IN RE: MICHAEL D. WEISMAN

NO. BD-2014-003

S.J.C. Order of Term Suspension entered by Justice Cordy on February 27, 2014. [1]

S.J.C. Judgment of Reinstatement entered by Justice Cordy on April 14, 2015.

Page Down to View Board Memorandum

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

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

BAR COUNSEL, Petitioner v. MICHAEL D. WEISMAN, ESQUIRE, Respondent	)

BOARD MEMORANDUM

For various improprieties in his representation of an organizational client, including a failure to segregate, and misuse of, retainer monies, and failure timely to return unearned fees, a hearing committee recommended that the respondent, Michael D. Weisman, be suspended from the practice of law for one year. The respondent appealed, arguing that the hearing committee's findings are not supported by the record and that, insofar as they rest on credibility determinations, they are wholly inconsistent with other findings. He argues as well that the sanction is far too harsh, and claims that his conduct would be more appropriately punished with a public reprimand. Bar counsel cites familiar case law to the effect that credibility determinations are for the hearing committee. She argues that one year is an appropriate sanction in light of the several Rules violations plus the committee's finding of aggravation. Oral argument was held before the full board on November 25, 2013. We adopt the hearing committee's findings of fact, conclusions of law, and its recommendation that the respondent receive a one-year suspension.

The Findings of the Hearing Committee

We summarize the hearing committee's findings of fact and conclusions of law, supplemented where necessary with evidence from the record.[1] The respondent, an experienced lawyer, has a significant reputation and accomplishment in school funding litigation, known as "adequacy litigation." Through March 2010, he was one of two partners practicing law in Boston under the name Weisman & McIntyre, PC. He was contacted in 2005 by the Indiana State Teacher's Association ("ISTA") about filing a lawsuit against the State of Indiana, challenging as unconstitutional its approach to the funding and provision of public education.

Dan Clark, Ph.D., was ISTA's Deputy Executive Director for Programs and was, at all times, the respondent's primary contact person. Unable to locate an Indiana attorney with the requisite experience or interest, Clark was referred to the respondent. Based on the respondent's earlier successes applying analogous constitutional provisions in Massachusetts, Clark considered him an attractive choice for handling the Indiana litigation.

Financial Arrangements

In late June of 2005, the respondent drafted and sent to ISTA a fee agreement for the time period through September 30, 2005, authorizing him to incur up to $30,000 in fees to investigate the feasibility of adequacy litigation in Indiana. Clark signed the agreement. He and the respondent worked together under the September agreement and, after identifying potential plaintiffs, Clark and ISTA decided to proceed with the litigation. The respondent advised Clark, and Clark understood, that the litigation would be difficult and potentially very expensive. In November 2005, the respondent drafted and sent to ISTA another detailed agreement, defining a more long-term relationship

[1] While we have reviewed all of the respondent's contentions, we discuss only those matters that we feel warrant discussion.

between ISTA and his firm and including prosecuting litigation.[2] ISTA agreed to pay the firm, for the period November 1, 2005-April 30, 2006, a monthly retainer in the amount of $25,000, against which time charges were to be billed, plus out-of-pocket expenses. The parties agreed to reassess the retainer at the end of the six-month period. This agreement was signed not by Clark but by his superior, Warren Williams, ISTA's Executive Director.

After entering into the November agreement with ISTA, the respondent decided he could not handle the case unless he was allowed to use the retainer money as received. He based this decision on his firm's financial model - virtually all contingent fee cases - and its representation of other clients for whom it advanced substantial expenses. This model resulted in high debt; by May 2006, the respondent's firm owed its bank about $1 million. The debt was secured by the respondent's investment account and the respondent's personal guarantee. The hearing committee noted that the respondent believed that unless he could use for operating expenses the monthly $25,000 retainer he would be receiving from ISTA, he would not be able to pay the $50-$60,000 a month he needed to keep his firm afloat.

Accordingly, at some time before or around December 6, 2005, the respondent had a conversation with Clark about his operating expenses and some use of the retainer funds. The respondent and Clark had very different recollections of what was discussed and what was agreed. The hearing committee rejected the respondent's claims that he thought he and Clark were in a position of equal bargaining power, and that he explained to Clark the difference between a retainer account and an operating account. It found that he explained that normally he would put the retainer money into a separate account, and that absent client consent, the law required him to do so. He did not explain the requirements of the Rules of Professional Conduct concerning segregating trust funds and

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[2] The respondent's hourly rate, specified as $250 in the June 2005 agreement, went up to $300 in the November 2005 agreement.

depositing them to an interest-bearing account. He did not tell Clark to speak to ISTA's in-house counsel or any other attorney about a new financial arrangement, and he did not seek the client's countersignature, as he had done with the June and November fee agreements, assenting to the purported modification. The hearing committee credited Clark's testimony that he was under the impression that the respondent wanted to use retainer funds to defray some allocated portion of the firm's overhead related to the ISTA litigation. Clark did not understand, and the respondent did not explain, the terms "client funds," "operating account," "special retainer account," and "client funds account."

The hearing committee credited the respondent's testimony that if ISTA had not consented to his use of the money, he would have withdrawn from the case. However, it did not credit the respondent's testimony that he explicitly obtained Clark's assent to his use of the entirety of the retainer money as it was received, and it did not believe that he told Clark that all the money would be used as received. Indeed, it ultimately concluded that the respondent's efforts to obtain Clark's consent to his commingling and use of ISTA's retainer were dishonest, unethical and ineffective.

Around the time of these conversations, the respondent received ISTA's check dated December 2, 2005, and deposited it into his firm's operating account. In early December and early January, the respondent issued invoices to ISTA. Neither of these invoices referenced either an amendment to the November 2005 fee agreement, or a new agreement that permitted the respondent to use the retainer funds before they had been earned. In early February 2006, the respondent sent another invoice. In the accompanying cover letter, he wrote: "as we agreed, the retainer payments that we receive each month are deposited into our operating account, rather than being held in a separate retainer account. As we generate bills, we will include an accounting for our time and expenses and will indicate whether there is a credit balance or deficit." The respondent's March invoice disclosed that the client had a credit balance of just under $42,000. The March cover letter included the same "retainer payment" language quoted

above. The respondent never discussed with Clark the language in either letter. The respondent agreed that these letters are the only contemporaneous written references to an alleged agreement with Clark about the unrestricted use of the retainers.

The respondent sent ISTA monthly invoices through February 2009. After March 2006, no letters made reference to the retainer funds being deposited into the firm's operating account. ISTA paid the respondent's firm $25,000 per month from December 2005 through May 2007; in June 2007, by agreement, the payments were reduced to $12,500 per month because the credit balance was building up too quickly and Clark wanted it to be no larger than $100,000. ISTA paid $12,500 per month until March 2008. The unearned retainer balance ultimately rose to $171,676.

Adequacy Litigation

In April 2006, the respondent's law firm filed a lawsuit on ISTA's behalf in the Indiana Superior Court. On defendant's motion, the lawsuit was dismissed in January 2007. Plaintiffs, represented by the respondent, appealed. On September 24, 2008, the Indiana Appeals Court reversed and reinstated the case. The defendants appealed. On June 2, 2009, the Indiana Supreme Court reversed the Appeals Court and dismissed the case.

ISTA's Efforts to Recoup Retainer Payments

In and around June and July 2009, entities related to ISTA went bankrupt. ISTA went through a management change and was placed in receivership. Ann Clarke was appointed acting Executive Director. On several occasions from about November 2009 to January 2010, she contacted the respondent to get him to refund the unearned retainer balance of $171,676. Among other things, she told him in January 2010 that "[w]e are in budget season now and ISTA is in very bad shape," and that "we are in a cash crunch and I need to get this done asap." At the time, the respondent had assets that, with appropriate arrangements with his lender, he could have used to repay ISTA.

In early 2010, the respondent's firm ceased operating. When it did, it had few assets and substantial debt. In response to Ann Clarke's continued attempts to collect the debt he owed ISTA, the respondent told her around March 12, 2010 that his firm was closing down and he was moving to another firm, but that a case was settling that would pay the debt. On April 1, 2010, the respondent joined a new law firm. During May 2010, by drawing on a home equity line of credit, the respondent paid off to a family friend a $150,000 loan he had taken to fund his law firm's operations.

After the respondent did not make any payment to ISTA, it engaged Indiana attorney Ben Caughey to pursue the refund. He called the respondent around June 2010. They discussed the respondent making payments from personal funds, and Caughey drafted and sent a note intended to provide the respondent some flexibility with respect to payments, giving him until November 2012 to pay in full. The respondent did not sign the note, and did not begin making payments.

During a subsequent conversation with Caughey the respondent cited his divorce, a complaint for which had been filed in August 2010. He told Caughey that the divorce should be wrapped up soon, and asked to have until October 1, 2010 to pay. Caughey agreed. The respondent did not pay by October 1; during an October phone call, he asked for more time, said he could not bind himself to new debt while his divorce litigation was pending, and refused to make a good-faith payment towards the debt.

In March 2011, ISTA hired a Massachusetts attorney to bring a collection action. This attorney also filed a complaint with bar counsel, a copy of which was sent to the respondent on April 7, 2011. Shortly thereafter, on April 21, 2011, the respondent paid ISTA $180,000, an amount which made it whole.

The hearing committee found that the respondent's conduct violated Mass. R. Prof. C. 1.15(b) (segregate and safeguard trust funds); 8.4(c) (dishonesty, fraud, deceit or misrepresentation); 8.4(h) (conduct that adversely reflects on fitness to practice law); 1.4 (b) (explain a matter so that client can make an informed decision); 1.16(d) (refund

advance payment after termination); and 1.8 (a)(1), (2), and (3) (no business transaction with client that is not fair, that does not give client the opportunity to seek advice of counsel and that does not feature written consent).

Factors in Mitigation and Aggravation

The hearing committee made no findings in mitigation. In aggravation, it cited the respondent's experience – twenty-eight years of practice at the time of the hearing – and his understanding of how, under the Rules of Professional Conduct, client funds were to be treated and segregated. It noted as well his failure to seek advice from either another lawyer or bar counsel about the unconventional agreement he proposed to ISTA. It rejected the claim that he had always acknowledged his personal debt to ISTA, finding instead an aggravating personal financial motive in his use of the retainer to fund his financially-strapped law firm, and in his receipt of an unsecured, interest-free loan at ISTA's expense.

Discussion

The respondent argues strenuously that the hearing committee's finding that he was dishonest is both unsupported by the record and fatally inconsistent with other findings. Since he is challenging a credibility determination, he has a heavy burden to overcome. Matter of Hachey, 11 Mass. Att'y Disc. R. 102, 103 (1995) (hearing committee findings based on credibility not to be rejected unless "wholly inconsistent with another implicit finding"); cf. Matter of Saab, 406 Mass. 315, 328-329, 6 Mass. Att'y Disc. R. 278, 291-292 (1989) (Court rejects argument that it should credit respondent's testimony over that of uncorroborated testimony of complainants, noting that "[o]ur rules concerning bar discipline, however, accord to the hearing committee the position of 'the sole judge of the credibility of the testimony presented at the hearing'").

We do not agree with the respondent's analysis of the hearing committee's report. In isolating a few findings and giving them an unnatural construction, the respondent has

missed the proverbial forest for the trees. We conclude that the dishonesty findings had ample support in the record. The committee cited many reasons in support of its conclusion that the respondent's omissions and lapses were a dishonest ploy to induce the client to consent to an arrangement it did not understand and which strongly favored the respondent. These reasons include the fact that the respondent did not explain the requirements of the Rules of Professional Conduct concerning segregating trust funds and depositing funds in an interest-bearing account; that he did not ask for a waiver of the client's right to earn interest; that he did not suggest that he was proposing an arrangement not in compliance with the Rules; that he did not advise the client to consult with independent counsel; that he did not explain the fact that ISTA was contracting with a limited liability company – a law firm that ultimately closed its doors while the debt was outstanding; that he did not seek a written modification of the parties' agreement; and that he did not advise that the balance of unearned retainer funds might not be available to the client when the representation terminated. He did not explain the terms "client funds," "operating account," "special retainer account," and "client funds account." These failures manifestly support a finding of dishonesty.

In addition, we see no fatal inconsistency between the credibility determinations undergirding the hearing committee's finding of dishonesty and the other findings the respondent has identified. For instance, the fact that the respondent decided that he needed to use the retainer money as received; that he believed he had to use it or would not be able to pay his firm's operating costs; that he thought it was ethically permissible to obtain authorization to use unearned retainer funds; and that without the client's consent he would have withdrawn, do not inexorably lead to a conclusion that the client consented. These facts are reasonably read to mean no more than had the client objected to what it understood the respondent to be proposing, the respondent would have withdrawn. More important, these findings do not preclude a finding that the respondent

acted dishonestly in the way he tried to procure consent, or in procuring defective consent. Cf. Matter of Zimmerman, 17 Mass. Att'y Disc. R. 633, 646 (2001) ("a lawyer cannot avoid 'knowing' a fact by purposefully refusing to look . . .[;] '[s]tudied ignorance of a readily accessible fact by consciously avoiding it is the functional equivalent of knowledge of the fact.'" (citation omitted). Looked at objectively, through the lens of the Rules' requirements, we see a pattern of dishonesty and no meaningful consent. Since the input was corrupted, the output is defective.

We turn for guidance to the misuse of retainer cases. The case law treats misuse of retainer funds as a discrete wrong, different from the misuse of other trust funds such as settlement monies or estate funds. See generally Matter of Sharif, 459 Mass. 558, 568-570 (2011). For three reasons, the misuse of retainer funds is sanctioned differently than the misuse of trust funds generally: there is an expectation that the attorney will earn the entire retainer; the term "retainer" is somewhat ambiguous, since it can mean either prepayment for legal services or compensation for a lawyer's agreement to be bound and available to provide services as needed; and certain legal fees, such as those advanced for expenses, can legitimately be held in an operating or business account even though they are considered client trust funds.

Thus, the presumptive sanctions for misuse of trust funds, enunciated by the Court in Matter of Schoepfer, 426 Mass. 183 (1997), do not automatically apply in the misuse of retainer context. In lieu of a presumptive sanction, the Court has endorsed "a more textured comparison of the facts and circumstances of the case to other similar matters in which disciplinary sanctions have been imposed . . . ." Matter of Pudlo, 460 Mass. 400, 406 (2011) (one-year suspension, six months stayed with conditions, for negligent misuse of unearned retainer). However, in cases like this one, featuring intentional use of retainer funds with intent to deprive, or actual deprivation, "our previous disciplinary decisions suggest that the appropriate sanction is disbarment, indefinite suspension, or a term suspension, depending on the facts of the case." Sharif, 459 Mass. at 566. See also

Matter of Hopwood, 24 Mass. Att'y Disc. R. 354 (2008) (one year suspension for various rules violations, including failure to return unearned retainer of several thousand dollars; misuse of retainer; and failure to cooperate with bar counsel). The public reprimand cases cited by the respondent are inapposite; they do not present the type of intentional conduct, with harm, manifest here.[3]

We are faced here not only with intentional Rule 1.15 misconduct,[4] but also with a Rule 1.8(a) violation that, by undermining the trust and confidence between lawyer and client, strikes at the heart of the fiduciary relationship. As to lawyer-client contracts entered into during a representation, the Restatement recognizes the potential for overreaching, noting that "[a] lawyer . . . usually has no justification for failing to reach a contract at the inception of the relationship or pressing need to modify an existing contract during it. The lawyer often has both the opportunity and the sophistication to propose appropriate terms before accepting a matter." Restatement (Third) of the Law Governing Lawyers, § 18, cmt. e, p. 156 (2000). "Postinception modification beneficial to a lawyer, although justifiable in some instances, raises questions why the original contract was not itself sufficiently fair and reasonable." Id., p. 157. "It is a well-settled rule in equity . . . that the attorney who bargains with his client in a matter of advantage to himself must show, if the transaction afterwards is called in question, that it was in all

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[3] The respondent is correct that there was no evidence that, before his divorce was filed, he cited the automatic restraining order as a reason why he could not repay ISTA or sign a promissory note. However even without this evidence, the hearing committee's finding of dishonesty is, as described above, sturdy and irreproachable. Further, as reflected in its findings of fact and conclusions of law, the committee clearly did not rely on the respondent's testimony that, before the divorce was filed, he cited the restraining order as an excuse for non-payment. The committee's comment about the automatic restraining order occurs in the introduction to the hearing report. Read sensibly, it refers to the respondent's testimony at the disciplinary hearing, where he *did* testify that he had offered the nonexistent restraining order as an excuse for not paying his former client.

[4] We agree with the hearing committee that bar counsel's decision not to plead intentional misuse of the retainer is not dispositive, because intent to misuse is not an element of a Rule 1.15 violation but, rather, a consideration on disposition. Matter of Murray, 455 Mass. 872, 887, 26 Mass. Att'y Disc. R. 406, 424 (2010). We note as well that bar counsel *did* plead dishonesty in connection with the respondent's failure to disclose the implications of the new fee agreement, by virtue of her alleged Rule 8.4(c) violation (conduct involving dishonesty, fraud, deceit or misrepresentation).

respects fairly and equitably conducted. . . . " Hill v. Hall, 191 Mass. 253, 262 (1906). "The attorney must see to it that his client is so placed as to be enabled to deal with him at arm's length, without being swayed by the relation of trust and confidence which exists between them." Id.[5]

Sanctions for Rule 1.8 violations include substantial term suspensions that can range well over one year. E.g., Matter of Fitz, 24 Mass. Att'y Disc. R. 280, 283 (2008) (year and a day, by stipulation, for IOLTA violations and 1.8(a) violation that consisted of a failure to transmit terms of loan to client in writing, and a failure to get written consent; client was repaid its loan, plus interest, within a month of due date; aggravating and mitigating factors); Matter of Pilavis, 17 Mass. Att'y Disc. R. 459, 461-62, 475 (2001) (Single Justice describes business deal whereby sophisticated investor client was induced to purchase stock in the lawyer's company, leading to loss by client of entire $25,000 investment; Single Justice notes that "[s]tanding alone, his fraudulent scheme . . . merits indefinite suspension"); Matter of Ferris, 9 Mass. Att'y Disc. R. 110, 112 (1993) (three-year suspension for transacting with clients by borrowing $50,000 with no security, no suggestion that clients retain counsel, and no disclosure of the lawyer's precarious personal financial circumstances; misconduct compounded by the lawyer's failure to make any payments towards $50,000; in mitigation, hearing committee found that when the lawyer borrowed the money, he had not formed an intent not to repay the funds; in aggravation, it found that by inducing the clients to lend him money, he intentionally misled them for his own gain).[6]

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[5] We emphasize that we are dealing here with a Rule 1.8(a) violation premised on dishonesty. We are not saying that any transaction with a client which does not comply, in all respects, with Rule 1.8(a), and which concerns monies held in a trust account is, *per se*, intentional misuse. We are simply stating that on the facts presented here, we cannot conclude that the arrangement proposed by the respondent constituted a valid Rule 1.8(a) business transaction.

[6] Of course, not all Rule 1.8(a) violations trigger suspensions; much depends on the magnitude of the misconduct, the degree of harm and the existence (or lack) of unfairness. Compare Matter of Long, 24 Mass. Att'y Disc. R. 435 (2008) (two-month suspension, stayed for one year, with CLE for Rule 1.8(a) and other violations, plus aggravation; board notes that loan transaction between lawyer and client, despite failure to make adequate disclosure or written consent and without encouraging client to obtain

We agree with the hearing committee that there was no mitigation. The respondent gains no edge for keeping compliant records and cooperating with bar counsel. "'[W]e are not so pessimistic about the ethics of lawyers as to conclude that a lawyer who conforms to the expected standard of conduct in some respects thereby has established mitigating circumstances.'" Matter of Anderson, 416 Mass. 521, 527, 9 Mass. Att'y Disc. R. 6, 12 (1993) (citation omitted).

We note several aggravating factors. "An older, experienced attorney should understand ethical obligations to a greater degree than a neophyte." Matter of Luongo, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 203 (1993) (noting that under ABA Standards 9.22(i), substantial experience in the practice of law is an aggravating factor); Matter of Hilson, 448 Mass. 603, 619, 23 Mass. Att'y Disc. R. 269, 289 (2007) (conduct motivated by personal financial interests and gain is aggravating).

We do not agree with the respondent that the misconduct was isolated. In addition to the dishonesty detailed above in connection with the purported amendment to the fee agreement, we find pervasive and long-term dishonesty in the respondent's failure, from at the latest November 2009 until April 2011, to fully and explicitly acknowledge his personal debt, and his refusal to enter into an enforceable agreement to repay it. We must consider the cumulative effects of several violations (Matter of Saab, 406 Mass at 327; Matter of O'Reilly, SJC-BD-No. 2010-092 (December 3, 2010); ABA Standards 9.22(c) and (d)). In choosing a sanction, we are mindful of the intentional Rule 1.15 violation, the dishonest Rule 1.8 violation, and the additional diverse breaches of the rules found by the hearing committee. Bearing in mind that the purpose of the disciplinary process is to deter similar behavior and to protect the public, we agree that a suspension of one year is highly appropriate.

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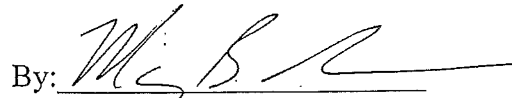
independent legal advice, was not unfair or unreasonable; Matter of Humphries, 24 Mass. Att'y Disc. R. 369 (2008) (public reprimand for 1.8(a) and 1.7(b) violations; no predatory intent, and client not harmed); Matter of Whalen, 22 Mass. Att'y Disc. R. 796 (2006) (public reprimand, by stipulation, for 1.8(a) violation with aggravation; lawyer delayed repayment of $15,000 loan from client for over four months).

Conclusion

For all of the foregoing reasons, we adopt the hearing committee's proposed disposition. An information shall be filed with the Supreme Judicial Court for Suffolk County recommending that the respondent, Michael D. Weisman, be suspended from the practice of law for one year.

Respectfully submitted,

BOARD OF BAR OVERSEERS,

By: 

Mary B. Strother
Secretary pro tem

Voted: January 6, 2014