the partner Glynn had bought out. The respondent rejoined that it was Glynn who owed the money to Alliance, and that if Glynn did not repay it, the respondent would have to pay it himself. In order to avoid such a "personal disaster," he told Glynn, he would not release any of the proceeds he was holding from the September 24 condominium closing until Glynn repaid the loan or agreed to do so. The committee found that both Alliance and, consequently, the respondent's family trust would have been harmed if Glynn had defaulted on the loan.

On October 7, the proceeds of the September 24 sale were distributed. Glynn allowed the respondent to retain $12,000 from the sale proceeds. This Glynn did with apparent reluctance – he initially listed the payment on the HUD statement as a "Loan to James Long" – but he eventually acceded to the payment by striking that notation and replacing it with one characterizing the payment as a "Loan Repay't for Quincy Land Purchase." The respondent forwarded the $12,000 to Alliance.

While the hearing committee did not find the loan transaction to be "unfair and unreasonable" to Glynn, it nonetheless ruled that the respondent had:

- violated Mass. R. Prof. C. 1.8(a) by entering into a loan transaction with a client without (1) disclosing the terms in writing, (2) obtaining the client's consent to those terms in writing, and (3) advising him to consult with independent counsel;
- violated Mass. R. Prof. C. 1.7(a) by simultaneously representing Glynn in the closing and Alliance in the loan transaction without the informed consent of both after consultation; and
- violated Mass. R. Prof. C. 1.7(b) by representing Glynn in the closing when his representation was materially limited by responsibilities to other clients, to third parties, and by his own interests, all without obtaining the consent of each client after consultation. In support of this ruling, the committee noted that he had threatened, in derogation of his duties as counsel to Glynn, to withhold distribution of the proceeds of the condominium closing in order to secure payment of the Alliance loan.

The hearing committee rejected bar counsel's contentions that the respondent had also violated Mass. R. Prof. C. 8.4(b), which prohibits criminal conduct that reflects on a lawyer's honesty, trustworthiness, or fitness as a lawyer, as well as charges that he violated Mass. R. Prof. C. 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. The committee viewed respondent's conduct – failing to make the appropriate filing with the Attorney General – as flowing from a negligent error of law, not from any dishonesty, deceit, or untrustworthiness. Finally, the committee rejected a charge that he had interfered with the "prompt[] deliver[y]" of client funds in violation of Mass. R. Prof. C. 1.15 by threatening to withhold the proceeds from the condominium sale until the loan was paid because, the committee found, the funds were delivered promptly once the closing proceeds were ripe for disbursement.

Count Two. In February 2004, another client engaged the respondent on a contingent-fee basis to represent him in a possible medical malpractice suit arising from surgery performed in November 2001. The respondent urged the client to obtain a narrative report from the physician who performed corrective surgery. The report was supportive but not conclusive, as

it did not rule out other possible causes of the client's condition. The respondent advised that he needed to investigate further. After consulting with another attorney, the respondent concluded that the case was not worth pursuing.

He did not apprise the client of his conclusion, however, and he failed to advise him to consult with another lawyer before the limitations period expired. The client tried to contact the respondent for nine or ten months, but the respondent did not speak to him or return his calls. The limitations period expired in November 2004. The hearing committee credited the respondent's testimony that a combination of factors, including his divorce and the emotional difficulty of telling a client that his case lacked merit, contributed to his failure to notify the client that he would not pursue the claim.

The hearing committee found violations of Mass. R. Prof. C. 1.2(a) (pursue client's lawful objectives), 1.3 (diligence and zeal), and 1.16(d) (duty on withdrawal to take steps to the extent practicable to protect a client's interests) in the respondent's failure to file suit or to protect the client's interests by notifying him that he would not pursue the case. The committee also ruled that the respondent had violated Mass. R. Prof. C. 1.4(a) and (b) by failing to communicate adequately with the client.

Aggravation, Mitigation, and Disposition.

In aggravation of the misconduct, the committee found that the respondent:

- had substantial experience in the practice of law, see Matter of Luongo, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 203 (1993);
- had committed multiple violations, and against more than one client, see Matter of Saab, 406 Mass. 315, 325-327, 6 Mass. Att'y Disc. R. 278, 289-290 (1989); ABA Standards for Imposing Lawyer Sanctions § 9.22(d) (1992);
- had displayed no appreciation of the issues implicated by the conflict of interest and, in particular, by using his control over the client's funds to compel repayment of the loan; and
- had displayed a lack of candor by giving incomplete and evasive testimony at the hearing, see Matter of Eisenhauer, 426 Mass. 448, 456, 14 Mass. Att'y Disc. R. 251, 261 (1998); ABA Standards, supra, § 9.22(g).

In mitigation, the committee made note of "typical" mitigating circumstances such as the respondent's reputation for honesty and good character. See Matter of Alter, 389 Mass. 153, 15, 3 Mass. Att'y Disc. R. 3, 7-8 (1983). The committee also found that the respondent was overwhelmed by his divorce after his wife left him and he became a single parent, circumstances that contributed somewhat to his failure to communicate with the personal injury client described in the second count but did not "substantially mitigate" his neglect of that client's matter and was irrelevant to his business transactions with Glynn.

The committee viewed the conflict of interest described in the first count as itself warranting a public reprimand at most. The added force of the neglect at issue in the second count was not, in the committee's judgment, sufficient to warrant outright suspension. Hence the recommendation for a public reprimand with conditions.

Objections to Findings and Rulings.

1. **Bar counsel's objections**. Neither of bar counsel's objections to the hearing committee's findings of fact and rulings of law has merit.

First, bar counsel contends that the committee erred in rejecting a charge that the respondent had violated Mass. R. Prof. C. 8.4(b) and (c) in making a loan that violated the usury statute. We disagree. This is not a conviction case. For whatever reason, the Attorney General did not prosecute – perhaps because the statute appears to have been designed to

streamline the prosecution of leg-breaking loan sharks and other predatory lenders, not to penalize legitimate businessmen who are ignorant of the filing requirement. See, e.g., Beach Associates, Inc. v. Fauser, 9 Mass. App. Ct. 386, 393 (1980) (refunding excess interest instead of voiding unregistered loan). As a consequence, it does not advance bar counsel's argument to bandy about the definition of a "serious crime" under S.J.C. Rule 4:01, § 12(3). The respondent has not been convicted of a crime, and we are not addressing issues that arise when that rule's definition of a "serious crime" comes into play.

In the absence of a conviction, the question reduces to whether the respondent's failure to make the filing with the Attorney General, through ignorance of the requirement, or to advise Glynn that the loan was consequently unenforceable, amounts to "conduct involving dishonesty, fraud, deceit, or misrepresentation" in violation of Rule 8.4(c). It appears to us self-evident that terms employed by the rule contemplate a more culpable state of mind than ignorance of a filing requirement.

For the same reason, we reject the charge that issuing the loan violated the provisions of Rule 8.4(b), which proscribes criminal conduct that "adversely reflects on [a lawyer's] fitness to practice law." As a catch-all provision whose generality raises due process concerns, the rule should be applied only with great care. See In re Ruffalo, 390 U.S. 544, 556 (1968) (White, J., concurring); Matter of Crossen, 450 Mass. 533 (2008), Board Memorandum at 65-68; PR 94-2, 10 Mass. Att'y Disc. R. 309, 315-316 (1994). See also A. Kaufman, Problems in Professional Responsibility 667-669 (3rd ed. 1989). In light of those concerns, we are loath to treat ignorance of a filing requirement as a reflection on one's fundamental fitness to practice law. Branding that lapse as a "ten-year felony" or "serious crime" when there has been no conviction does nothing to overcome our reluctance. The rule's drafters put it best: "Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to practice." Mass. R. Prof. C. 8.4(b), Comment [1].

Second, we reject bar counsel's argument that the hearing committee erred in finding the terms of the loan to be fair and reasonable. We believe that two businessmen, dealing in an arm's length transaction, could indeed view the terms of the loan as fair and reasonable in the circumstances. The issue is not the annualized rate of interest imputed, but the absolute amount charged ($1,000), which could well be viewed as reasonable given Glynn's need to proceed with some expedition – Glynn, who did not testify, was in danger of losing a $45,000 investment as well as his interest in the project – and the amount of time the respondent, acting as a lawyer as well as the lender's agent, would have had to devote to the transaction. Again, that calculus is not affected by the failure to make the filing with the Attorney General. It depends, rather, on whether such a transaction, effected in an arm's length transaction, was fair and reasonable. After all, it was Glynn himself, a seasoned real estate developer, who proposed the terms of the loan. Given all the circumstances, we cannot say that those terms were not fair and reasonable.

Of course, the loan was not an arm's length transaction because Glynn was the respondent's client at the time. That is what created the conflict of interest and triggers the need for discipline. But neither the presence of the conflict nor the failure to make the filing renders the transaction fundamentally unfair or unreasonable.

2. **The Respondent's objections**. The four objections raised by the respondent are also unavailing.

First, the respondent argues that, while he represented Glynn in the sale of condominium units, he was not acting in his capacity as Glynn's counsel when making the loan or representing him in his dealings with the partner he bought out with the loan proceeds. While this appears to be a fair statement of the evidence, it is irrelevant. The point remains that Glynn was the respondent's client, that the respondent engaged in a conflict of interest by entering into a loan transaction with a current client, and that the respondent had a financial

interest in the transaction. In the absence of more informed consent than is indicated on the record here, the conflict violated the rules in question.

Second, the respondent insists that the committee erred in finding that was acting as Alliance's attorney, not just as its business agent, at the time he was engaged in the loan transaction with Glynn. Nothing turns on the point: even if the respondent was not then acting as Alliance's counsel and thus could not be deemed to have violated Rule 1.7(a), he still violated Rule 1.7(b), given his own and his family's interests in Alliance, and he violated Rule 1.8(a) by entering into a business transaction with a client without making adequate disclosure and without encouraging him to obtain independent legal advice. And even if it he were not acting as Alliance's counsel in this specific loan transaction, he nonetheless was representing Alliance in other matters at the time. See Ex. 1, at 20 (respondent testifying that Alliance was his client in September 2003, when the loan made, and that he held Alliance funds in his client funds account at the time). In other words, Alliance was his client at the same time he was lending its money to Glynn and representing him in closings on condominium units. There was no error.

Third, the respondent argues that there was insufficient evidence to support the committee's finding that he threatened to withhold closing proceeds until Glynn agreed to repay the Alliance loan. The record reflects, however, that the respondent bluntly advised Glynn on October 2, 2003, that he would not release any of the proceeds of the condominium closings until Glynn either repaid or agreed to repay the loan (see Ex. 1, at 28-29), and in a February 3, 2004 letter he recounted that he had told Glynn on October 2 he "would not release the proceeds from unit #5 until [the loan] was resolved." Ex. 12. Furthermore, as the sole arbiter of the credibility of testimony before it, see S.J.C. Rule 4:01, § 8(4), the committee cannot be second-guessed for rejecting the respondent's efforts to put a more benign spin on his admissions. See Matter of Crossen, supra, Board Memorandum at 34 (hearing officer not required to accept the "self-serving gloss" on the import of a witness's statements, and the "decision not to believe him was one committed solely to [the hearing officer's] province"). There was no error.

Fourth, the respondent argues that there was no evidence of harm to the client with the medical malpractice claim at issue in the second count. To the extent this may be viewed, in essence, as a contention that there can be no violation because the malpractice claim lacked merit, it must be rejected. The argument was addressed and disposed of in Matter of Shaughnessy, 19 Mass. Att'y Disc. R. 410, 418-419 (2003), modified on other grounds, 442 Mass. 1012 (2004) (rescript). There the attorney argued that a client's claims had no chance of success and that the neglect could not have caused her any harm. Justice Sosman brushed the contention aside as "premised on the assumption that harm to a client must be shown in order to establish a violation of the disciplinary rules." Id. at 416. While we take into account the presence, extent, and character of harm in selecting an appropriate sanction, see Matter of Kane, 13 Mass. Att'y Disc. R. 321, 327-328 (1997), the committee did not err in finding a violation even if we were to accept the respondent's dubious claim that the extinction of an allegedly weak claim causes no "actual harm" to the wronged client. Cf. ABA Standards, supra, §§ 4.41-4.64 (1992) (discussing weight given harm and potential harm in choosing sanctions for neglect and failure of zealous representation).

The Appropriate Sanction. The respondent's conflict of interest in connection with the loan transaction itself warrants public reprimand, possibly admonition. See, e.g., Matter of Carnahan, 449 Mass. 1003, 1004-1005, 23 Mass. Att'y Disc. R. 57, 58-60 (2007) (rescript); Matter of Wainwright, 448 Mass. 378, 23 Mass. Att'y Disc. R. 753 (2007); Matter of Lake, 428 Mass. 440, 14 Mass. Att'y Disc. R. 418 (1998). And his neglect of the medical malpractice matter at issue in the second count, standing alone, would likely warrant an admonition. See Matter of Kane, 13 Mass. Att'y Disc. R. at 327-329 (1997). The cumulative misconduct is aggravated by the respondent's threat to hold unrelated client funds hostage to the loan and by his lack of candor at the hearing. We agree with committee that "something more than a public reprimand [is] necessary to ensure that he and others similarly situated will be mindful

of ethical obligations." Hearing Report at 20, citing Matter of Barrett, 447 Mass. 453, 462-463, 22 Mass. Att'y Disc. R. 58, 70 (2006).

At the same time, however, we agree with the committee that outright suspension is not necessary. The conflict of interest was not driven by any predatory self-interest, as existed in Matter of Pike, 408 Mass. 740, 6 Mass. Att'y Disc. R. 256 (1990). See Matter of Carnahan, 449 Mass. at 1005, 23 Mass. Att'y Disc. R. at 58-59. The harm at issue in the medical malpractice matter was not so great as to warrant public discipline by itself. See Matter of Kane, supra. We also believe that the respondent would benefit from additional training in professional conduct.

Consequently, we believe such an end be accomplished by an order structured along the lines of bar counsel's fallback position: suspending the respondent for a short term but staying the suspension itself to allow him to complete at least six hours of continuing legal education in professional ethics in courses approved by bar counsel. If the respondent fails to do so within that year, the suspension should go into effect.

Conclusion

For all of the foregoing reasons, we adopt and incorporate the hearing committee's findings of fact and conclusions of law, but modify its proposed disposition. An Information shall be filed with the Supreme Judicial Court recommending (1) that the respondent, James P. Long, be suspended for two months, and (2) that the order of suspension be suspended for one year, during which he shall take and complete at least six hours of continuing legal education in professional ethics in courses approved by bar counsel. Should he fail to complete these continuing legal education requirements, the suspension should take effect one year after entry of the order.

FOOTNOTES:

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