IN RE: WILLIAM J. PUDLO

NO. BD-2011-125

S.J.C. Order of Term Suspension entered by Justice Lenk on May 16, 2012.[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-2011-125

IN RE: William J. Pudlo

MEMORANDUM OF DECISION

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 January 22, 2010, which was brought before a hearing committee of the board pursuant to S.J.C. Rule 4:01, § 8(3), second par, as amended 435 Mass. 1301 (2002). The petition alleged that the respondent, William J. Pudlo, intentionally misused client funds, failed to maintain required records for his IOLTA account, and attempted to conceal his conduct by making false statements to third parties.[1]

[1] Specifically, the petition alleged that the respondent violated Mass. R. Prof. C. 1.15(a)-(b) (segregation of personal and client funds); Mass. R. Prof. C. 1.15(e) (operational requirements for IOLTA accounts); Mass. R. Prof. C. 1.15(f) (record keeping requirements for IOLTA accounts); Mass. R. Prof. C. 4.1(a) (truthfulness in dealing with others); Mass. R. Prof.

The board determined that the respondent's misuse of funds was negligent rather than intentional, but otherwise found that the allegations in the petition were supported by the evidence presented at the respondent's disciplinary hearing. The primary issue before me is the appropriate sanction to be imposed.[2]

1. Background. Bar counsel filed a petition for discipline on January 22, 2010; a hearing committee of the board held a hearing on that petition on November 1 and 2 of that year. I summarize the hearing committee's findings and conclusions as adopted by the board. These findings are adequately supported by the evidence submitted at the hearing.

In August, 2008, John and Karine Cruse (the sellers) contracted to purchase a house from Curtis and Rebecca Wood (the buyers). The sellers were unable to obtain a timely pre-closing regulatory certification of their septic system, known as a Title V certificate. Accordingly, the buyers and sellers agreed that $12,300 of the purchase price would be held in escrow until the sellers could furnish the necessary certification.

C. 8.4(c) (conduct involving fraud); and Mass. R. Prof. C. 8.4(c)(h) (conduct that adversely reflects on fitness to practice law).

[2] The respondent suggests also that the hearing committee considered evidence of his prior misconduct, and that this evidence was unduly prejudicial, see Part 2, infra, and that the hearing committee misconstrued his fiduciary obligations to the lender. See note 4, infra. As explained below, these contentions do not merit extensive discussion.

The respondent, who represented the lender, GMAC Mortgage, LLC, served alongside the sellers' counsel as an escrow agent. Per an oral understanding between the respondent and the sellers' counsel, the respondent was to hold the escrow funds in his noninterest-bearing IOLTA account[3] until the sellers obtained a Title V certificate. Yet, while the sellers obtained the necessary certification in May, 2009, and informed the respondent of this fact by letter dated June 5, 2009, the respondent did not release the escrow funds until September, 2009.

The respondent does not contest that he withdrew certain of the escrow funds for purposes not contemplated by the parties to the escrow agreement. Rather, he contends, and the hearing committee found, that these withdrawals were the product of poor record keeping; that is, that they were negligent rather than intentional. Nevertheless, as a result of these withdrawals, the balance of funds in the respondent's account was, for a period of at least three months between June and September, 2009, insufficient to cover the escrow amount. The respondent eventually borrowed funds from a local bank to cover the shortfall, and on September 3, 2009, released the funds to the seller. The respondent explained this delay to the sellers'

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[3] An IOLTA account is "a pooled account . . . for all trust funds which in the judgment of the lawyer are nominal in amount, or are to be held for a short period of time." Mass. R. Prof. C. 1.15(e)(5).

counsel by claiming that the lender would not approve release of the escrow funds, an explanation that the hearing committee did not credit.[4]

On the basis of the preceding facts, the hearing committee concluded that the respondent negligently misused escrow funds, in violation of Mass. R. Prof. C. 1.15(b) (segregation of trust property) and 8.4(h) (conduct adversely reflecting on fitness to practice law); failed to deposit client funds in an interest bearing account in violation of Mass. R. Prof. C. 1.15(b);[5] failed promptly to deliver funds that a third party was entitled to receive, as required by Mass. R. Prof. C. 1.15(c); and made a false statement of material fact to a third party, the sellers' counsel. See Mass. R. Prof. C. 4.1(a). The hearing committee determined also, based on a review of the respondent's IOLTA

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[4] The respondent contends that, in reaching its credibility determination, the hearing committee relied on a misunderstanding of his fiduciary responsibilities to the lender, his client. The committee merely noted, as one of two factors providing "further support[]" to its credibility determination, that the client was not a party to the escrow agreement, implying that it was not likely the client would have objected to the release of funds. The hearing committee's report did not suggest that the respondent could have released the escrow funds without notifying his client, or that he could have done so over his client's objection.

[5] Attorneys may deposit nominal amounts or short-term funds in IOLTA accounts, where the pooled interest is used to fund legal services for the indigent. Larger amounts must, however, be deposited in interest-bearing trust accounts "with the interest payable as directed by the client or third person on whose behalf the trust property is held." Mass. R. Prof. C. 1.15(e)(5).

documentation, that the documentation was deficient in light of the standards established in Mass. R. Prof. C. 1.15(f), and that the respondent withdrew such funds without identifying the recipient of the withdrawn funds, thereby violating Mass. R. Prof. C. 1.15(e). The hearing committee recommended that the respondent be suspended from the practice of law for nine months, with reinstatement subject to conditions.

Both parties appealed from the hearing committee's findings, and contested also the committee's recommended sanction. The board adopted the hearing committee's findings of fact and conclusions of law. The board did not, however, adopt the hearing committee's recommended sanction, recommending instead that the respondent be suspended for a year and a day.

2. Evidence of prior misconduct. The respondent claims that the hearing committee considered what he characterizes as prejudicial evidence of his prior misconduct, specifically, a disciplinary report in a prior disciplinary action which resulted in the suspension of the respondent's license to practice law. See Matter of Pudlo, 460 Mass. 400, 408 (2011) (imposing one year suspension, with six months stayed).

The record reveals that the committee considered the respondent's disciplinary history only as bearing on his

credibility,[6] and in the determination of an appropriate sanction. This use of the respondent's proven prior misconduct was appropriate.[7] See Matter of Dawkins, 412 Mass. 90, 96 (1992).

3. Appropriate sanction. In determining the proper sanction to impose on the respondent, I accord substantial deference to the board's recommendation. See Matter of Griffith, 440 Mass. 500, 507 (2003). Still, I must decide each case "on its own merits," see Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984), and must ensure that the board's recommended sanction is not "markedly disparate" from sanctions imposed on attorneys found to have committed comparable violations. See Matter of Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited.

I am unpersuaded by bar counsel's argument that the respondent's conduct was so negligent as to constitute recklessness, and thus should be sanctioned as the equivalent of intentional action. That logic is contrary to this court's bar discipline cases. See Matter of Murray, 455 Mass. 872, 887

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[6] Bar counsel cross-examined the respondent on the basis that certain of his mitigating explanations closely resembled those presented at his prior hearing.

[7] Although, at the time the hearing committee issued its report, the full court had not yet imposed a final sanction, the respondent did not dispute in his appeal the substance of the prior violations. The only dispute was over the proper sanction to be imposed.

(2010), and cases cited ("[b]ar counsel's argument that there is no distinction in the rules of professional conduct between . . . misuse with deprivation, 'whether intentional or negligent,' . . . is unavailing").

In any event, the board made no finding that the respondent acted recklessly. Nor does the record in this case compel such a finding. Negligent conduct and reckless conduct are "distinct in kind and not merely in degree." Desmond v. Boston Elevated Ry. Co., 319 Mass. 13, 14 (1946), and cases cited. Absent a finding that the respondent acted recklessly, the respondent may not be disciplined on the mere allegation of recklessness. Cf. id.; Commonwealth v. Sanford, 460 Mass. 441, 450-451 (2011) (remanding for determination whether prosecutor acted negligently or recklessly in disregarding discovery order).

Nonetheless, while he acted carelessly rather than purposefully, the respondent's neglect deprived the sellers of the use of $12,300 for a period of three months.[8] See Matter of Carrigan, 414 Mass. 368, 373 n. 6 (1993) (deprivation occurs when client funds remain diverted after they are "due and payable"). The negligent mishandling of client funds resulting in actual deprivation to the client calls for suspension for a definite term. Matter of Jackman, 444 Mass. 1013, 1014 (2005), and cases

[8] The respondent was on vacation for the first of these months.

cited. See Matter of Newton, 12 Mass. Att'y Disc. R. 351 (1996); Matter of Zelman, 10 Mass. Att'y Disc. R. 301 (1994).

The respondent's misconduct was aggravated when he failed, on discovering his error, to disclose the issue to any other party, instead attempting to deceive the sellers' counsel as to the reason for the delay in release of escrow funds. See Matter of Murray, supra at 884. I consider also that the transgressions at issue here were not isolated. See Matter of Saab, 406 Mass. 315, 325-326 (1989). The events underlying the petition for discipline in this case occurred while the respondent was under investigation for similar negligence in handling client funds.

However, the respondent was not impassive in the face of the prior disciplinary proceedings. Rather, he employed a paralegal, and, eventually, a chartered accountant to improve the quality of his financial management. Although these steps failed timely to rectify the defendant's ethical violations, the respondent's attention was diverted by two serious family medical emergencies. The respondent's family obligations "cannot excuse [an] abdication of professional responsibilities," Matter of Johnson, 444 Mass. 1002, 1003 (2005), but where, as here, there is a causal link between the diversion of the respondent's attention and the ethical violations at issue, the respondent's family circumstances may be considered in mitigation. See Matter of Guidry, 15 Att'y Disc. Rep. 255 (1999).

Considering the totality of the circumstances surrounding the respondent's misconduct, I find this case to be closely analogous to Matter of Cronin, 19 Att'y Disc. Rep. 101, 102-103 (2003). As here, Cronin engaged in a pattern of "generally inadequate and insufficient" record keeping, which resulted in negligent deprivation of client funds. Id. However, that case also involved significant mitigating circumstances: Cronin suffered from major depression and was going through a divorce and custody dispute; his attention "was focused entirely on his domestic situation and not on office matters." Id. at 103. In consideration of these mitigating circumstances, bar counsel agreed to a joint recommendation that the attorney be suspended for one year. Id. at 104.

While the cases are similar in their broad outlines, the mitigating circumstances in the present action are not as significant as those at issue in Matter of Cronin, supra. Cf. Matter of Schoepfer, 426 Mass. 183, 188 (1997) ("[i]f a disability caused a lawyer's conduct, the discipline should be moderated"). It was, therefore, within the board's discretion to recommend a suspension for one year and a day. As the board noted, the additional day of suspension has the effect of requiring the respondent to demonstrate his fitness to resume practice at a reinstatement hearing, see S.J.C. Rule 4:01, § 18, as appearing in 430 Mass. 1329 (2000), a burden not placed on

Cronin.

4. Disposition. An order shall enter suspending the respondent from the practice of law in the Commonwealth for one year and a day. The term of suspension shall commence nunc pro tunc to the effective date of his suspension in the prior disciplinary matter, In re William Pudlo, BD-2010-028, see In re William Pudlo, 460 Mass 400 (2011), and shall run concurrently with that suspension; while the final six months of the prior suspension have been stayed, the suspension in this matter shall not be stayed.

By the Court

Barbara A. Lenk
Associate Justice

Entered: May 16, 2012

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-2010-0028

IN RE: William J. Pudlo

ORDER

The respondent seeks reinstatement to the bar of the Commonwealth following his disciplinary suspension. In August, 2011, with an order of term suspension after rescript issued on September 22, 2011, the respondent was suspended from the practice of law for one year, with six months stayed subject to conditions. On April 27, 2012, the respondent filed an affidavit of compliance with the terms of his suspension, pursuant to the requirements of S.J.C. Rule 4:01, § 18(1)(a), and requested reinstatement.

Because further disciplinary proceedings against the respondent in a separate matter, In re William J. Pudlo, BD-2011-0125 (2011), are currently pending, and bar counsel seeks a term of suspension in that matter, it is ORDERED that the respondent's motion be, and hereby is, denied.

By the Court (Lenk, J.)

Maura S. Doyle, Clerk

Entered: May 16, 2012