

IN RE: JAMES P. LONG

NO. BD-2013-047

S.J.C. Order of Term Suspension entered by Justice Botsford on August 7, 2013, with an effective date of September 7, 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
DOCKET NO. BD-2013-047

IN RE: JAMES P. LONG

MEMORANDUM OF DECISION

The Board of Bar Overseers (board) has filed an information pursuant to S.J.C. Rule 4:01, § 8 (6), recommending that the respondent James P. Long be suspended from the practice of law for nine months, with a requirement that he petition for reinstatement. At issue is the respondent's handling of trust funds in family-related trusts of which he was the trustee. The board concluded that the respondent intentionally had misused trust funds, although he had not caused deprivation. The respondent opposes the board's recommendation, arguing that his conduct does not warrant any sanction because the challenged transfers of trust funds were intended to be interest-bearing loans and, therefore, investments authorized under the terms of the trust, and that this court lacks jurisdiction to assess the propriety of the loans because they were made from a trust established under and governed by Florida law. In the alternative, the respondent contends that the board's recommended sanction is markedly disparate from sanctions imposed in comparable cases. For the reasons that follow, I agree with the board's proposed discipline of a nine-month suspension with the condition that the respondent be required to petition for reinstatement.

1. Background. The respondent was admitted to the Massachusetts bar on December 19, 1979. He always has maintained a solo practice and has kept an IOLTA account at all times relevant to these proceedings.

On August 30, 2011, bar counsel filed a petition for discipline against the respondent alleging that the respondent, while serving as estate representative and as a family trustee, failed to deposit trust funds into a separate account bearing interest for the benefit of the beneficiary, misappropriated trust funds, and thereby caused deprivation. A hearing was held on April 30 and May 2, 2012. Forty-one exhibits were admitted, and two witnesses testified, a financial investigator from bar counsel's office who prepared financial schedules from the respondent's account records, and the respondent. The hearing committee issued its report on October 1, 2012, determining, based on extensive findings, that the respondent had violated a number of separate disciplinary rules, and recommending a suspension of nine months. Both bar counsel and the respondent appealed to the board. After a hearing, the board issued a memorandum in which it adopted the hearing committee's findings of fact and conclusions of law and recommended a nine-month suspension with the added requirement that the respondent petition for reinstatement. The board then filed this information.

The facts, as found by the hearing committee and adopted by the board, may be summarized as follows. In 2007, the respondent accepted appointment as trustee of the Ryan J. Long Residuary Trust (residuary trust), created by his late brother; the late brother's son, then a minor, was and is the sole beneficiary of the trust. On November 1, 2007, the respondent deposited into his IOLTA account two checks totaling \$243,027.54 from the Minnesota Life Insurance Company and made payable to the "Ryan J. Long Residuary Trust and James P. Long as Trustee." The respondent maintained several separate accounts on behalf of the residuary trust into which he deposited other insurance proceeds, but he did not transfer the Minnesota Life proceeds into a separate residuary trust account until April, 2011, after bar counsel instructed him to do so. In the meantime, the respondent made a number of withdrawals from the residuary trust's funds in the IOLTA account for purposes unrelated to that trust.

Specifically, at the same time as the respondent accepted appointment and was serving as trustee of the residuary trust, he was also the trustee of the Long Family Trust (family trust), a separate trust that designated the respondent's mother, Irma Long, as the primary beneficiary and the respondent and his siblings as remainder beneficiaries. Since 2007, Irma's retirement income had not covered her monthly expenses, and the respondent's sister, Ann Long, had asked the respondent to make up the shortfall from the family trust. Between November, 2007, and December, 2009, the respondent intentionally drew on the residuary trust's funds in his IOLTA account, rather than family trust funds, issuing checks in the total amount of \$27,000 and depositing them in an account in his mother's and sister's names. At all relevant times, the respondent could have withdrawn these funds from the family trust brokerage account but did not do so.¹ Around December, 2008, the respondent became aware that his financial dealings with his late brother's estate were coming under bar counsel's scrutiny in connection with a separate matter, but he did not create any loan documentation for the checks he had previously drawn from the residuary trust or for those he drew thereafter from that trust.

For a few months after February, 2010, when the respondent repaid a mortgage loan he had taken from the family trust, he did not use residuary trust funds in lieu of family trust funds. Then, from September to November, 2010, the respondent made three transfers of residuary trust funds totaling \$35,000 from his IOLTA account into the family trust account. Roughly contemporaneously with these transfers, the respondent made multiple withdrawals from the

¹ The hearing committee, and derivatively the board, declined to credit the respondent's testimony that he transferred residuary trust funds instead of family trust funds because he believed the assets of the family trust brokerage account were depreciating, whereas his mother had a house that could be sold to pay back the money borrowed from the residuary trust. Contrary to the respondent's contention, the family trust brokerage account had appreciated in the months before the first residuary trust fund withdrawal, and the respondent had continued to write checks out of this brokerage account at least through 2007, including one check drawn the day after his first residuary trust fund transfer to the account in Irma and Ann Long's names.

family trust to pay himself, his bills, and his employees in an amount totaling approximately \$38,000.²

At the time of all the transfers of residuary trust funds the family trust had sufficient liquid assets to care for Irma Long. Additionally, the respondent did not prepare the annual accountings for 2007 through 2010 required by the residuary trust until bar counsel requested that he do so. When finally prepared, the residuary trust accountings did not list any loans to and payable by the family trust as assets of the residuary trust.

In January, 2012, the respondent sold his mother's home, deposited the proceeds into the family trust checking account, and transferred to the residuary trust \$70,197.39, consisting of the principal amount of the ten IOLTA checks described above plus interest calculated at 6.5% per year. The board noted that the interest rate was not based on any documentation contemporaneous with the purported loans because the respondent had created none.

The board found that the respondent knowingly and intentionally misused the funds of the residuary trust for the benefit of the family trust and for his own benefit. The board accepted the hearing committee's findings that (1) while the respondent intended to repay the funds eventually, he did not transfer these funds to his mother and sister and to the family trust as a form of investment for the residuary trust, and (2) the respondent did not believe that his powers as trustee of the residuary trust included the power to make loans to the family trust in the manner he employed. In the view of the hearing committee and the board, the residuary trust document did not authorize loans as they were made in this case – loans that enabled the respondent to avoid using liquid assets of a different trust in which he had a remainder interest and from which he was repeatedly making loans to himself. There was no deprivation, however,

² The petition for discipline did not include allegations referencing these withdrawals from the family trust or charge that they were wrongful. However, the board concluded that these withdrawals were properly considered as an aggravating circumstance, see Matter of the Discipline of an Attorney, 448 Mass. 819, 825 n.6 (2007), and as an indication of the respondent's purpose in transferring residuary trust funds to the family trust.

because there was no showing that the respondent was unable to pay out trust funds from the residuary trust when he would have been required to do so under the terms of the residuary trust instrument.

The board found the respondent's failure to maintain the residuary trust funds in a separate individual interest-bearing account violated Mass. R. Prof. C. 1.15 (e) (5), as appearing in 440 Mass. 1338 (2004) (separate interest-bearing account required for certain trust funds), and that the respondent's intentional misuse of the residuary trust's funds violated rule 1.15 (b) (segregation of trust property), Mass. R. Prof. C. 8.4 (c), 426 Mass. 1429 (1998) (dishonesty, deceit, fraud, misrepresentation), and 8.4 (h) (other conduct adversely reflecting on fitness to practice law).

The hearing committee recommended a nine-month suspension. The respondent and bar counsel appealed to the board, which adopted the hearing panel's findings of fact and conclusions of law but slightly modified the hearing panel's proposed disposition. The board was of the view that the respondent had failed to learn from prior discipline he had received for misconduct that involved an improper business transaction with a client and a conflict of interest – conduct "that also involved a failure to appreciate the manner in which his own self-interest might affect his judgment." See Matter of Long, 24 Mass. Att'y Discipline Rep. 435 (2008). For this reason, the board concluded that the respondent should be required to demonstrate his fitness at a reinstatement hearing under S.J.C. Rule 4:01, § 18 (5), as appearing in 453 Mass. 1315 (2009).

2. Discussion. In reviewing a bar discipline matter, this court affords substantial deference to the factual findings and conclusions of law of the hearing committee and the board. See, e.g., Matter of Barrett, 447 Mass. 453, 462-463 (2006). The board's subsidiary findings of fact will be upheld if supported by substantial evidence – evidence that "a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (6). See S.J.C. Rule 4:01, § 8 (5), as appearing in 453 Mass. 1310 (2009). The hearing panel is the sole judge of the credibility of

the testimony presented at the hearing. Matter of Finneran, 455 Mass. 722, 730 (2010); S.J.C. Rule 4:01, § 8 (5). Its credibility determinations will be upheld unless it can be "'said with certainty' that [a] finding was 'wholly inconsistent with another implicit finding.'" Matter of Barrett, supra at 460. Similarly, the findings and recommendations of the board are not binding on this court, but they are "entitled to great weight" (citations omitted). Matter of Finneran, supra at 730.

The respondent contends the board's finding that the respondent intentionally misused trust funds was not based on substantial evidence. My review of the record persuades me that the disputed finding was made on ample evidence and based in large part on credibility determinations of the hearing committee. The finding is grounded in the respondent's demonstrated failure to document the purported loans of residuary trust funds to the family trust either at the time they were made or thereafter, when he belatedly prepared accountings, as well as in the fact of respondent's own pecuniary interest in the transactions. It was unquestionably within the hearing committee's authority to discredit the respondent's conflicting testimony. See Matter of Barrett, 447 Mass. at 461 ("The committee was in the best position to make such determinations, having heard and observed the witnesses firsthand, and we do not disturb those findings").

The respondent also argues that the board lacks jurisdiction to determine the propriety of his inter-trust loans where the residuary trust was established in Florida. This court, however, has disciplinary jurisdiction over "[a]ny lawyer . . . admitted to, or engaging in, the practice of law in this Commonwealth," "even if the act or omission [to which the disciplinary proceeding relates] did not occur in the course of a lawyer-client relationship or in connection with proceedings in a court." S.J.C. Rule 4:01, §§ 1 (1), 3 (1), as amended, 430 Mass. 1319 (2000). The respondent is a member of the Massachusetts bar and practices in the Commonwealth; the fact that the trust of which he serves as trustee was established in a different State is not relevant

to the board's jurisdictional authority. Relatedly, and contrary to the respondent's suggestion, he properly may be found to have violated the charged provisions of Mass. R. Prof. C. 1.15, even though he was handling the trust funds in his capacity as trustee rather than as an attorney dealing with client funds, because that rule expressly governs the use of "trust funds" by a lawyer in any accounts into which trust funds have been deposited – it is the status of the person handling the trust funds as a lawyer that triggers application of the rule, and it applies to the lawyer whenever he holds property in a fiduciary capacity -- "whether as trustee, agent, escrow agent, guardian, executor, or otherwise." Mass. R. Prof. C. 1.15(a).³

The respondent contends that the hearing committee improperly denied his motion to bifurcate the hearing into separate hearings on the petition for discipline and on the appropriate sanction. In his view, this decision prejudiced him because in determining the appropriate sanction the committee and board were able to conclude from his vigorous defense of his conduct at the hearing that he did not appreciate the wrongfulness of his conduct. As noted by bar counsel, however, the motion to bifurcate the hearing stated as its grounds that "[the respondent] may be unduly prejudiced in the trial on the merits of the bar counsel's complaint by the admission of evidence relevant to discipline." In this regard, the record reflects that the committee indeed considered separately the merits of the present disciplinary complaint and the

³ Mass. R. Prof. C. 1.15(a)(1) defines "trust property" to mean "property of clients or third persons that is in a lawyer's possession in connection with a representation . . . includ[ing] property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, executor, or otherwise." The comments to Mass. R. Prof. C. 1.15 indicate that the rule is intended to apply to all situations where an actively practicing attorney holds property as a fiduciary, even where that attorney is not providing legal services. See Mass. R. Prof. C. 1.15 cmt. 2 ("In general, the phrase 'in connection with a representation' includes all situations where a lawyer holds property as a fiduciary, including as an escrow agent. For example, an attorney serving as a trustee under a trust instrument . . . holds property 'in connection with a representation'"), cmt. 5 ("The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction").

appropriate sanctions. In any event, as described further below, the sanction ultimately imposed is well supported by multiple aggravating factors independent of the respondent's apparent inability to understand the wrongfulness of his conduct at the hearing.

3. Sanction. The question of appropriate sanction remains. As described above, the hearing committee recommended that the respondent be suspended from the practice of law for nine months in light of its finding that the respondent intentionally misused trust funds, but without deprivation.⁴ The board agreed, but recommended the additional requirement that the respondent petition for reinstatement at the end of the term of suspension. The respondent urges that the board's proposed sanction is improper because the funds involved were not client funds, but rather trust funds that he had discretion to invest under the trust instrument. Thus, the respondent argues, the case is materially distinct from those cases in which attorneys spent client funds held in an IOLTA or escrow account. Bar counsel responds that the board's recommended sanction of nine months followed by a petition for reinstatement is appropriate because as a lawyer who is also a trustee, the respondent assumed responsibility as a fiduciary for the welfare of his elderly mother and his minor nephew, both vulnerable beneficiaries, and his role was akin to that of a lawyer representing a client.

"[M]indful that the board's recommendation is entitled to substantial deference," Matter of Doyle, 429 Mass. 1013 (1999) (quotation omitted), I must determine whether the sanction imposed by the board "is 'markedly disparate' with the sanctions imposed in other similar cases." Matter of Brown, 12 Mass. Att'y Discipline Rep. 23, 27 (1996), quoting Matter of Alter, 389 Mass. 153, 156 (1983). See Matter of Goldberg, 434 Mass. 1022, 1023 (2001); Matter of a Discipline of an Attorney, 392 Mass. 827, 834 (1984). Decisions regarding misuse of client

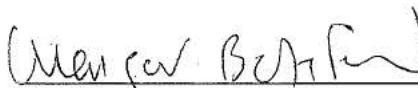
⁴ Both the hearing committee and the board rejected bar counsel's argument, advanced before both, that the respondent's misuse of funds caused deprivation to the beneficiary of the residuary trust. Bar counsel does not advance this argument here, and my review of the record suggests that the board's (and hearing committee's) rejection of it was appropriate.

funds, as set forth below, are relevant in discerning the appropriate sanction in the context of misuse of trust funds controlled by a respondent, acting as trustee. See, *e.g.*, Matter of DeMarco, 25 Mass. Att'y Discipline Rep. 156, 158 (2009), citing Matter of the Discipline of an Attorney, 392 Mass. 827, 836-837 (1984) (disbarment for intentional misappropriation of funds respondent controlled in capacity as trustee of two trusts). The intentional misuse of such funds, where, as here, there is no finding of intent to deprive a trust beneficiary of funds or actual deprivation of those funds, "normally calls for 'a term suspension of appropriate length.'" Matter of Schoepfer, 426 Mass. 183, 187 (1997), quoting Matter of the Discipline of an Attorney, *supra*. Sanctions for such misconduct range from months to more than one year. See, *e.g.*, Matter of O'Reilly, 26 Mass. Att'y Discipline Rep. 470 (2010) (year and day suspension for intentional misuse of \$50,000 of estate funds without deprivation, plus failure to file estate returns, aggravated by three instances of misrepresentation to client); Matter of O'Keefe, 21 Mass. Att'y Discipline Rep. 530 (2005) (nine months suspension for attorney's misuse of escrowed settlement funds on two occasions without deprivation, comingling of funds, and use of misleading firm name); Matter of Rattigan, 14 Mass. Att'y Discipline Rep. 600 (1998) (eighteen months suspension for intentional misuse of client funds without deprivation and pattern of comingling and inadequate records resulting in negligent misuse of funds with only one instance of deprivation); Matter of Norris, 12 Mass. Att'y Discipline Rep. 377, 380 (1996) (six months suspension for intentional misuse of \$1,773 client funds without deprivation, allowance of expiration of statute of limitations on client's claim, and misrepresentations to client to cover up neglect); Matter of Callahan, 10 Mass. Att'y Discipline Rep. 30 (1994) (eighteen months suspension for intentional misuse of client funds and attorney's inability to return misused funds upon client's request, failure to make payment under promissory note, and avoidance of deprivation finding solely because no estate representative appointed at time return of funds demanded).

In light of the foregoing decisions, I agree with the board that a suspension of nine months and a requirement to petition for reinstatement constitute an appropriate sanction in the circumstances of this case. The respondent improperly deposited \$243,027.54 in residuary trust funds into his IOLTA account, despite the existence of separate interest-bearing accounts for the residuary trust, and he intentionally misused approximately \$62,000 in residuary trust funds held in trust for his minor nephew through ten transactions conducted over a period of three years. Given these aggravating factors, the term of suspension proposed by the board fits comfortably within the sanctions imposed in other similar cases. The additional aggravating factor of the respondent's prior similar misconduct justifies the added sanction of the requirement for petition for reinstatement. I accept the board's determination that the respondent's misconduct in this case, like the conflict of interest violations in Matter of Long, 24 Mass. Att'y Discipline Rep. at 435, was motivated by the respondent's own pecuniary interest, as the respondent transferred residuary trust funds to benefit a trust of which he was remainder beneficiary and out of which he was contemporaneously paying personal expenses. See, e.g., Matter of Goodman, 22 Mass. Att'y Discipline Rep. 357, 365 (2006) (added requirement of reinstatement proceedings appropriate "because of the respondent's apparent lack of appreciation for the wrongfulness of his conduct"). Accordingly, I adopt the recommended sanction of the board.

ORDER

For the foregoing reasons, it is **ORDERED** that a judgment enter suspending the respondent James P. Long from the practice of law for nine months with the requirement that he file a petition for reinstatement thereafter.



Margot Botsford
Associate Justice

DATED: August 2, 2013