IN RE: RICHARD P. HEARTQUIST

NO. BD-2013-029

S.J.C. Order of Term Suspension entered by Justice Cordy on May 13, 2013, with an effective date of September 7, 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.

EXHIBIT 3

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL,
Petitioner

vs.

RICHARD P. HEARTQUIST, ESQ.
Respondent

B.B.O. File No. 2-08-0209

Board Memorandum

Bar counsel appeals from a hearing committee's recommendation that the respondent, Richard P. Heartquist, be suspended for six months and a day, and that certain conditions be placed on his reinstatement. Oral argument was heard by the full board.

For the reasons discussed below, we adopt the hearing committee's findings of fact, conclusions of law, and recommendation that he be suspended for six months and a day. We decline to adopt the proposed restrictions on his reinstatement.

The Findings and Conclusions of the Hearing Committee

The respondent was a sole practitioner focused on criminal defense, including court-appointed work, with some cases involving personal injury, civil litigation, and business advice. He spent about eighty percent of his professional time in court.

From 2006 through 2008, the respondent also conducted a few residential real estate closings each month, almost always as the settlement agent for the lender. He opened a separate IOLTA account dedicated to his conveyancing practice.

Before undertaking this line of work the respondent had no experience in real estate closings. When he became a title agent for First American Title, he received training concerning

HUD-1 settlement statements and conveyancing. He also received some training from an acquaintance.

Count One: A Series of Fraudulent Checks

During the latter part of 2007 through the end of November 2008, the respondent engaged Barbara Brady as an independent contractor. The respondent knew she had worked for the FDIC and that, as a paralegal, she had assisted attorneys in real estate matters. Observing Brady's work, the respondent concluded that she knew "exactly what she was doing" in gathering information and assembling the documents required for a closing.

This was the second time Brady worked for respondent. During her first round, lasting some months and several closings, Brady apparently performed her duties competently and without raising concerns about her honesty. Brady briefly left the respondent, then returned in late 2007 after her other employer reduced her hours.

The respondent agreed to pay Brady $300-$400 per closing, depending on whether the closing was for a refinancing or a new sale. Between late 2007 and November 2008, Brady worked on approximately twenty-five closings.

The respondent assigned Brady the tasks of setting up each closing file, dealing with the lender, and preparing paperwork. He also delegated to Brady the writing and transmittal of checks and the maintenance of the records of transactions in his IOLTA conveyancing account.

In advance of a closing Brady wrote the necessary checks and presented them to the respondent for his signature. Brady did not have general check-signing authority; usually the respondent signed the closing checks presented to him. Still, the respondent simply looked at the checks to see whether they matched the HUD-1 settlement statement for the closing.

The respondent did not maintain records of the IOLTA conveyancing account in compliance with Mass. R. Prof. C. 1.15(f), including the requisite chronological check register, individual client ledgers, and reconciliation reports. He understood that he had a professional obligation to maintain individual ledgers that accounted for all funds and balanced out the

transaction. For this purpose, he kept a reconciliation and disbursement sheet (R&D) and a HUD-1 settlement statement for each closing.

The respondent delegated to Brady the task of creating the R&D, which listed all of the payments to be paid and referenced the IOLTA check number by which such payments were made. Each R&D sheet should have demonstrated that the underlying transaction balanced out as between all cash in and all cash out. Properly prepared, the R&D sheets would have corresponded to disbursements on the HUD-1 settlement statement, and they would have permitted the respondent to determine that all required disbursements had been made.

For each of the closings Brady handled, the respondent also signed the HUD-1 settlement statement. He understood that the HUD-1 had to account for all monies received and disbursed at closing.

The respondent compared the R&D sheets Brady prepared with the corresponding HUD-1's, but he did not do so with sufficient care. In some of the closings the R&D sheet Brady prepared could not be reconciled easily with the HUD-1 settlement sheet.[1]

The respondent allowed Brady to pay herself by writing checks drawn on his IOLTA conveyancing account. These checks were included in the packets Brady presented to the respondent for signature in connection with each closing. The respondent also wrote a number of checks to Brady out of his operating account at various points from late 2007 through 2008. Aside from reviewing the checks Brady presented to him, the respondent took no steps to ascertain how much Brady paid herself or to assure that Brady paid herself only from attorney's fees that were due to the respondent or funds that the HUD-1 settlement statements earmarked for payment directly to Brady. The respondent did not keep a separate log of his payments to Brady, and in 2007 and 2008 he did not issue a 1099 reflecting Brady's earnings.

In early October 2007, First American audited the respondent's closing practice, and advised the respondent that he should pay Brady from funds transferred into his operating

[1] The committee discussed four closings presenting this problem.

account, not from the IOLTA account. First American did not report any other deficiencies. Contrary to First American's advice, Brady continued to receive funds out of the IOLTA account through November 2008.

The checks purportedly in payment of title insurance and real estate taxes that Brady prepared for the respondent's signature were not always delivered. Consequently, some of the buyers had no title insurance in effect after their closing, and in some instances real estate taxes were not paid.

As it turned out, during late 2007 and most of 2008, Brady wrote numerous checks on the IOLTA account to herself, or to others on her behalf, in the total amount of about $50,000. Brady forged the respondent's signature on those checks. The respondent acknowledges that he could have caught Brady's forgeries early on if he had reconciled his bank statements with the R&D sheets she gave him, but he did not do so.

At some time around August 2008, and in the course of reviewing bank statements, the respondent discovered unauthorized checks Brady had written on the IOLTA account, payable to herself, and that the number of checks Brady wrote to herself had increased over time. When the respondent confronted Brady about the unauthorized checks, he found her explanation plausible. Some of the checks, she said, were for extra work she had performed for him, and others were for extra work she was doing for a certain client, with payment to come out of "their end" of their transactions.

The respondent contacted that client and confirmed that Brady was doing some work for it, but he did not confirm that the client was aware that Brady was paying herself with funds he held on their behalf the IOLTA account.

At about this same time, the respondent also discovered checks Brady had written payable to someone he later learned was Brady's landlord. When Brady told the respondent the payee was a broker on certain transactions, he found that explanation plausible. In fact, he himself wrote a check payable to the landlord even after he had discovered the unauthorized

checks in August 2008 because he believed the check had been issued in connection with a closing. He did not check the HUD-1 statements for disclosure of a broker's fee.

Aside from this, the respondent simply accepted Brady's explanations of the forged checks; he did not attempt to corroborate Brady's explanation through the documentation or perform an investigation, which would readily have disclosed Brady's misuse of funds.

The respondent did not fire Brady, notify his malpractice carrier, or notify any of the parties to the closings when he discovered Brady had written the unauthorized checks. He retrieved the checkbook from Brady and "put it under lock and key." He told Brady not to sign his name to checks and that he needed to know about all money going out of the IOLTA account. Still, the respondent continued to let Brady prepare closing checks, and he acknowledges that she could have obtained unsupervised access to the checkbook. He also instructed Brady to sign his name on checks on one or more occasions, despite having directed her not to do so.

Brady continued to write unauthorized checks. For a while she was able to deceive the respondent with fabricated documentation. She created spreadsheets combining information from R&D sheets, HUD-1 statements, and bank statements to create a purported "picture" of the IOLTA conveyancing account which the respondent would review in addition to the R&D sheets. The committee reviewed samples of such account reconciliations for July through September 2008, in which Brady showed opening and closing balances that matched bank account statements.[2] The respondent acknowledges that if he had overseen bank statements as well as the spreadsheets Brady prepared, he would have recognized that she was continuing to misuse IOLTA money, and he would have fired her sooner than he did.

Until this time, Brady's embezzlement had not resulted in a dishonored check. On September 19, 2008, Brady's scheme began to unravel when the respondent's bank notified the Office of Bar Counsel that one of the respondent's IOLTA checks had been dishonored for

[2] The committee noted that during her hiatus with another attorney, Brady also misused closing funds by drawing the money from a formerly inactive trust account into which she had diverted them.

insufficient funds. Brady had written that check to herself and forged the respondent's signature on it.

On October 6, 2008, bar counsel wrote to the respondent requesting an explanation of the dishonored check. Brady intercepted bar counsel's letter and sent bar counsel a response purportedly from respondent on which she had forged his signature.

On November 4, 2008, the respondent's bank alerted the Office of Bar Counsel that two more of the respondent's IOLTA checks had been dishonored for insufficient funds. These checks, and Brady's explanation for them, are discussed further in connection with the second count.

The respondent fired Brady around December 1 or 2, 2008, when she confessed that she had forged another attorney's checks. On December 5, 2008, First American audited the respondent's closings. The audit disclosed the multiple unauthorized checks payable to Brady. That day, the respondent advised the auditor that he had terminated Brady.

About two weeks later, the respondent reported Brady to the local police, and Brady was charged with larceny. The criminal matter was continued without a finding to July 2015, with Brady ordered to make restitution in the amount of $20,000.

During bar counsel's investigation the respondent conceded that "clearly" he "did not monitor [Brady] closely enough."

Based on the foregoing, the committee found that the respondent had violated the following Rules of Professional Conduct:

- Mass. Rule Prof. C. 1.15(f)(1)(E) by failing to perform the three-way reconciliations required under that rule; the respondent's answer admits that he violated this rule with respect to other forms of records as well.
- Mass. R. Prof. C. 5.3(a) (reasonable measures to assure compliance by non-lawyer staff with the respondent's ethical duties).
- Mass. R Prof. C. 1.15(c) (prompt notice and delivery of trust funds to persons entitled to them).
- Mass. R. Prof. C. 1.1 (competence) and 1.3 (diligence).

Count Two: The Masone Funds

On November 7, 2008, the respondent drew a check on his IOLTA account for $8,400 and deposited it into his operating account to cure an account deficit. The $8,400 check in fact drew on money received on behalf of and payable to certain clients, the Masones. The committee found that the respondent had negligently misused that money, and it rejected bar counsel's charge that the misuse was intentional.

During the five or so days leading up to November 10, 2008, the respondent's operating account was in deficit. The negative balance resulted when two checks the respondent had deposited into the account on November 3 were dishonored on November 4. During those same days leading up to November 10, 2008, the respondent's IOLTA account balance was low, and the two dishonored checks were drawn on, and overdrew, the respondent's IOLTA account.

The respondent was unaware that the previous September Brady had drawn IOLTA check 1429 payable to herself, and that it had been dishonored (see count one). The committee found that the respondent understood that a bounced check in his IOLTA account would be reported to bar counsel, and it credited the respondent's testimony that he would not have drawn the two IOLTA checks in November if he had known they would create a negative balance. The committee also credited the respondent's testimony that he believed the IOLTA account held sufficient available funds to cover the checks.

The respondent eventually learned of the two dishonored checks. Brady told him that an anticipated wire transfer related to a closing had not yet arrived. The respondent accepted this explanation at the time, but he acknowledged at the disciplinary hearing that he should have done more to investigate.

On November 7, 2008, the respondent caused a check for $8,400 to be written on his IOLTA account and paid into the operating account, to cure the deficit. He did so because Brady

told him the delayed closing wire had finally arrived. He believed he was entitled to the $8,400,[3] and he neither believed it came from, nor intended to take it from, his clients. In fact, however, the $8,400 check was drawn against $179,550 deposit wire to the IOLTA account on November 10, the day the bank processed the $8,400 check.

The $179,550 wire consisted of proceeds from a real estate sale. The respondent, who did not attend that closing, had agreed to accept the proceeds on behalf of Anthony and Joanne Masone, two of the principals of the seller LLC for which he had done some legal work. Anthony and Joanne were each to receive $89,500, and the respondent was to receive $550 as attorney's fees and document preparation fees. Before the respondent sent the Masones their checks, however, Brady told him that $10,000 had been withheld from the closing funds because of a lien against the Masones' property. The respondent believed Brady's false explanation.

On November 12, 2008, the respondent issued checks to Anthony and Joanne Masone in the amounts of only $84,500 each. He explained to them there had been a $10,000 hold-back from the closing proceeds because of a lien on the property. The committee credited both the respondent's denial that he had converted money from the Masones, who were his friends, as well as his testimony that he wrote their checks for less than they were owed to pay them "the money they were due and [intended to] get the rest to them as soon as [he] got it."

Eventually, during a call to the closing attorney, the respondent learned there had been no holdback from the Masones' funds. He confirmed the closing attorney's assertion that the entire $179,550 had already been wired. He then contacted the Masones and told them that, in effect, Brady had stolen $10,000 of their funds. The respondent acknowledges that Brady had not literally stolen the $10,000 shortfall out of the wired funds. He meant, rather, that Brady had depleted the account by writing unauthorized checks, resulting in the misuse of the Masones'

[3] The respondent believed he could draw $8,400 out of the closing funds because two of the checks he was covering were related to the same client and Brady had told him that some of his own money in the account had been used for the benefit of that client.

funds. The committee found that the respondent's representation to the Masones was substantially correct and was neither intended, nor likely, to mislead them.

The respondent did not fire Brady immediately on learning that she had lied about the purported hold-back. The committee declined to draw any adverse inference from this fact.

After terminating Brady on December 2, 2008, respondent called her back to the office to help with the audit of his files conducted by First American on December 5, 2008. After the audit, the respondent said he was firing Brady immediately, and he escorted her out of the office.

In a letter to bar counsel dated December 18, 2008, the respondent reported Brady's misrepresentations to him about the receipt of the Masones' funds and the purported $10,000 hold-back. In that same letter, the respondent also represented that he had "made up the difference to the [Masones] with [his] own personal funds." Based on the following subsidiary findings, the committee found that this representation was false.

At some time around the first week of December 2008, the respondent gave one of the Masones $5,000 in cash as security towards an anticipated malpractice insurance settlement arising from the missing funds. The respondent advanced the $5,000 to cover the deductible in that amount under his malpractice insurance policy. He did so because he was concerned that an insurance recovery might not make his clients whole.

In October 2009, the Masones presented the respondent's malpractice insurer, Liberty International Underwriters, with a claim for the $10,000. The respondent was aware of the claim and supported it.

Liberty requested information supporting the Masones' claim from the respondent. He informed Liberty that Brady had embezzled the $10,000. The respondent also represented to Liberty that the Masones were still owed $10,000, notwithstanding the $5,000 he had given them as "security." Around June, 2010, Liberty paid the Masones $10,000 in settlement of their claim. Liberty apparently waived the $5,000 deductible because of expenses the respondent had incurred and which the insurer would have borne in the ordinary course. When the first client

received reimbursement from the respondent's malpractice insurer, he returned to the respondent the $5,000 given as security.

The respondent made inconsistent statements to various people concerning the $5,000 he gave the first client. As noted above, he told his client that the payment was, in effect, a security deposit. To bar counsel, he said that he had made full restitution. Through a misleading omission, he allowed his malpractice insurer to believe that his clients had received no payments.

During late 2008, the respondent hired an accountant to reconstruct his IOLTA account. Working primarily off the respondent's bank statements, the accountant reconstructed some of the account, which the respondent provided to bar counsel. This incomplete reconstruction generated lists of unauthorized checks that the respondent provided to bar counsel and to the police. The reconstruction noted a number of deposits and withdrawals that were not or could not be attributed to a particular transaction, payee, or source.

The respondent made some restitution with his own funds, but the committee was not persuaded that the respondent had thoroughly reviewed all closing files and that he had not ascertained which designated payees did not receive the funds earmarked on the pertinent HUD-1 statements. It did find that he had made a sincere attempt to notify any and all potential victims of the fraud.

Based on the foregoing, the committee found that the respondent had violated the following Rules of Professional Conduct:

- Mass. R Prof. C. 1.15(c).
- Mass. R. Prof. C. 8.1(a) (misrepresentation of material fact to bar counsel during investigation), and, in connection with the misrepresentation to bar counsel, Rules 8.4(c) and (h).

The committee made a number of findings in mitigation. The respondent spent personal funds attempting to untangle his accounts, to have title searches performed, and to reimburse a client's insurer. He now has a greater awareness and understanding of the requirements of trust accounting. Having reflected on the course of events under the second count, he has a better

understanding of how to respond and understands the importance of reviewing original bank records and information. Finally, in 2008 he closed his conveyancing practice and transferred uncompleted closings to other counsel.

There were no findings in aggravation.

The Appropriate Sanction

We agree with the hearing committee that the appropriate sanction in this case falls somewhere between those cases involving employee embezzlement and resulting in suspensions, see, e.g., Matter of Gordon, 20 Mass. Att'y Disc. R. 166 (2004) (two-year suspension), and employee embezzlement cases resulting in public reprimand. See Matter of Perrone, 23 Mass. Att'y Disc. R. 545 (2007); Matter of Guida and Perry, 24 Mass. Att'y Disc. R. 314 (2008).

In Perrone, the attorney received a public reprimand after his trusted office manager, who was also his and his wife's closest friend, embezzled about $1.9 million from his trust accounts as part of a Ponzi-like scheme: the office manager converted money received in connection with closings and failed to discharge prior mortgages. Later unrelated mortgage payoff funds were used to make monthly payments on the earlier mortgages that remained undischarged. Perrone, who had delegated the management of his trust account to the office manager, was wholly unaware of the office manager's scheme until it came to light some six years later. In the meantime, audits by the IRS and his title insurer, as well as bar counsel's investigation of a dishonored trust account check notice the summer before the scheme came to light, did not uncover the embezzlement. Once Perrone became aware of the scheme, he made exhaustive efforts to make whole those who had been injured by it.

In recommending a public reprimand in Perrone, the special hearing officer distinguished on six points those cases where an employee's theft of trust funds resulted in an attorney's suspension. First, Perrone had not failed to establish appropriate systems and controls and had handled a large volume of cash for decades virtually without apparent incident until the scheme came to light. Second, Perrone had not entrusted the account to someone he had no reason to trust; his reliance on the office manager was reasonable in light of his knowledge of her and her

skills. Third, Perrone did not brush aside problems with his trust account; only a single incident came to his attention, and it appeared to have been resolved when bar counsel closed the file. Fourth, Perrone's account had withstood a number of audits, and he had asked his accountant to perform reconciliations of the trust account which, unbeknownst to him, were not performed. Finally, a review of the relevant conveyancing account statements would not necessarily have disclosed the scheme.

These points illustrate why, in contrast, a suspension is appropriate here. The respondent had less reason to trust Brady and, over time, more reason to distrust her; he did not have appropriate control systems in place and did not have reason to think he did; and the acts of reviewing and reconciling his bank statements would have disclosed Brady's misconduct. Further, the respondent's efforts at restitution were not as exhaustive as Perrone's.[4]

While this case differs from those resulting in a public reprimand, it also differs from Matter of Gordon, supra. Gordon knew of trust account shortages and covered them with personal funds; he failed to reconcile and audit the account after learning of the embezzlement; He also had additional misconduct, which included failing to turn over a client's file after discharge, endorsing and depositing a settlement check without that client's authority, and neglecting a separate matter.

For similar reasons, the respondent's misconduct was less egregious than that for which a suspension was imposed in Matter of Goldberg, 23 Mass. Att'y Disc. R. 191 (2007). Goldberg delegated to his relatively inexperienced office manager (she had been employed two years earlier as a secretary) the responsibility for maintaining checkbooks, preparing checks and

[4] For similar reasons, this case is distinguishable from Matter of Guida and Perry, 24 Mass. Att'y Disc. R. 314 (2008), where the attorneys received public reprimands following employee embezzlement. There, an office manager, delegated responsibility to handle the firm's high-volume closing accounts, gave false assurances that the accounts were receiving independent review. In part because of a dishonored check notice, it came to light that the office manager and other employees had embezzled about $1.6 million. An investigation was undertaken and prompt steps were taken to ensure that victims were compensated. As in Perrone, and unlike the instant case, the attorneys had reason to rely on the office manager – given the existence of in-house bookkeeping and accounting staff, as well as independent accounting help – and they did not ignore warning signs that things were amiss. While the attorneys had in fact failed to ensure the existence of control systems, they were given assurances that such systems were in place. And, as in Perrone, their title insurer's quality reviews did not disclose any problems.

documents for real estate closings, for sending and receiving mail, and for sending records to a bookkeeper for reconciliation. In addition, the office manager was authorized to sign checks after advance approval. The attorney did not have controls in place, and he neither reviewed his trust account records nor consulted with the bookkeeper. The office manager embezzled up to $200,000 from closing funds. So far, Goldberg is substantially similar to the instant case. Some two years after the embezzlement began, Goldberg learned that a lien had not been paid in connection with one of the closings. He did not investigate the matter and instead instructed the office manager to pay it, which she did using unrelated funds. During several ensuing months, Goldberg received numerous overdraft notices concerning his IOLTA account, and at first his only response was to cover the shortages with personal funds.

In contrast, the respondent's warning signs concerned unauthorized checks that, to his knowledge, had not resulted in loss of client funds. He requested and received explanations from Brady that, he thought, plausibly confirmed this. To the respondent's knowledge, until the shortage in the Masone funds came fully to light, the forged checks did not require him to use personal funds to make up for missing trust funds. During most of Brady's embezzlement, the respondent did not receive notice of dishonored checks, the clearest warning sign that a trust account has been overdrawn and that client funds may have gone missing. Even after he received notice that checks had been dishonored, Brady was able to offer an explanation that did not implicate the misuse of funds. Because in Goldberg the warning signs of trust fund misuse were so much clearer than here, we conclude that the appropriate sanction for the failures of supervision and account record-keeping, and the resulting negligent misuse, should be a suspension shorter than Goldberg's.

We must also weigh the respondent's misrepresentations to bar counsel concerning his restitution to the Masones. While inexcusable and material, that misrepresentation did not concern the central issues of misuse of funds and the respondent's failed supervision over Brady, and the respondent did succeed in making those clients whole through an insurance recovery he supported. We also note that, in the absence of other egregious misconduct, the Court has

indicated that public reprimand is the appropriate sanction for misrepresentations to bar counsel during disciplinary investigations. See Matter of an Attorney, 448 Mass. 819, 833, n. 19 (2007), citing Matter of Fitzgerald, 16 Mass. Att'y Disc. R. 164 (2000); Matter of Manion, 12 Mass. Att'y Disc. R. 265 (1996).

Finally, we weigh the respondent's acknowledgement of his failings, his efforts to avoid recurrence of the same problem, and his use of personal funds to help rectify the injury to his clients. We bear in mind that the hearing committee had the opportunity to assess the sincerity of his efforts and the likelihood that his wrongdoing would not be repeated. Because the major purpose of discipline is the protection of the public and maintaining the integrity of the bar, we believe the respondent's mitigating efforts should receive some recognition both in fairness to him and also to encourage other attorneys to acknowledge their mistakes and to extend themselves to make whole the victims of their misconduct.

Given all the circumstances, we conclude that suspension for a six months and a day, which would entail the requirement that the respondent to take and pass the Multi-State Professional Responsibility Examination before readmission, strikes an appropriate balance. In making our recommendation, we follow the guidance from the single justice in Matter of Donaldson, SJC No. BD-2010-110 (April 4, 2011): "Suspensions longer than six months in duration typically involve substantial violations of the ethical rules, such as fraud, deliberate financial malfeasance, or intentional misrepresentation . . . . Here, respondent's wrongdoing does not reflect egregiously unethical behavior but rather an accumulated record of negligence and sloppiness in the handling of his business." So too, the respondent's accumulated neglect in supervising Brady, coupled with his related misconduct, warrant a suspension of six months and a day.

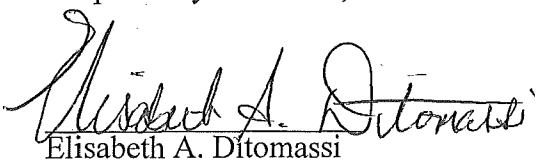
The committee also recommended that the respondent perform a number of conditions before, and obligations after, any reinstatement, all of them intended to demonstrate that parties affected by his misconduct have been made whole. Because we believe the decision to impose

any such conditions are the province of the panel hearing a petition for reinstatement, we decline to adopt them here.

Conclusion

For all of the foregoing reasons, and except to the extent specifically stated above, we adopt the hearing committee's findings of fact and conclusions of law, but modify slightly its proposed sanction. An information shall be filed with the Supreme Judicial Court recommending that the respondent, Richard P. Heartquist, be suspended from the practice of law for six months and a day.

Respectfully submitted,



Elisabeth A. Ditomassi
Secretary pro tem

Voted: December 10, 2012