IN RE: MICHAEL J. PASTERCZYK

NO. BD-2012-106

S.J.C. Order of Disbarment entered by Justice Lenk on April 23, 2013, with an effective date of May 23, 2013.[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-2012-106

IN RE: Michael J. Pasterczyk

JUDGMENT OF DISBARMENT

This matter came before the Court, Lenk, J., presiding, on an Information and Record of Proceedings pursuant to S.J.C. Rule 4:01, § 8(6), with the Recommendation and Vote of the Board of Bar Overseers (Board) filed by the Board on October 31, 2012. After a hearing, attended by assistant bar counsel and the lawyer and in accordance with the Memorandum of Decision of this date;

It is ORDERED and ADJUDGED:

1. that Attorney Michael J. Pasterczyk is hereby disbarred from the practice of law in the Commonwealth of Massachusetts and the lawyer's name is stricken from the Roll of Attorneys. In accordance with S.J.C. Rule 4:01, § 17(3), the disbarment shall be effective thirty days after the date of the entry of this Judgment. The lawyer, after the entry of this Judgment, shall not accept any new retainer or engage as a lawyer for another in any new case or legal matter of any

nature. During the period between the entry date of this Judgment and its effective date, however, the lawyer may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

It is FURTHER ORDERED that:

2. Within fourteen (14) days of the date of entry of this Judgment, the lawyer shall:

a) file a notice of withdrawal as of the effective date of the disbarment with every court, agency, or tribunal before which a matter is pending, together with a copy of the notices sent pursuant to paragraphs 2(c) and 2(d) of this Judgment, the client's or clients' place of residence, and the case caption and docket number of the client's or clients' proceedings;

b) resign as of the effective date of the disbarment all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary, attaching to the resignation a copy of the notices sent to the wards, heirs, or beneficiaries pursuant to paragraphs 2(c) and 2(d) of this Judgment, the place of residence of the wards, heirs, or beneficiaries, and the case caption and docket number of the proceedings, if any;

c) provide notice to all clients and to all wards, heirs, and beneficiaries that the lawyer has been

disbarred; that he is disqualified from acting as a lawyer after the effective date of the disbarment; and that, if not represented by co-counsel, the client, ward, heir, or beneficiary should act promptly to substitute another lawyer or fiduciary or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

d) provide notice to counsel for all parties (or, in the absence of counsel, the parties) in pending matters that the lawyer has been disbarred and, as a consequence, is disqualified from acting as a lawyer after the effective date of the disbarment;

e) make available to all clients being represented in pending matters any papers or other property to which they are entitled, calling attention to any urgency for obtaining the papers or other property;

f) refund any part of any fees paid in advance that have not been earned; and

g) close every IOLTA, client, trust or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds in his possession, custody or control.

All notices required by this paragraph shall be served by certified mail, return receipt requested, in a form approved by

the Board.

3. Within twenty-one (21) days after the date of entry of this Judgment, the lawyer shall file with the Office of the Bar Counsel an affidavit certifying that the lawyer has fully complied with the provisions of this Judgment and with bar disciplinary rules. Appended to the affidavit of compliance shall be:

a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. Supplemental affidavits shall be filed covering subsequent return receipts and returned mail. Such names and addresses of clients shall remain confidential unless otherwise requested in writing by the lawyer or ordered by the court;

b) a schedule showing the location, title and account number of every bank account designated as an IOLTA, client, trust or other fiduciary account and of every account in which the lawyer holds or held as of the entry date of this Judgment any client, trust or fiduciary funds;

c) a schedule describing the lawyer's disposition of all client and fiduciary funds in the lawyer's possession, custody or control as of the entry date of this Judgment or

thereafter;

d) such proof of the proper distribution of such funds and the closing of such accounts as has been requested by the bar counsel, including copies of checks and other instruments;

e) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

f) the residence or other street address where communications to the lawyer may thereafter be directed.

The lawyer shall retain copies of all notices sent and shall maintain complete records of the steps taken to comply with the notice requirements of S.J.C. Rule 4:01, § 17.

4. Within twenty-one (21) days after the entry date of this Judgment, the lawyer shall file with the Clerk of the Supreme Judicial Court for Suffolk County:

a) a copy of the affidavit of compliance required by paragraph 3 of this Judgment;

b) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

c) the residence or other street address where communications to the lawyer may thereafter be directed.

By the Court, (Lenk, J.)

Maura S. Doyle, Clerk

Entered: April 23, 2013

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-2012-106

IN RE: MICHAEL J. PASTERCZYK

MEMORANDUM OF DECISION

This matter came before me on an information and record of proceedings, together with a unanimous vote of the board of bar overseers (board) recommending that the respondent be disbarred from the practice of law. On July 26, 2011, bar counsel filed a petition for discipline against the respondent. On August 16, 2011, the respondent filed an answer. Following an evidentiary hearing on December 13, 2011, at which the respondent testified, the hearing committee recommended disbarment. The respondent appealed, and, on October 15, 2012, after argument before the full board, the board adopted the hearing committee's findings, credibility determinations, and conclusions of law, and voted unanimously to recommend disbarment. A hearing was held before me on March 11, 2013, on the respondent's appeal of the board's findings and the recommended sanction.

I conclude that the board's findings are supported by the record, the sanction is appropriate, and the respondent shall be disbarred from the practice of law.

1. Background. a. Findings of fact. I summarize the hearing committee's findings and conclusions as adopted by the board. The respondent was admitted to the practice of law in the Commonwealth on June 8, 1977. Beginning in 2000, the respondent held a full-time position at the Soldiers Home in Holyoke, keeping a small law office open on a part-time basis by going into that office early in the morning and late in the afternoon, scheduled around his full-time job. Much of the daily operation of the law office was, apparently, left to the respondent's secretary. The secretary, about whom the record reveals almost nothing, and who could not be located at the time of the disciplinary hearing, left the respondent's employ in 2007 or 2008.

In April, 2004, Helen Edelding retained the respondent to represent her in connection with an automobile accident in which her vehicle was damaged and she was injured, requiring extensive physical therapy.[1] The damage to her vehicle was estimated to be $3,000. The at-fault driver's insurance carrier, OneBeacon, decided that the vehicle was a total loss and, on April 14, 2004, sent Edelding a check in the amount of $1,000, which she gave to the respondent. On April 28, 2004, the respondent sent a letter to OneBeacon stating that Edelding rejected the offer of $1,000

[1] The respondent had represented Edelding in a prior matter involving drafting her will.

for the damage to her vehicle. With that letter, the respondent also provided OneBeacon information concerning the damage estimate of $3,000. The check was never deposited, returned to OneBeacon, or returned to Edelding.

In February, 2006, without Edelding's knowledge or consent, the respondent entered into a settlement agreement with OneBeacon, through a third-party settlement agency, for Edelding's personal injury claim. That agreement was for $4,500. OneBeacon sent the respondent a "General Release," for consideration of $4,500, in Edelding's name. On February 24, 2006, again without the knowledge or consent of his client, the respondent either signed or caused someone else to sign Edelding's name on the release agreement; the respondent then falsely notarized the agreement and returned it to OneBeacon. At the end of March, 2006, the respondent received a check from OneBeacon, written to Edelding and the respondent. He signed, or had someone else sign, the back of the check in Edelding's name, and deposited it in his IOLTA account.

During the month of April, 2006, while making no payments into the account, the respondent withdrew $2,850 from his IOLTA account, in five checks payable to himself, with no documentation that the checks were for any particular client or purpose. By June, 2006, the respondent had withdrawn all but $394.94 from his IOLTA account, and had made no payments to Edelding from any of

the settlement funds.

In October, 2007, the respondent contacted OneBeacon and requested that a check in the amount of $1,000, for the damage to Edelding's vehicle, be reissued. OneBeacon sent the check to the respondent, who signed or had someone else sign the check in Edelding's name, and deposited it into his IOLTA acccount. The respondent, who made no other payments into the account that month, withdrew $800 of this amount within ten days, in three checks made payable to himself; he did not provide any of the funds to Edelding and did not notify her of the receipt of the second check.

From April, 2004, through April, 2009, the respondent met with Edelding on a number of occasions. The respondent testified that those meetings concerned a class action law suit that Edelding was contemplating filing and an estate matter; Edelding testified, and the hearing committee credited, that she also asked the respondent about the status of her automobile accident case a number of times during this period, and that the respondent told her the case was still in process. He did not notify her of the settlement agreement or the receipt of the checks, and did not make any payments to her from the proceeds of those checks. Consistent with Edelding's testimony, a letter in the respondent's file indicates that, on April 9, 2009, he met with Edelding to discuss both an estate matter and her "motor

vehicle accident."

Sometime in 2009, Edelding became aware that her motor vehicle accident claim had been settled. In January, 2010, Edelding retained separate counsel to investigate the handling of her motor vehicle accident case; that attorney wrote to the respondent about the matter, but the respondent did not answer. In July 2010, on the advice of her new attorney, Edelding filed a complaint with bar counsel concerning the respondent's handling of her case. During the course of the investigation, bar counsel learned that Edelding was suffering from a terminal illness. Without objection by the respondent, in June, 2011, bar counsel conducted a video-recorded deposition of Edelding to preserve her testimony; the respondent was notified of the deposition, and invited to appear to cross-examine Edelding, but declined to do so. Edelding died on July 11, 2011.

On July 25, 2011, the respondent sent a check in the amount of $2,000 to his deceased client's successor counsel, stating that the payment would be one of three payments in restitution, and that the others would be made within two to three weeks. By the time of the hearing before the hearing committee, however, the respondent had made no further payments.

b. Evidentiary hearing and hearing committee's report. The respondent admitted to the hearing committee that he had deposited the funds from the settlement checks into his IOLTA

account, and had withdrawn the funds from the IOLTA account for his own benefit, resulting in the account having a balance that was inadequate to pay the money due Edelding. The respondent admitted also that he did not deliver any of the money received from either of the insurance checks to Edelding before her death.[2]

The respondent maintained, however, that there was no evidence that he had signed, or caused to be signed, the general release or the settlement checks, or that he intentionally, rather than inadvertently, misused client funds.[3] He claimed that his former secretary, whom he said he had been unable to locate, might have signed the release, thinking she was acting appropriately, and then given him the release to notarize, and might have mistakenly deposited the checks to his IOLTA account after signing them. The hearing committee found, however, that the respondent did admit to notarizing the release without the client present, and that the secretary would have had no reason to act as the respondent alleged. Moreover, when notarizing the

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[2] At the hearing before me, the respondent represented, and bar counsel did not dispute, that, at that point, he had paid full restitution. He had not done so, however, when the board issued its memorandum on his appeal in October, 2012, almost one year after the initial disciplinary hearing.

[3] In addition to her testimony that she had not signed the checks or the release, the hearing committee examined a number of documents signed by Edelding; the committee noted her very distinctive signature, and that the signature on the release and on the checks bore no resemblance to her known signature.

release, the respondent would have had a duty to examine the signature and to question Edelding about any discrepancy in her signature. Finally, the committee noted, the respondent withdrew the money from the IOLTA account in a series of checks written to himself in rapid succession and in round amounts, without any documentation of the funds being for any other matter, at a time when there was no other activity in his IOLTA account.

On the basis of essentially these findings, the hearing committee determined that the respondent's conduct violated five provisions of the Massachusetts Rules of Professional Conduct. Chiefly, the hearing committee concluded that, by endorsing the settlement checks without his client's knowledge or consent, forging or causing to be forged his client's signature on the back of the checks and on the statement of general release, and falsely notarizing the release, the respondent violated Mass. R. Prof. C. 8.4(a), (c), and (h). In addition, the hearing committee concluded that the respondent violated Mass. R. Prof. C. 8.4(c) and (h) by failing to notify his client about the receipt of the settlement funds, and violated Mass. R. Prof. C. 1.5(b) and (c) by his intentional conversion of client funds to his own use. Noting the intentional misuse of a vulnerable client's funds, the respondent's failure to pay restitution, and his two prior disciplinary proceedings, the committee recommended that the respondent be disbarred.

c. Subsequent proceedings. On March 27, 2012, the respondent appealed to the board from the hearing committee's recommendation. As he had before the hearing committee, the respondent argued that there was insufficient evidence that he had signed the release or caused it to be signed, or had signed the settlement checks. He challenged the hearing committee's credibility findings concerning his former client's testimony, and claimed that any misuse of the client's funds was inadvertent. He maintained that his former secretary, who had left his employ in 2007 or 2008, and who could not be located, might have misunderstood his instructions or mistakenly decided on her own initiative to sign and deposit the checks in his IOLTA account. The board rejected all of the respondent's arguments, and adopted, in full, the findings, conclusions, and recommendation of the hearing committee.[4] The board unanimously voted to recommend that the respondent be disbarred.

The parties appeared before me at a hearing on March 11, 2013. They reiterated essentially the arguments made before the

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[4] Adopting the hearing committee's conclusions, the board determined that the respondent violated Mass. R. Prof. C. 8.4(a) (violate or attempt to violate rules of professional conduct or knowingly assist or induce another to do so); Mass. R. Prof. C. 8.4(c) (engage in conduct involving dishonesty, deceit, fraud, or misrepresentation), and Mass. R. Prof. C. 8.4(h) (engage in conduct otherwise reflecting adversely on fitness to practice law). The board determined also that the respondent violated Mass. R. Prof. C. 1.15(b) (segregation of trust property) and Mass. R. Prof. C. 1.15(c) (prompt notice and delivery of trust property to client or third person).

board. In addition, the respondent maintained that he could not have paid restitution in July, 2011, when he stated that he intended to do so, because he did not receive notice that an estate had been filed in the Probate and Family Court on behalf of his client. As bar counsel pointed out, however, the respondent tendered the first payment to Edelding's subsequent counsel absent any evident similar concern. Moreover, the respondent could at any point have contacted that attorney to determine the status of the estate and the appropriate mechanism by which to complete the payment of restitution.

2. Discussion. As he did before the board, the respondent challenges the sufficiency of the evidence that he signed the release and the settlement checks, or caused someone else to do so. He claims that, while he did withdraw the funds from the IOLTA account, the money was deposited into his IOLTA account by his former secretary, he mistakenly believed he was entitled to the funds, and he did not intentionally deprive Edelding of the settlement proceeds. He questions the hearing committee's reliance on Edelding's videorecorded testimony, claiming that she was experiencing difficulties with her memory due to the drugs that she was taking for her medical condition, and that she appeared "catatonic" on the videotape. He claims that bar counsel acted in bad faith by introducing her videotaped deposition testimony, knowing that she was taking certain

medications that could affect her mental condition. He continues to deny that he spoke with Edelding concerning her motor vehicle accident claim on those occasions, over a five-year period, when she testified that she had inquired about the status of the claim and been told that it was still in process, long after the respondent had settled the claim.

I first consider the respondent's arguments with regard to the hearing committee's findings, and then address the recommended sanction.

a. Credibility determinations. The hearing committee stated explicitly that it found the respondent's testimony not credible, and found Edelding's to be credible. In particular, the committee did not find believable that Edelding, who had not received any payment from the motor vehicle accident claim, would not have inquired about the status of her claim during the five-year period before she learned that the claim had been settled without her knowledge. The committee relied also upon the respondent's 2009 letter to Edelding, in which he mentioned discussion of "your motor vehicle accident."

"The hearing committee . . . is the sole judge of credibility, and arguments hinging on such determinations generally fall outside the proper scope of our review." Matter of McBride, 449 Mass. 154, 161-162 (2007). See S.J.C. Rule 4:01, § 8(5)(a) (hearing committee is "sole judge of the credibility of

the testimony presented at the hearing"). "Absent clear error," the hearing committee's findings will not be disturbed. Matter of McCabe, 13 Mass. Att'y Disc. R. 501, 506-507 (1997). "The hearing committee's credibility determinations will not be rejected unless it can be said with certainty that [a] finding was wholly inconsistent with another implicit finding." Matter of Murray, 455 Mass. 872, 880 (2010).

In support of his argument that Edelding's testimony was confused and not reliable, the respondent points to the hearing committee's finding as to one of her statements concerning the property damage check, that she received a check in the amount of $4,000. Noting that there was at no point a check in the amount of $4,000, the hearing committee concluded that Edelding misspoke, and that she was referring to the check for $1,000, the only check she saw, which she turned over to the respondent.

Like any finder of fact, the hearing committee is entitled to believe some portions of a witness's testimony and to disbelieve others. The committee described in detail Edelding's ability to respond appropriately to questions during her videotaped deposition. The committee emphasized the consistent story she reported to her subsequent attorney, to bar counsel, and in her deposition, supported by record evidence concerning her signatures, by the amounts withdrawn by the respondent from his IOLTA account and paid to himself, and by documents in the

respondent's own files. The committee pointed out also that the respondent had chosen to forgo any opportunity to cross-examine Edelding at her deposition. This single misstatement does not detract from the hearing committee's well-supported findings concerning Edelding's credibility.

Having reviewed the hearing committee's report, as well as the hearing transcript, I conclude that the committee's factual findings have ample basis in the record, and that the committee's credibility determinations were not inconsistent or contradictory.

b. Sanction to be imposed. I turn to the appropriateness of the board's recommended sanction of disbarment. The primary concern in determining the appropriate disciplinary sanction to be imposed is "the effect upon, and the perception of, the public and the bar." Matter of Crossen, 450 Mass. 533, 573 (2008), quoting Matter of Finnerty, 418 Mass. 831, 829 (1994). The appropriate sanction is one which is necessary to deter other attorneys from the same behavior and to protect the public. See Matter of Foley, 439 Mass. 324, 333 (2003), citing Matter of Concemi, 422 Mass. 326, 329 (1996). In addition, the sanction must not be "markedly disparate" from sanctions imposed on other attorneys for similar misconduct. See Matter of Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited; Matter of Finn, 433 Mass. 418, 423 (2001). Nonetheless, "[e]ach case must be decided

on its own merits, and every attorney must receive the disposition most appropriate in the circumstances." Matter of Crossen, supra at 574, quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984).

The presumptive sanction for intentional misuse of client funds, with actual deprivation to the client, is indefinite suspension or disbarment. Matter of Shoepfer, 426 Mass. 183, 187 (1997) (where attorney "intended to deprive the client of funds, permanently or temporarily, or if the client was deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension"). See Matter of McBride, 449 Mass. 154, 163-164 (2007) (deprivation of client funds alone merits disbarment because "standard discipline" is either disbarment or indefinite suspension, and thus "sanction of disbarment is not markedly disparate"); Matter of Goldstone, 445 Mass. 551, 566-567 (2005) (disbarring attorney who converted client funds); Matter of Johnson, 444 Mass. 1002, 1004 (2005) (indefinitely suspending attorney who commingled funds and used client funds for personal expenses); Matter of Dragon, 440 Mass. 1023, 1023-1024 (2003) (disbarring attorney for intentional deprivation of client funds).

Both the board and the hearing committee recommended that the respondent be disbarred. The committee considered in aggravation the respondent's history of prior discipline: (i) an

admonition in 1995 for neglect of an estate matter;[5] and (ii) a public reprimand in 1998 for neglecting a client's real estate transaction, failing to determine whether a deed had been properly executed and notarized, failing to record the deed, and failing to communicate with the buyer.[6] Most significantly, in deciding to recommend disbarment over indefinite suspension, the board and the hearing committee relied on the respondent's failure to pay restitution.[7] This was entirely appropriate. See Matter of LiBassi, 449 Mass. 1014, 1017 (2007) (in choosing between indefinite suspension or disbarment, "the court generally considers whether restitution has been made").

The respondent's actions in converting his client's funds to his own use, and misrepresenting to her that no settlement had taken place and that no settlement funds had been received, would merit either disbarment or indefinite suspension. See Matter of Schoepfer, supra. While the respondent has repaid the funds, he did so only after the disciplinary investigation was complete and

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[5] See AD-95-18, 11 Mass. Att'y Disc. R. 345 (1995).

[6] See Matter of Pasterczyk, 14 Mass. Att'y Disc. R. 562 (1998).

[7] The hearing committee also considered in aggravation that the respondent took advantage of a vulnerable client, and that the respondent did not ask his client to sign a contingent fee agreement, which the committee stated was "uncharged misconduct" that could be considered in aggravation. Given the board's and the hearing committee's proper reliance on the intentional misuse of client funds and the failure to pay restitution, I do not consider the appropriateness of these additional factors.

the hearing committee had recommended disbarment, well after the client's death. See Matter of LiBassi, supra ("[r]ecovery obtained through court action is not restitution for purposes of choosing an appropriate sanction"). As a result, I will not consider this repayment in mitigation, and, thus, the intentional deprivation of the client's funds alone would likely merit disbarment. See Matter of Dasent, 446 Mass. 1010, 1012-1013 (2006) (imposing sanction of disbarment where attorney failed to repay client full amount owed after intentionally misusing client funds, committed multiple other violations, and showed no mitigating factors).

Considered in light of the respondent's prior misconduct, the forgery of the client's signatures, his denial of any responsibility for his actions, his efforts to place blame on his former staff, and his manifestly unreasonable explanation for his failure to pay restitution when he promised to do so, I have little doubt that disbarment is the appropriate sanction. In addition, the respondent's past misconduct includes repeated neglect of client matters and failing to communicate adequately. Such similar prior misconduct "is an especially weighty aggravating factor." Matter of Ryan, 24 Mass. Att'y R. 632, 641 (2008).

The respondent has identified no mitigating factors that might justify reduction of the recommended sanction. Given the

cumulative effect of the intentional violations present here, his record of prior discipline, his failure to pay restitution before the commencement of disciplinary proceedings or while the client was alive, and the absence of any mitigating factors, there is no basis for me to conclude that disbarment would be "markedly disparate" from the sanction imposed in prior cases. See Matter of Goldberg, supra. Accordingly, I impose the sanction recommended by the hearing committee and unanimously agreed to by the board.

3. Disposition. A judgment shall enter disbarring the respondent from the practice of law in the Commonwealth.

By the Court

Barbara A. Lenk
Associate Justice

Entered: April 23, 2013