NO. BD-2009-115

IN RE: BRUCE NICHOLLS

S.J.C. Judgment of Disbarment entered by Justice Botsford on February 22, 2010.[1]

BOARD MEMORANDUM

A hearing committee found that the respondent, Bruce Nicholls, intentionally misappropriated proceeds from a sale of real estate pursuant to a divorce decree, and failed to make disbursements in accordance with the escrow agreement and court orders until after a probate court had found him in contempt and jailed him. The committee also found violations of other court orders, including an order to render an accounting, and it found that the accounting he eventually rendered deceptively hid his misuse of the funds. The committee recommended disbarment. The respondent has appealed, seeking dismissal. The full board heard oral argument on his appeal on September 14, 2009. For the reasons set out below, we adopt the hearing committee's findings of fact, conclusions of law, and proposed sanction.

Findings of Fact

The hearing committee's findings are detailed and meticulous. We provide a brief summary of them here for purposes of this appeal, reserving some details as needed for discussion of particular issues.

In the course of getting divorced, a couple entered into a separation agreement in February 2005. So far as is relevant here, the agreement provided that the marital home would be sold and the net proceeds distributed as follows: (1) the parties' joint marital debt would first be paid, (2) the husband would receive $10,000 for relocation expenses, (3) the wife would receive 60% and husband 40% of the remainder, and (4) the parties would pay their attorneys' fees from their respective shares. The agreement also provided that the wife's attorney, Patricia Davis, would act as escrow agent for the net proceeds pending further order of the court or agreement of the parties. The separation agreement was incorporated, but not merged, into the judgment of divorce, and it thus survived as an independent contract.

The respondent was initially retained to assist the couple in the sale of the marital home. By agreement of the parties he became the substitute escrow agent for the proceeds from the sale of the house. The agreement provided that the net proceeds were not to be distributed absent mutual assent or order of the court. The new escrow agreement was executed by the parties but not presented to the court for approval.

The respondent proceeded to negotiate and prepare a purchase-and-sale agreement for the house and, upon its execution, he accepted a $13,000 check from the buyers to hold as a deposit. On October 12, 2005, the respondent (1) effectively zeroed out his IOLTA account by transferring its balance to his operating account,[2] and (2) deposited the $13,000 deposit into his operating account, thus commingling the deposit with his own funds. Within less than two weeks of this deposit, and without any payments having been made on behalf of the couple or the buyers, the balance in the respondent's operating account was $8,079.22. About $5,000 of escrowed funds had been used for other purposes.

On October 21, 2005, the respondent filed a notice of appearance as counsel for the wife in the probate court. After the closing on the sale of the marital home later that month, the

closing attorney made a partial distribution of the proceeds by issuing to the respondent, as escrow agent, a check in the amount of $63,572.03. On October 28, 2005, the respondent endorsed the check and deposited it into his operating account. By November 15, the balance in the account was below $4,000, again without any payments having been made to or on behalf of the couple. Over $72,000 of the escrowed funds had been expended for other purposes.

The hearing committee did not credit the respondent's testimony that he did not know that the two payments had been deposited into his operating account instead of his IOLTA account. They found that he had intentionally deposited the funds into the operating account and that he had intentionally misused the funds for his own purposes. Thereafter, the respondent did not distribute any of the sale proceeds until after April 28, 2006, immediately after (as discussed below) he had been held in contempt for failing to do so.

The respondent's failure to make distributions prompted the husband to file, on November 22, 2005, a motion to compel distribution and to hold the wife in contempt for failing to effect it. In response, the court on December 5 found that Attorney Davis, not the respondent, was the escrow agent under the separation agreement, and that the respondent was not authorized to hold the funds. The court ordered the parties to cooperate with Attorney Davis in the discharging of her responsibilities. The closing attorney forwarded to Attorney Davis a check for $29,603.66, the amount remaining from the sale proceeds.

The respondent did not comply with the order, however, and he failed to transfer any funds to Attorney Davis. The husband filed another complaint for contempt against the wife, this time for failure to comply with the court's December 5 order. He also sought an order to compel payment of the $10,000 amount allocated to him for relocation expenses under the settlement agreement. On December 28, the court found the respondent and the wife in contempt and authorized Attorney Davis to release $10,000 to the husband.

The respondent then wrote Attorney Davis to voice his objection to her acting as escrow agent and to demand that she not make the distribution to the husband. Attorney Davis made the distribution and requested that the respondent forward the funds he was supposed to be holding in escrow. When the respondent failed to do so, Attorney Davis filed a complaint for civil contempt against him.

The respondent then filed a notice of appeal and a motion to stay the probate court proceedings. On or about March 6, 2006, he used the proceeds from a newly obtained line of credit to fund a check in the amount of $77,252.03, which he deposited into his IOLTA account to make up the shortfall in client funds.

On April 28, the court entered a judgment finding the respondent guilty of contempt and ordered him jailed immediately for willfully refusing to release funds to Attorney Davis. He was released later that day after a cashier's check drawn on his IOLTA account in the amount of $77,252.03 was delivered to Attorney Davis. The court also found the wife in contempt for failing to instruct the respondent to turn over the proceeds, and it ordered her to pay, from her portion of the sale proceeds, $4,772.50 to pay attorney's fees incurred by the husband in bringing the contempt action. Finally, the court ordered the respondent to provide a written accounting of his handling of the sale proceeds.

While Attorney Davis proceeded to discharge her duties as escrow agent for the husband and wife, who continued to argue over the distributions, the respondent filed notices of appeal on behalf of himself and the wife from the orders entered against them. A justice of the Appeals Court entered an order staying the proceedings pending disposition of the appeals. The respondent then refused to comply with the orders in question and demanded that Attorney Davis make distributions in accordance with his instructions.

By the end of August, the Appeals Court had dismissed the respondent's appeals for lack of

prosecution. Attorney Davis filed another complaint for contempt against the respondent, this time for failure to render an accounting. The respondent attached an accounting to his answer to the complaint: he represented that he had received $77,252.02 as proceeds from the sale of the house and that he had distributed the entire amount, by order of the court, to Attorney Davis on April 28, 2006. The only supporting documents submitted with the accounting were two statements for his IOLTA account, for April and May of 2006. The committee found the accounting to be intentionally misleading, deceptive, and false because it was designed to conceal his misuse of the funds, which had taken place in late 2005 and had not been restored until March 21, 2006.

The committee also found that, as a result of the respondent's intentional misuse of the escrow funds, the wife was deprived of the payment of almost $40,000 in undisputed marital debts (listed in the separation agreement) which were to be paid from the sale proceeds, and that she had been paying 25% interest on them because they were credit card debts.

Conclusions of Law

The hearing committee drew the following conclusions of law:

1. The respondent's conduct in commingling the escrow funds with his own funds and knowingly misusing them violated Mass. R. Prof. C. 1.15(b) (trust property to beheld separate from lawyer's property) and (c) (upon receipt of trust funds, lawyer shall promptly notify and deliver funds), and 8.4(c) (dishonesty, deceit, fraud, or misrepresentation) and (h) (conduct adversely reflecting on fitness to practice).
2. The respondent's conduct in knowingly failing to disburse the escrow funds as required by the separation agreement violated Mass. R. Prof. C. 1.2(a) (lawyer shall seek lawful objectives of client), 1.15(c), and 8.4(h).
3. The respondent's conduct in knowingly failing, until April 28, 2006, to comply with the court's December 5, 2005 order to turn over the escrow funds to Attorney Davis, in contempt of the court, violated Mass. R. Prof. C. 3.4(c) (lawyer shall not knowingly disobey obligation under rules of tribunal) and 8.4(d) (conduct prejudicial to the administration of justice) and (h).
4. The respondent's conduct in knowingly failing to comply with the court's order to provide a full written accounting of his handling of the escrow funds violated Mass. R. Prof. C. 1.15(d) (lawyer shall render full written accounting upon final distribution of trust property or upon request), 3.4(c) and 8.4(h).
5. The respondent's conduct in knowingly misrepresenting his handling of the escrow funds in the accounting provided to the wife's prior attorney and the court violated Mass. R. Prof. C. 3.3(a) (lawyer shall not knowingly make a false statement of material fact to a tribunal), 4.1(a) (in the course of representing a client, lawyer shall not knowingly make false statement of material fact) and (b) (in the course of representing a client, lawyer shall not fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6) and 8.4(c), (d), and (h)).

Factors in Mitigation and Aggravation

In **aggravation** of the respondent's misconduct, the hearing committee found:

1. that he had shown a lack of remorse and a failure to take any responsibility for his actions, and that he was evasive and demonstrated a lack of candor in his statements to bar counsel and his testimony before the hearing committee;
2. that he had made misrepresentations under oath to the court and bar counsel: he testified in probate court and in his statement to bar counsel that he "kept the money safe," when, in fact, he knew that the escrow funds had been in his operating account, that he had spent them for his own purposes, and that he had not replaced the funds until March 2006, after obtaining a line of credit;

3. that, repeatedly throughout the disciplinary investigation and hearing, he had made unwarranted and inappropriate accusations of serious misconduct on the part of others, including bar counsel, while denying any misconduct on his part; and
4. that, as a result of the respondent's refusal to turn over the funds or distribute them in accordance with the separation agreement, the husband did not receive the funds when he should have and had incurred legal fees to obtain them.

The hearing committee made no findings in **mitigation**. It found no mitigation in the respondent's contention that, during the course of these post-divorce proceedings, the husband was very difficult to deal with, stole money from the wife, and made threats of serious violence. Even if true, such problems are not mitigating because they were not causally related to the respondent's knowing misuse of the escrow funds for his own purposes, his contempt of the court orders, and his intentional misrepresentations to the court. See Matter of Schoepfer, 426 Mass. 183, 188, 13 Mass. Att'y Disc. R. 679 (1997) ("If a disability caused a lawyer's conduct, the discipline should be moderated, and, if that disability can be treated, special terms and considerations may be appropriate."); Matter of Ward, 8 Mass. Att'y Disc. R. 257, 257 (1991) (rejecting evidence of alcoholism for lack of a "causal connection between the alcoholism and the respondent's misconduct"); Matter of Gustafson, 6 Mass. Att'y Disc. R. 140, 141 (1989) (same); Matter of Jutras, 8 Mass. Att'y Disc. R. 119, 119-20 (1992) (no causal relation between misconduct and claimed bipolar disorder and substance abuse).

The respondent contended that he was simply a financial advisor and that he was never paid for his services. Tr. 2:17, 19-20, 57-58 (respondent). The committee declined to find these to be mitigating factors because the respondent represented Mrs. Frost as her attorney in connection with these proceedings, and regardless of whether an attorney receives payment for services, the attorney still must abide by the rules of professional conduct. See, e.g., Matter of Dembrowski, 8 Mass. Att'y Disc. R. 75 (1992).

The Respondent's Appeal

In a scattershot appeal, the respondent disputes almost every finding made by the hearing committee. Despite the breadth of his attack on findings he views as "against the weight of the evidence," the record supports the committee's findings. While we have considered and rejected all of his factual and legal objections to the report, we discuss below only those that merit some discussion. The heart of his misconduct is described in three principal findings he disputes: (1) that he intentionally commingled and misused the escrow finds; (2) that, in violation of the separation agreement and court orders, he failed to disburse those funds; and (3) that he knowingly misrepresented his handling of the funds in the accounting he filed with the court. All three findings are solidly supported by the evidence.

1. Intentional commingling and misuse. It is not disputed that the respondent deposited $77,752.03 of the couple's funds into his operating account and thus commingled them with his own. It is also undisputed that, within a few weeks of the deposit, the balance in the account had fallen to less that $4,000, and the respondent himself admitted that the withdrawals were not made on the couple's behalf. Tr. 2:57, 66 (respondent's testimony). Commingling and misuse are established.

The respondent testified that he had mistakenly deposited the funds to his operating account and that the consequent commingling and misuse were not intentional. The committee did not credit his testimony. Under S.J.C. Rule 4:01, § 8(4), we may not disturb the committee's credibility determinations absent palpable error absent here. See, e.g., Matter of Barrett, 447 Mass. 453, 460, 22 Mass. Att'y Disc. R. 58, 67 (2006) (hearing officers act like a jury on issues of credibility, which may not be set aside "unless the finding was wholly inconsistent with another implicit finding"), quoting Matter of Hachey, 11 Mass. Att'y Disc. R. 102, 103 (1995). While mere disbelief of the respondent's testimony does not establish the contrary proposition, see Hopping v. Whirlaway, Inc., 37 Mass. App. Ct. 121, 126 (1994);

Commonwealth v. Camerano, 42 Mass. App. Ct. 363, 367 (1997), there was more than ample other evidence to buttress the committee's determination that the commingling and misuse were intentional:

- holding securities and investment adviser's licenses, the respondent was experienced in real estate investments and financial transactions;
- having cleared out his IOLTA account the very same day he received the escrow funds, the respondent was aware of the balance in the accounts at the time;
- he deposited the funds taken from his IOLTA account as well as the $13,000 of escrow funds to his operating account on the same day;
- the appropriate account number was handwritten on the check and deposit slip for each of these accounts, on which the respondent was the sole signatory; and
- within three weeks after depositing escrow funds in the amount of $63,752.03, the respondent had expended over $72,000 from the operating account for his own purposes.

Such evidence, especially when combined with the hearing committee's determination not to credit the respondent's testimony to the contrary, suffices to sustain the committee's finding that both the commingling and the misuse were intentional. Later efforts to disguise his handling of the funds by filing a false and deceptive accounting with the court, as discussed below, strengthen the inference. Furthermore, even the respondent's own client, the wife, was deprived of the use of those funds at a time when she was paying 25% interest on credit card debts. As a consequence, the record establishes that the respondent engaged in intentional commingling and misuse of client funds, with actual deprivation resulting. See, e.g. Matter of Carrigan, 414 Mass. 368, 373 n.6, 9 Mass. Att'y Disc. R. 54, 59 n.6 (1993).

2. Failure to disburse escrow funds. The separation agreement plainly provided for the payment of the marital debt, which was never in dispute, out of the proceeds from the sale of the house. Despite knowledge that he had received a sufficient portion of the calculable proceeds to pay the debt, the respondent failed to do so. The husband brought motions to compel distribution and for contempt on November 22, 2005. On December 5, 2005, the court directed the respondent to transfer the funds to Attorney Davis so that she could make distributions. The respondent's insistence that that the court's order was not an "order" because it was labeled a "judgment" is a baseless cavil, given the unequivocal wording of the judgment itself. He did not relinquish the funds to Attorney Davis until April 28, 2006, after he was jailed for contempt. Given such conduct, the hearing committee properly found that the respondent had violated the court's order and had failed to make distributions under the terms of the agreement.

3. The misleading accounting. The respondent disputes the hearing committee's finding that he filed a false and deceptive accounting of his handling of the escrow funds. He insists that his accounting was "true, accurate and complete as well as laudable," and that the committee's finding is "utterly unsupported and contrary to the facts." His objection is without merit, as the history and nature of the accounting make clear.

On May 1, 2005, the probate court ordered the respondent "to provide a written accounting of all funds received from the sale of the marital home on or about October, 2005 together with all monthly bank statements, to account for all receipts and any and all disbursements since October, 2005 and for the accumulation of interest on the funds held . . . no later than May 15, 2006" (Ex. 58; emphasis added). On August 31, 2006, a complaint for civil contempt was filed against him for failure to comply with the order.

The respondent filed a purported accounting with the court almost a month later, on September 28. Disregarding the order to produce all monthly bank statements, he provided bank statements only for his IOLTA account (not the operating account into which the funds had been deposited), and only for April and May of 2006. Those two statements showed the funds to be intact, but only because the respondent had made a $77,252.03 deposit to the account on March 21, 2006, a deposit funded by a line of credit he had obtained earlier that

month. Producing prior bank statements for the operating account and prior statements for the IOLTA account, as plainly required by the court's order, would have disclosed that the escrow funds had never been deposited into the IOLTA account, and producing bank statements for the operating account, into which he actually had deposited the escrow funds, would have disclosed his misuse of the funds shortly after deposit.

In such circumstances, the hearing committee properly found that the "accounting as a whole was intentionally misleading, deceptive, and false because it was designed to conceal the fact that the respondent had commingled the escrow funds with his own funds in his operating account, had knowingly misused the escrow funds for his own purposes, and had not repaid the funds by depositing money into his account until March 21, 2006." Report ¶ 66.

Disposition

Disbarment is the only appropriate sanction for the respondent's misconduct. The hearing committee properly determined that the respondent had intentionally commingled and misused escrow funds. Both the husband and the wife were actually deprived of the use of the proceeds from the sale of their home, and the deprivation was exacerbated by the high interest paid on the credit card debt. The presumptive sanction for intentional misuse with resulting deprivation is disbarment or indefinite suspension. See 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), reaffirmed in Matter of Schoepfer, 426 Mass. 183, 187-188, 13 Mass. Att'y Disc. R. 679, 685-686 (1997). The respondent having made no showing in mitigation, the presumptive sanction should be imposed for the commingling and misuse alone.

In choosing between disbarment and indefinite suspension, we consider all the circumstances. Standing alone, the respondent's contumacious conduct before the court, which included testifying falsely under oath and filing a false and deceptive accounting to disguise his misuse of the escrow funds, would itself warrant a term suspension. See, e.g., Matter of Neitlich, 413 Mass. 416, 423-424, 8 Mass. Att'y Disc. R. 167, 175-176 (1992) (one-year suspension for making false statements to court); Matter of McCarthy, 416 Mass. 423, 428-429, 9 Mass. Att'y Disc. R. 225, 231 (1993) (same). A stiffer sanction is called for when the misrepresentations are made under oath, See, e.g., Matter of Shaw, 427 Mass. 764, 14 Mass. Att'y Disc. R. 699 (1998). In addition, the respondent has shown no remorse for his misconduct, see Matter of Clooney, 403 Mass. 654, 657-658, 5 Mass. Att'y Disc. R. 59, 63-64 (1988); Matter of Eisenhauer, 426 Mass. 448, 455-456, 14 Mass. Att'y Disc. R. 251, 261 (1998), and his lack of candor before bar counsel and the hearing committee weighs heavy in aggravation. See Matter of Eisenhauer, 426 Mass. at 456, 14 Mass. Att'y Disc. R. at 261; Matter of Friedman, 7 Mass. Att'y Disc. R. 100, 103 (1991) (lack of candor before tribunal weighed as aggravating circumstance).

Vehemently assailing the committee members, the probate court judge, Attorney Davis, and personnel in the Office of Bar Counsel in ad hominem terms, the respondent proclaims that he has been limited, until now, "by the prudential veil of disclosure and criticism of judicial action applicable to an admitted attorney." Disbarment, he suggests somewhat ominously, "would free him from those outdated and questionable restraints, observance of which, as a gentleman and professional, have hurt and cost him dearly." He should be disbarred.

Conclusion

For all the foregoing reasons, we adopt the hearing committee's findings of fact, conclusions of law, and recommendation that the respondent, Bruce Nicholls, be disbarred.

FOOTNOTES:

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

[2] Thereafter the IOLTA account ran a balance of zero (aside from an interest balance of $0.53) until March 21, 2006, when the respondent used the proceeds of a line of credit to deposit $77,252.03 into the account.