IN RE: A. JUSTIN McCARTHY

NO. BD-2014-021

S.J.C. Judgment Accepting Affidavit of Resignation entered by Justice Cordy on June 3, 2015.[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
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL,	
Petitioner	
v.	
A. JUSTIN McCARTHY, ESQ.,	
Respondent	

BOARD MEMORANDUM**

After finding that the respondent, A. Justin McCarthy, Esq., had engaged in numerous acts of misconduct, including the intentional misuse of estate funds with resulting deprivation, a hearing committee recommended his indefinite suspension. On appeal the respondent admits misusing funds, but he challenges the findings that his conduct was intentional and that deprivation resulted. He asks that we impose a public reprimand with conditions. In her own appeal, bar counsel asks only that the board amend the hearing report to include findings of additional violations and additional matters in aggravation. Bar counsel is satisfied, however, with the committee's recommendation for indefinite suspension.

The Findings of the Hearing Committee

We summarize the hearing committee's findings of fact, supplemented where necessary with evidence from the record.

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* After this memorandum was issued, the board filed an information and recommendation for indefinite suspension in the Supreme Judicial Court for Suffolk County. While the matter was pending in the County Court, the respondent indicated his intention to seek resignation from the bar pursuant to S.J.C. Rule 4:01, § 15. The matter was remanded to the board on that basis, and the respondent submitted an affidvit of resignation in April 2015. The board voted in May 2015 to recommend the respondent's resignation. On June 3, 2015, the Court entered a judgment accepting the affidavit of resignation effective in thirty days.

The respondent was admitted to the Massachusetts bar in 1977 and has operated his own law firm since the early 1980s. At all relevant times, his firm employed an associate, Attorney Michele Granger, and non-lawyer assistants, over all of whom he had direct supervisory authority.

The respondent prepared a will for Ann Groves, which she executed on September 8, 2004. Her sister Jean was named the executrix and beneficiary in the will, and the respondent was named successor executor. Ann died on January 26, 2006, leaving Jean and two nieces, one of whom was Anne-Louise Bramlett, as her heirs at law. Ann's probate estate consisted of about $1,300,000 held in bank accounts and Fidelity investment accounts. Ann also left non-probate assets totaling about $485,000, including her interest in a condominium as well as an annuity and Fidelity IRA accounts of which Jean was the beneficiary. The estate was subject to state taxes.

On or about February 1, 2006, Jean and Anne-Louise met and consulted with the respondent about probating Ann's estate. Anne-Louise gave the respondent a list setting out the location, type, account number, and balance of each bank and investment account and account statements for each. Jean declined appointment as executor, and the respondent agreed to serve. The respondent advised that he billed at an hourly rate of $225, and he estimated that the fees would not exceed $15,000. At this meeting, the respondent was retained to act as executor of the estate and counsel for the executor.

Because Jean wanted Anne-Louise involved in settling the estate, she authorized the respondent to communicate with Anne-Louise on her behalf regarding the estate. As time went by, Anne-Louise became the respondent's main contact. In late February 2006, the respondent started proceedings in the probate court for the allowance of Ann's will and his appointment as executor. The probate was uncontested and routine. On May 24, 2006, a decree was issued by which the will was allowed and the respondent appointed as executor.

During 2006, the respondent marshalled Ann's assets and paid estate-related expenses. He opened an interest-bearing estate bank account in the name of the "Estate of Ann G. Groves" at Enterprise Bank to hold the decedent's bank deposits and pay the estate expenses. Some of the

services in connection with the estate were rendered by the respondent's associate, Michele Granger. She prepared the probate inventory for Ann's estate, which was due by August 24, 2006. The inventory was inaccurate because, among other things, it included the value of a non-probate annuity, thereby overstating the estate assets by about $292,500. The respondent reviewed the inventory but failed to notice the errors. In addition, the inventory was not timely filed.

By or before the fall of 2006, the respondent knew that the estate was subject to taxation in Massachusetts and that an estate tax return had to be filed.[1] Around August 2006, he retained James Shannon, a certified public accountant, to prepare returns for the estate, the estate tax return, the fiduciary return, and the decedent's final return.[2]

The estate tax return for this estate was not complicated. In October 2006, Shannon requested additional information, which he received by November 10, 2006. On that date, the respondent suggested to Shannon that he file an estimated return as soon as possible. Shannon did not respond to that request.

Shannon did not provide a completed estate tax return for the estate until August 2007. The respondent, who has consistently acknowledged his failure to ensure timely filing of the tax returns, failed to discharge Shannon, to engage another accountant, finish the estate tax return himself, or take other measures to prevent harm to the estate due to delay.

On or about August 8, 2007, the respondent filed the late estate tax return prepared by Shannon and paid the listed tax of $85,999.87. Due to the late filing, the Commonwealth assessed the estate $6,533.65 in interest and $12,900.00 in penalties. The respondent failed to seek an abatement. Instead, he used estate funds to pay the interest and penalties, for which he

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[1] The respondent claimed that he mistakenly thought that the estate tax return was due nine months after his appointment as executor rather than nine months after the decedent's death. The committee found this claim to be irrelevant: the return would then have been due on February 26, 2007 and, as indicated infra, it was not filed until August 2007.

[2] It was the respondent's practice to hire accountants to handle tax returns and tax issues associated with probating estates. The respondent has never prepared an estate tax return or a fiduciary tax return.

was personally liable. The respondent did not object to Shannon's bill of $4,500 for preparing the estate tax return and paid it from estate funds.

By letter to Anne-Louise dated January 15, 2008, the respondent gave Jean a draft of the probate account for the estate. The draft account accurately stated as attorney's fees the amount the respondent had taken for himself or his firm at that point ($25,000), but it was inaccurate and incomplete in other respects. Among other things, it overstated the probate assets, failed to disclose the estate tax assessment, failed to disclose the payment of interest and penalties from estate funds, and failed to include income earned on the estate investments. The respondent's cover letter stated that he was getting ready to complete the estate, subject to filing a final fiduciary tax return and a first and final probate account. He concluded the letter by requesting that Anne-Louise contact him with any questions or concerns. She did not do so.

Between 2006 and 2008, he paid himself a total of $30,000 from the estate funds as fees. He made those payments by six check withdrawals, the first in July 2006 for $5,476.56 (of which $476.56 was an expense reimbursement) and the remaining five for $5,000 each in September 2006, November 2006, January 2007, January 2008, and May 2008.[3] With the exception of the January 2007 payment, which was deposited into the respondent's personal account, the other checks were all deposited into his operating account. We note as well that while Attorney Granger wrote, and the respondent signed, virtually all of the other estate checks, these six checks were each written and signed by the respondent alone. In May 2010, after reconstructing his time records for bar counsel, the respondent claimed to have earned a total of $28,012.50 in fees and expenses.

According to the respondent's own records, except for the first check for fees and expenses in July 2006, he made each of the $5,000 withdrawals before earning the full amount withdrawn. As of May 2008, the date of the last withdrawal, the respondent had taken at least $5,000 more than he had earned.

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[3] The respondent took his last fee payment in May 2008, but the list of time and charges he reconstructed for bar counsel in May 2010 has time entries through April 2010.

The respondent's answer admitted that he had misused estate funds, but he claimed that his misuse was negligent, and that in each instance he believed he had earned what he withdrew. The respondent also claimed that he was unaware that he had taken the additional $5,000 until bar counsel so informed him in 2011. The committee found that when the respondent wrote the check to himself for $5,000 on January 2, 2007, he knew that he had not earned most of it.

On August 15, 2008, the respondent sent a letter to Anne-Louise informing her that he had completed the asset transfers from Fidelity and that the only remaining funds in the estate were $92,000 in the estate account. He stated that these funds, less expenses and fees, would be transferred to Jean by the end of the year.

After August 15, 2008, the respondent took no action to finalize a probate account or to make a further distribution to Jean. He had no further communication with Anne-Louise or Jean, who raised no issues regarding the draft account he had sent. His only action on the estate was to direct Shannon to file fiduciary tax returns for tax years 2007 and 2008.

In the spring of 2009, Jean and Anne-Louise engaged Attorney John Carroll, to inquire about the estate. On April 22, 2009, Carroll asked the respondent to provide a probate account and remit any estate funds he was still holding.

On May 6, 2009, the respondent sent Carroll a second draft probate account and a check for $88,907.72, which represented the funds in the estate account after a holdback of $2,200 for filing fees and final expenses. The respondent also gave Carroll a copy of the estate tax closing letter showing the tax-related assessment, including the interest and penalties. This was the first time Jean and Anne-Louise learned of the late filing of the estate tax return and the assessment of interest and penalties.

The second draft probate account sent to Attorney Carroll was also inaccurate and incomplete. It listed total fees of $25,000 and failed to disclose that the respondent had, at that point, taken $30,000 of the estate funds. The committee found that this error was due to negligence, and was not an attempt to cover-up the $5,000 it found he had intentionally misappropriated during January 2007. In support of this conclusion, the committee noted that

the first account (while also erroneous) had accurately listed $25,000 for attorney's fees. The second draft carried over the errors of the first draft account in the listed receipts and disbursements and incidentally omitted over $80,000 in accumulated income earned on the invested estate funds.

In the fall 2009, Attorney Carroll asked the respondent to explain the late estate tax filing. On December 7, 2009, the respondent replied that the late filing was due to circumstances beyond his control, one of which was Shannon's delay.

Attorney Carroll became ill and died. In the spring of 2010, the estate was still open. In March 2010, Jean and Anne-Louise sent a letter to bar counsel asking for an investigation of the respondent's conduct. On April 20, 2010, bar counsel forwarded this request to the respondent and asked him to include with his response, among other things, copies of all his bills, records of time charges, and other records documenting his fees for the estate. Bar counsel also reminded him to retain intact all his original files, financial records, time and fee records, and other records related to the matters set forth in the request for investigation.

In early May 2010, the respondent prepared for bar counsel an itemization of time and charges for services in connection with the estate. It listed total charges of $28,012.50 through April 2010 for 124.5 hours of service by the respondent and Attorney Granger, and it recited that he had voluntarily capped them at $25,000. The respondent and Attorney Granger had kept some notes regarding the time they spent on legal services for the estate, but they discarded these notes each time he took a payment of $5,000 for legal fees. As indicated above, respondent took his last fee payment in May 2008, but the list of time and charges goes through April 2010. The respondent took his payments for fees without any substantial documentation and with little basis for knowing whether he had actually earned them.

In July 2011, bar counsel advised the respondent that an analysis of his financial records showed that in January 2007 he had taken a $5,000 payment from the estate account that was not disclosed in his second draft account. In late August 2011, the respondent deposited $5,150 into the estate account as a return of the $5,000 payment, plus $150 in interest. Also in response to

bar counsel's inquiry, in late September 2011, the respondent deposited an additional $24,433.65 into the estate account as reimbursement for the $19,433.65 assessed due to the late filing of the estate tax return, and a fee refund of $5,000.

In the fall 2011, Jean and Anne-Louise retained Attorney Randi Levine to represent Jean. On October 13, 2011, the respondent sent Levine a revised first and final account and a check for $31,657.45 for Jean, which comprised the $5,150 and the $24,433.65 returned to the estate account and the balance remaining in the account, less the cost of filing the probate account in court. About February 29, 2012, Jean, Anne-Louise, and the respondent reached an agreement under which the respondent paid an additional $11,100 to Jean in satisfaction of all claims, subject to the allowance of a first and final account. A revised account was filed and was allowed on March 21, 2012, nearly six years after Ann Groves' death.

The committee found that, from 2009 when the respondent acknowledged the estate was ready for distribution, and certainly after May 2009 when the respondent distributed most of the estate funds, Jean was deprived of the $5,000 he knowingly misused.

Based on the foregoing findings and additional findings we discuss as they become pertinent, the committee found that the respondent had violated the following rules in the following ways:[4]

- Rules 1.15(b) (failure to segregate trust funds), 8.4(c) (dishonesty, fraud, deceit, or misrepresentation), and (h) (other conduct adversely reflecting on fitness to practice law) by his intentional misuse of estate funds with resulting deprivation;

- Rules 1.2 (a) (failure to seek client's lawful objectives); 1.15(c) failure promptly to deliver funds due a third person); 1.1 (lack of competence); 1.3 (lack of diligence); 8.4 (d) (conduct prejudicial to the administration of justice); and 1.5 (a) (collection of clearly excessive fee) by his neglect of the estate, his failure to close the estate and disburse funds, and his charging an excessive fee;

- Rules 1.15(d), (e) (5), and (f) (1) (B)-(F) by mishandling IOLTA funds; and

[4] The committee found no violations under Count 2, pertaining to advance fee payments and fee withdrawals.

- Rule 5.3(a) (failure to make reasonable efforts to ensure conduct of non-lawyer assistants is compatible with lawyer's professional obligations) by failing adequately to supervise his non-lawyer assistants.

Factors in Mitigation and Aggravation

The hearing committee noted the respondent's lack of disciplinary history and reputation for good character in the legal community, factors it described as "typical" mitigation" and to which it assigned little weight in determining the appropriate sanction. See, e.g., Matter of Alter, 389 Mass. 153, 156, 3 Mass. Att'y Disc. R. 3, 6-7 (1983). It rejected his argument that he should receive a reduced sanction because of the gap in communication with bar counsel from May 2010 until July 2011, because delay without resulting prejudice is not mitigating. Matter of Gross, 435 Mass. 445, 17 Mass. Att'y Disc. R. 271 (2001).

The committee found in mitigation that the respondent had made complete restitution to the estate and its beneficiaries by paying back: the money he took plus interest, an additional $5,000 in fees, the interest and penalties assessed on the late tax return, and an additional $11,100 to the beneficiary, in satisfaction of all claims.

Discussion[5]

The respondent makes two primary arguments on appeal: that the hearing committee erred in finding intentional misuse and that it erred in finding deprivation. We reject both arguments.

The credible evidence supported the hearing committee's finding that the respondent's withdrawal of $5,000 of estate funds in January 2007 was made intentionally. The respondent wrote himself the January 2007 check only six weeks after he had taken the November 2006 check denominated for fees. He wrote few other checks on the account during that time and was not likely to have been confused. Since the November 2006 check, his firm had expended only

[5] While we have reviewed all of the parties' contentions, we discuss only those matters pertinent to our analysis and disposition.

about four and a half hours of work, well short of the time needed to justify a $5,000 fee payment at his hourly rate of $225. The respondent does not contest the finding that he consistently withdrew fees before they were earned, albeit in other instances negligently. For that reason, the January 2007 withdrawal was not an attempt to recoup fees long past due. Based on this evidence, the respondent certainly should have known he was not entitled to the entire $5,000.

Additional findings confirm that the respondent knew he was not entitled to the full $5,000 and that his misuse was intentional. First, unlike the other five checks by which he paid his firm $5,000, neither the January 2007 check nor its check stub indicate that it was in payment of the respondent's fees. Second, in contrast to those five checks, which were made payable to the respondent's firm, the January 2007 check was made payable to him personally. Third, while the other five checks were deposited into the firm's operating account, which the respondent used to track his income for tax purposes, the January 2007 check was deposited directly into the respondent's personal account. Finally, the personal account into which he deposited the January 2007 check had incurred insufficient fund charges the month before.[6]

Taken individually these additional findings might fall short of supporting a finding of intentional misuse. Yet there is no innocent reason explaining why all of these circumstances came together in a check the respondent had to have known he had not earned.[7] Furthermore, the committee expressly declined to credit the respondent's testimony that his misuse of this $5,000 was unintentional. While bar counsel argues that the committee's affirmative finding concerning the respondent's intent is categorically unassailable as a credibility determination, we

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[6] Contrary to the respondent's argument on appeal, the fact that the respondent had other assets he might have used to cover his personal account does not mean he had no motivation to do so by taking estate funds.

[7] The respondent argues that the committee improperly shifted the burden of proof to him by noting that he had failed to explain why the January 2007 check was treated differently. Where bar counsel makes a prima facie showing of a rules violation, it does not constitute improper burden-shifting to note that a lawyer has failed to establish an affirmative defense. See Matter of London, 427 Mass. 477, 482-483, 14 Mass. Att'y Disc. R. 431, 438-439 (1998).

need not go that far.[8] The evidence of intentional misuse was adequate and persuasive, and we adopt it.[9]

Likewise, the committee did not err in finding deprivation. The respondent argues that, as a matter of custom and practice,[10] the missing funds were not due and owing until the respondent's probate accounting had been allowed. He makes no argument, and cites no authority, that this conclusion is compelled by law. His own actions demonstrate the contrary. While the final account was not allowed until March 2012, he informed a beneficiary in August 2008 that some $92,000 remained in the estate account, which he said would be disbursed by year's end. During 2009 he acknowledged that the estate was ready for distribution, and by May 2009 most of the estate funds had been distributed. Where the respondent himself acknowledged the beneficiaries' entitlement to an earlier distribution of funds – and paid himself his own fees before formal probate court approval of those fees – his protest that the $5,000 he misused was not due and payable in the absence of formal account approval is wholly unpersuasive.

Bar counsel's cross-appeal raises issues that neither challenge the committee's underlying factual determinations nor change our disposition of this matter.[11] For these reasons, we decline to address them here.

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[8] Contrast Matter of Murray, 455 Mass. 872, 879, 26 Mass. Att'y Disc. R. 406, 417-418 (2010), and Matter of Shea, 14 Mass. Att'y Disc. R. 708, 714 (1998) (both cases: the committee's determination of intent upheld as a credibility determination), with Matter of McBride, 449 Mass. 154, 162-163, 23 Mass. Att'y Disc. R. 444, 455 (2007), and Matter of Kerlinsky, 428 Mass. 656, 663, cert. denied 526 U.S. 1160, 15 Mass. Att'y Disc. R. 304, 311 (1999) (upholding board's determination of intent that differed from committee's).

[9] The respondent argues that it was inconsistent for the committee to find that his misuse of $5,000 in January 2007 was intentional while also finding unintentional his failure to disclose in his draft accounting of May 2009 the entire $30,000 in payments to himself. We see no irreconcilable inconsistency. More than two years, additional services, and two additional fee checks separated these two events, and the draft accounting was prepared by the respondent's associate.

[10] The respondent offered expert testimony concerning the general customs of the probate bar with respect to the timing of distributions; the committee rejected the testimony to the extent the respondent offered it to prove absence of deprivation.

[11] Specifically, bar counsel asks that we add the conclusion that the respondent's negligent use of estate funds to pay fees before they were earned violated rules 1.1, 1.3, 1.15(b), and 8.4(h). She asks that we find a violation of rule 1.15(d)(1) (failure to account for trust funds) because the respondent's accountings were inaccurate. Finally, she asks that we find in aggravation that the respondent had substantial experience at the time of his misconduct, that the

Recommended Disposition

Based on the hearing committee's findings, which we have adopted, the respondent intentionally misused estate funds with consequent deprivation visited upon the heirs. More than fifteen years ago, the Court enunciated strict presumptive sanctions for the commingling and misuse of client funds. See Matter of Schoepfer, 426 Mass. 183, 187-188, 13 Mass. Att'y Disc. R. 679, 685-686 (1997), reaffirming and clarifying Matter of the Discipline of an Attorney (and two companion cases) (Three Attorneys), 392 Mass. 827, 836-837, 4 Mass. Att'y Disc. R. 155, 166-167 (1984). Where, as here, the misuse was intentional and accompanied by deprivation, the presumptive sanction is disbarment or indefinite suspension, usually depending on whether restitution has been made. See, e.g., Matter of Bryan, 411 Mass. 288, 292, 7 Mass. Att'y Disc. R. 24, 29 (1992). The respondent has offered no evidence by which he might discharge the "heavy burden to demonstrate that these principles should not be applied to him." He has not shown any "special mitigating facts that justify less severe discipline," such as a disability that caused the misconduct and which has since been overcome. Matter of Schoepfer, 426 Mass. at 187, 13 Mass. Att'y Disc. R. at 685. Nor has he made any other kind of strong showing that might warrant a downward departure from the presumptive sanction. If anything, his other misconduct, like his responsibility for the interest and penalties imposed on the estate, are aggravating circumstances. See id. Given the facts found and the Court's presumptive standard, therefore, we are constrained to recommend indefinite suspension.

Conclusion

For all of the foregoing reasons, we adopt the hearing committee's findings of fact and conclusions of law, and adopt its proposed disposition. An information shall be filed in the

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victim of his misuse was vulnerable, and that the respondent's misconduct spanned several rules, several incidents, and several years. While these points have some force, the findings of fact supporting them, set forth in the hearing report, are a matter of record, and are available to the public, to any other jurisdictions to which he might be admitted, and to any reinstatement panel.

Supreme Judicial Court for Suffolk County recommending that the respondent, A. Justin McCarthy, Esq., be indefinitely suspended from the practice of law.

Respectfully submitted,

THE BOARD OF BAR OVERSEERS

By: _____
Regina Roman
Secretary

Approved: January 27, 2014