IN RE: STEPHEN B. SWAYE

NO. BD-2011-076

S.J.C. Order of Term Suspension entered by Justice Lenk on November 22, 2011, with an effective date of December 22, 2011.[1]

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

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-2011-076

IN RE: STEPHEN B. SWAYE

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). Bar counsel filed a petition for discipline on May 5, 2010, which was brought before a hearing committee of the board pursuant to S.J.C. Rule 4:01, § 8(3), second par, as appearing in 435 Mass. 1302 (2002). The petition alleged that Stephen B. Swaye (respondent) negligently misused client funds, failed to maintain required records for his IOLTA account, and attempted to conceal his conduct by making false statements to bar counsel, which he supported with tampered records.[1] The sole contested issue before me is the appropriate sanction to be imposed.

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[1] Specifically, the petition alleged that the respondent violated Mass. R. Prof. C. 1.15(b) (segregation of personal and client funds), (e) (operational requirements for IOLTA accounts), (f) (record keeping requirements for IOLTA accounts); Mass. R. Prof. C. 1.3 (diligence in representation); Mass. R. Prof. C. 3.4(b) (falsification of evidence); Mass. R. Prof. C. 8.1(a) (false statements in bar discipline matters); and Mass. R. Prof. C. 8.4(c) (conduct involving fraud), (d) (conduct prejudicial to the administration of justice), (h) (conduct that adversely reflects on fitness to practice law).

1. Background and procedural history. I summarize the hearing committee's findings and conclusions as adopted by the board. The findings are based in part on a joint stipulation by the parties; the remaining findings are supported by the evidence submitted at the disciplinary hearing.

a. Factual background. On June 14, 2007, the respondent issued his client a check for $13,181.09, which reflected the net proceeds from the client's loan refinancing. The respondent drew this check against his IOLTA account at Citizens Bank. The client attempted to negotiate the check in November of 2007, but the check was dishonored due to insufficient funds. The respondent immediately deposited personal funds to his IOLTA account to make up the remaining balance, and the client did not file a complaint against the respondent. Nevertheless, Citizens Bank notified bar counsel of the dishonored check, resulting in an investigation into the respondent's practices in managing his IOLTA account.

Early in the investigation, the respondent submitted a letter to bar counsel to explain the dishonored check. In this letter, which the respondent supported with documentary records, the respondent stated that he had withdrawn the client's funds at her request, because the client had expressed an immediate need for cash. The respondent prepared an affidavit to the same effect; the client signed this affidavit. In his initial

interview with bar counsel, the respondent repeated this account under oath, although he admitted that certain of the records he had submitted in support of his representations had been altered.

The hearing committee determined that the respondent's statements were not credible and that his conduct did not support the statements in his letter. For example, the respondent did not stop payment on the June 14, 2007 check, notwithstanding that he claimed to have previously withdrawn the vast majority of the respondent's funds from his trust account at his client's request.

b. Hearing committee's disposition and recommended sanction. The first count of the petition for discipline alleged that the respondent negligently misused client funds, resulting in temporary deprivation to the client. The second count stated that the respondent intentionally altered records and submitted false testimony to conceal his negligent misuse of client funds. The third count alleged that the respondent violated several record-keeping requirements with regard to his IOLTA account.[2]

Because the hearing committee did not credit the respondent's explanation of the dishonored check, it concluded that the respondent negligently misused at least $12,072.47 in funds that he should have been holding for the client. It concluded further that the respondent's letter and his statements

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[2] See note 1, infra.

under oath constituted intentional misrepresentations. As to the third count, the respondent stipulated that he did not maintain the required records for his trust account.

The committee recommended that the respondent be suspended from the practice of law for two years, a recommendation adopted by the board. In recommending this sanction, the committee considered in mitigation that the respondent suffered strokes in 2009 and 2010 that affected his ability properly to maintain records. However, the committee considered in aggravation that the respondent was an experienced attorney and that he had been disciplined previously for inadequate record-keeping related to his IOLTA account.

2. Appropriate sanction. In determining the appropriate sanction in an attorney disciplinary proceeding, I look to the discipline imposed in comparable cases, Matter of Saab, 406 Mass. 315, 325 (1989), considering the "cumulative effect of the several violations committed by the respondent." Matter of Jackman, 444 Mass. 1013, 1013 (2005). Although I am not bound by the board's recommended sanction, the board is entitled to substantial deference. Matter of Alter, 389 Mass. 153, 157 (1983).

Standing alone, each of the first two counts would warrant a term of suspension. Such a sanction is "typical" in cases of negligent misuse of client funds resulting "in even temporary

deprivation."[3] Jackman, supra at 1014. Suspension may be warranted even without such deprivation. For example, in Matter of Murray, 455 Mass. 872, 884-855 (2010), the full court imposed a six-month suspension on an attorney who failed to deposit client funds into an IOLTA account, notwithstanding "the respondent's sincere efforts to assist the client," who, the committee found, was not deprived of access to her funds. Further, making "[f]alse representations to bar counsel [is] comparable to making false representations to a court." In re Curry, 450 Mass. 503, 532 (2008); Matter of Sprei, 10 Mass. Att'y Discipline Rep. 246, 249 (1994). Absent significant mitigating circumstances, the submission of false documents or statements in the course of an official proceeding "requires suspension."[4] Matter of Admission to the Bar of the Commonwealth, 431 Mass.

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[3] I note that in Matter of Beatrice, 17 Mass. Att'y Discipline Rep. 31 (2007), a public censure rather than a term of suspension was imposed where an attorney failed to maintain a proper accounting of his IOLTA account, resulting in a dishonored check. In that case, however, "there was no evidence of any co-mingling" of client and attorney funds. Id. at 32. Additionally, the attorney, who had no prior history of discipline, cooperated fully with bar counsel's investigation.

[4] Terms of suspension have been imposed even in cases arising from an attorney's personal life, notwithstanding the presence of substantial mitigating circumstances. See, e.g., Matter of Angwafo, 25 Mass. Att'y Discipline Rep. 12, 23-24 (one-month suspension where attorney made false statement in proceeding for support of her child but was under significant stress from recent and grave physical abuse by child's father); Matter of Balliro, 453 Mass. 75 (six-month suspension where attorney stated falsely at boy friend's criminal trial that he had not abused her).

678, 683 n. 6 (2000). See also Matter of Hilson, 448 Mass. 603, 619 (2007) (knowing false testimony at trial "warrants a suspension of at least two years").

Where attorneys have engaged in cumulative violations, compounding initial misconduct that itself warrants a term of suspension by then making false statements to bar counsel, they have been sanctioned by one or more years of suspension. In Matter of Abbot, 437 Mass. 384 (2002), for example, the court imposed a two-and-a-half-year suspension on an attorney who failed to pursue his client's viable post-conviction remedies and then made false statements under oath to bar counsel.

Unlike Abbot, the respondent did not significantly harm his client or others through his ethical lapses.[5] The respondent's client was deprived of access to her funds for only a brief period of time. The respondent argues that this consideration makes his case analogous to Matter of Harwood, 25 Mass. Att'y

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[5] The absence of harm generally does not justify deviation from a presumptive sanction. See, e.g., Matter of Foley, 439 Mass. 324, 337 (2003). The respondent contends that the absence of harm here was due to his immediate replacement of the misused funds from his personal accounts, which he analogizes to the payment of restitution. The respondent emphasizes that the payment of restitution can be "relevant to the determination of the appropriate disciplinary sanction." Matter of Smoot, 26 Mass. Att'y Discipline Rep. 637, 644 (2010). However, the use of restitution in mitigation has primarily been in the context of intentional misuse of client funds, where full restitution has been held to weigh in favor of indefinite suspension over disbarment. Id. While this is a factor to which I give some consideration, it is not of sufficient weight in the circumstances to alter the balance.

Discipline Rep. 252 (2009) (Harwood). There, the court suspended an attorney for a year and a day where he had used a retainer without performing services for his client and then lied about this misuse to bar counsel while under oath.[6]

The respondent's reliance on Harwood is misplaced. Because Harwood's client had given him control of her retainer for a fixed period of time, she was not deprived of her funds. Id. at 252. Further, our recent decisions make clear that the misuse of retainers will not be treated with the same severity as misuse of other client funds.[7] Matter of Sharif, 26 Mass. Att'y Discipline Rep. 590, 596 (2010). Further, the respondent's misrepresentations here were more serious than the purely oral misrepresentations considered in Harwood. The respondent submitted altered documents to the board and caused his client to

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[6] The respondent relies further upon Matter of Goodman, 22 Mass. Att'y Discipline Rep. 352, 360 (2006), which involved a similar year-long term of suspension in a case involving misrepresentations by an attorney with a history of prior discipline. However, the misrepresentations in that case were made to an opposing party, and the court "distinguish[ed] cases involving misrepresentations to a tribunal" under oath. Id. at 365. Further, the prior discipline had "occured more than ten years ago, and it involved a different disciplinary rule." Id at 366.

[7] "We take this position not because the misuse of retainers is any less serious, but because the potential for misunderstanding" of the boundaries of appropriate use "is substantially greater." Matter of Sharif, 26 Mass. Att'y Discipline Rep. 590, 596 (2010)

attest to a false affidavit.[8] While oral misrepresentations may result from a spur of the moment decision, an attorney who alters or prepares false documents necessarily engages in some level of prior thought and planning. The respondent did not admit to these actions until confronted by bar counsel. Contrast Matter of Richard, 25 Mass. Att'y Discipline Rep. 529, 530 (2009) (noting that attorney informed bar counsel of altered documents before they were discovered in imposing year-and-a-day suspension).

Moreover, the respondent's history of prior discipline, and the cumulative nature of his violations, are significant aggravating factors.[9] See Matter of Murray, supra at 884; Matter of Dawkins, 412 Mass. 90, 96 (1992) (prior discipline is "a substantial factor"). For example, in Matter of Saab, supra at 317, the full court imposed a two-year suspension on an attorney who had engaged in multiple ethical violations and had a prior record of discipline, even though each count, "on its own, would require a public censure at most."

Here, even standing alone, the respondent's negligent misuse

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[8] The nature of the respondent's misrepresentations also renders unwarranted his reliance on Matter of Daniels, 23 Mass. Att'y Discipline Rep. 102, 107 (2007), which involved a failure to cooperate with bar counsel rather than affirmative misrepresentations to bar counsel.

[9] I note that the first of the respondent's strokes, which the board considered in mitigation, occurred only in 2009, well after most of the misconduct alleged in the petition.

of client funds and his misrepresentations to bar counsel would each warrant a substantial term of suspension. See Matter of Murray, supra; Matter of Hilson, supra. His misrepresentations are of particular concern because they were not confined to oral statements, but included the submission of false records and affidavits. In light of the nature of the respondent's misrepresentations, his cumulative violations, and his prior history of discipline for related conduct, I conclude that the board's recommendation of a two-year suspension merits deference.

3. Disposition. A judgment shall enter suspending the respondent from the practice of law in the Commonwealth for a period of two years.

By the Court

Barbara A. Lenk
Associate Justice

Entered: November 17, 2011