IN RE: EMILE E. MORAD, JR.

NO. BD-2015-037

S.J.C. Order of Indefinite Suspension entered by Justice Botsford on July 30, 2015, with an effective date of August 29, 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

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2015-037

IN RE: EMILE E. MORAD, JR.

MEMORANDUM OF DECISION

The Board of Bar Overseers (board) has filed an information pursuant to S.J.C. Rule 4:01, § 8 (6), recommending the indefinite suspension of the respondent, Emile E. Morad, Jr. The respondent opposes the recommendation, arguing that in the circumstances of this case, lesser discipline would be a more appropriate sanction. For the reasons discussed hereafter, I agree with the board that an indefinite suspension is the appropriate level of discipline to impose.

Background.[1] The respondent was admitted to the Bar of the Commonwealth on June 20, 1995, and was engaged as a sole practitioner in private practice. From at least 2002 through 2013, the respondent maintained an IOLTA account at Sovereign Bank; the respondent was the only signatory on the account. He also maintained an operating account at Sovereign Bank from at least August of 2007 through January of 2013.

On August 26, 2013, bar counsel filed a ten-count petition for discipline against the respondent. The petition contained allegations relating to nine different clients of the respondent's; it generally described occurrences of intentional misuse of client funds leading to deprivation, as well as improper IOLTA record-keeping.

[1] The background facts are taken from the findings of the hearing committee and adopted by the board, as well as from the stipulation of the parties that was filed before the hearing committee on February 2, 2014.

A hearing committee of the board heard the petition in 2014, and in connection with that hearing, the respondent and bar counsel entered into a stipulation of facts that related to many of the allegations in the petition. Based on the evidence before them – the stipulation, ninety-eight exhibits and the testimony of four witnesses, including the respondent – the hearing committee found that with respect to seven of the nine clients, the respondent received funds on behalf of the clients – *e.g.*, in settlement of a case, or to hold in connection with a real estate transaction – and deposited the funds in his IOLTA account, but in each case thereafter, the balance in the respondent's IOLTA account dropped below the amount the respondent should have been holding for the benefit of the client; and that when the respondent finally paid each of these clients the money each was entitled to receive, the respondent used funds that he had received from other clients and put in his IOLTA account to hold for those clients' benefit, or funds he borrowed from other clients or friends.[2] The hearing committee also found that: in five instances, the respondent did not promptly pay funds that were due to clients, sometimes waiting several months or even years to pay them;[3] in at least two instances, the respondent failed to place clients' funds into individual interest-bearing trust accounts with interest payable to the client, their estate or a third party;[4] and with respect to two clients, the respondent received funds that he should have deposited in his IOLTA account but instead he deposited in his operating

[2] Edna Reitano (Count 1); Ray Morrison (Count 2); June Gonsalves (Count 3); Robin Salerno (Count 4); Deborah Soucy (Count 5); and the estate of Doris Laviolette (Count 8) all fit this category. With respect to Lars Vinjerud, II (Count 6), the hearing committee found that respondent paid out funds held in the IOLTA account on behalf of this client that exceeds the funds provided by $7,595.62, causing a negative balance in the individual client matter and necessarily using of other clients to make the distributions.

[3] Edna Reitano (Count 1); Ray Morrison (Count 2); June Gonsalves (Count 3); T. Kevin Richards (Count 7); Co-executors and sole beneficiaries of the estate of Doris Laviolette (Count 8).

[4] June Gonsalves (Count 3); Robin Salerno (Count 4); co-executors and sole beneficiaries of the estate of Doris Laviolette (Count 8).

account, thereby commingling the clients' funds with his personal funds.[5] Ultimately, the hearing committee found intentional misuse of client funds with actual deprivation in six instances,[6] and three instances of intentional misuse without deprivation,[7] all in violation of Mass. R. Prof. R. 1.15(b) (requirement to hold trust property separate from lawyer's own property), 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and 8.4(h) (conduct adversely reflecting on fitness to practice law).[8] The hearing committee separately found that with respect to six of the clients, the respondent had received funds for them, had deposited the funds in his IOLTA account, and had then withdrawn his fees without rendering to clients a record of the amounts withdrawn, the services rendered, or a balance of client funds left in the account.[9]

The hearing committee, by a vote of two to one, recommended that the respondent be disbarred; the dissenting member recommended indefinite suspension. The board adopted the hearing committee's findings of fact and conclusions of law, but not the majority's recommended sanction. The board's recommendation is that the respondent be indefinitely suspended.

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[5] Lars Vinjerud, II (Count 6); T. Kevin Richards (Count 7).

[6] Edna Reitano (Count 1); June Gonsalves (Count 3); Lars Vinjerud, II (Count 6); T. Kevin Richards (Count 7); coexecutors and sole beneficiaries of the estate of Doris Laviolette (Count 8); Amelia Hardy (Count 9).

[7] Ray Morrison (Count 2); Robin Salerno (Count 4); Deborah Soucy (Count 5).

[8] The hearing committee also determined, and the board agreed, that that the respondent had violated many other disciplinary rules, none of which featured prominently in the hearing committee's discussion or sanction: Mass. R. Prof. C.1.15(c) (prompt notice and delivery of trust property); 1.15(e)(ii) (failure to maintain client trust funds in separate, interest-bearing account); 1.3 (diligence); 1.1 (competence); 1.2(a) (seek lawful objectives of client); 1.4 (requirement to keep client reasonably informed and comply with request for information); 1.16(e) (requirement to make file available within reasonable time; and various IOLTA record keeping rules).

[9] Edna Reitano (Count 1); Ray Morrison (Count 2); June Gonsalves (Count 3); Robin Salerno (Count 4); Deborah Soucy (Count 5); and the estate of Doris Laviolette (Count 8).

Discussion. The respondent argues that his actions do not warrant disbarment or an indefinite suspension. He admits that balances for at least seven clients fell below what they should have been on some matters, resulting in temporary deprivation of those clients' funds. He contends however, that this occurred as a result of inadvertence, negligence, and sloppy bookkeeping on his part, and that he never intended to keep any funds belonging to his clients. He also points out that he did not deprive any client permanently of his or her funds, a point that bar counsel concedes. The respondent agrees that the presumptive sanction for intentional misappropriation of client funds, whether temporary or permanent, is disbarment or indefinite suspension. See Matter of Shoepfer, 426 Mass. 183-187 (1997). See also Matter of Haese, 468 Mass. 1002, 1008 (2014); Matter of Discipline of an Attorney, 392 Mass. 827, 836 (1984) (Three Attorneys). He points out, however, that where the misuse of client funds is not intentional but simply negligent, the presumptive sanctions set forth in Schoepfer do not apply. See Matter of Scola, 460 Mass. 1003, 1005-1006 & n.1 (2011). Because he views his conduct as negligent, the respondent requested that the board either impose no more than a term suspension or remand the case to the hearing committee with directions to enter a lesser penalty – and he makes the same request here.[10]

The hearing committee made specific and detailed findings of intentional misuse, suggesting an awareness and intentional manipulation by the respondent of his account balances. These findings include the following: the respondent often had an IOLTA balance too low to satisfy his client obligations, causing him to find new funds to satisfy existing obligations; he exhibited a pattern of writing checks to himself from his IOLTA account, in round numbers, and with no client identifiers, when he was not entitled to payment from these client funds; he also displayed an ability to avoid bouncing checks. The hearing committee found as well that on

[10] The respondent also challenges the failure of bar counsel to call additional clients to testify against him. Contrary to the respondent's suggestion, there was no need for bar counsel to call witnesses to prove each count. Cf. Matter of London, 427 Mass. 477, 482 (1998) (lawyer had opportunity to call his own witnesses; his failure to do so is not bar counsel's error).

several occasions, the respondent commingled client funds with his own personal and business funds, and in some other instances, instead of properly segregating long-term trust funds, the respondent "warehoused" them in his IOLTA account, which enabled him to use them freely for his own purposes. Moreover, the hearing committee expressly did not credit a number of the respondent's explanations for his handling of certain client funds.[11] It characterized the respondent's conduct as indicative of "not bumbling but rather, calculated and knowing misuse." These and related findings of the hearing committee, which are well supported by the record, support the committee's and board's determination that the respondent's repeated misuse of client funds over the course of many years was intentional. See Matter of Dragon, 440 Mass. 1023, 1023-1024 (2003); Matter of Schoepfer, 426 Mass. at 188. Cf. Matter of Soutter, 17 Mass. Att'y Discipline Rep. 524, 532-533 (2001) ("unauthorized use of one client's funds to make payments to or on behalf of another is a fundamental violation of [the lawyer's fiduciary] duty. The violation of that duty is indeed serious, and a suspension is required"). In addition, the finding that many clients suffered temporary deprivation is unassailable: the respondent, on numerous occasions, failed for months or longer to pay funds when due. This clearly constitutes deprivation, which "arises when an attorney's intentional use of a client's funds result in the unavailability of the client's funds after they have become due, and may expose the client to a risk of harm, even though no harm actually occurs." Matter of Bailey, 439 Mass. 134, 150 (2003) (citation omitted). See Matter of Carrigan, 414 Mass. 368, 373, n.6 (1993) ("There is deprivation of a client's funds whenever an attorney uses client funds for unauthorized purposes after the time these funds are due and payable").

The respondent urges that I weigh certain mitigating factors he believes are present in his case: during the period at issue in this case, his son came to live with him; his father died; and

[11] The hearing committee, of course, is the sole judge of the credibility of witnesses and its credibility determinations will generally not be disturbed. See, e.g., Matter of Haese, 468 Mass. 1002, 1007 (2014), and cases cited. There is no basis on which to disturb the credibility of the hearing committee in this case.

there was a secretary in his office who was paying her bills from his operating account and transferring money from the IOLTA account to the operating account to cover her thefts. I agree with the board, however, that the hearing committee appropriately concluded that the respondent's ignorance of IOLTA rules, lack of prior discipline, and his inadequate supervision of his secretary to be "typical" mitigation, and without much force here. See generally Matter of Alter, 389 Mass. 153,157 (1983). Compare Matter of Cobb, 445 Mass. 452, 480 (2005) (viewing blaming of others as aggravating factor). Moreover, the hearing committee found several factors in aggravation that, like its specific findings concerning the respondent's acts of misconduct, are factually well-grounded. These aggravating factors include: the personal financial gain enjoyed by the respondent in writing himself checks while his clients were deprived of funds; the length his experience in practice (approximately eighteen years); instances of deliberately false testimony before the hearing committee; and longstanding multiple acts of misconduct. See generally Matter of Pike, 408 Mass. 740, 745 (1990); Matter of Luongo, 416 Mass. 308, 312 (1993); Matter of Saab, 406 Mass. 315, 326-327 (1989). See also Matter of Crossen, 450 Mass. 533, 580 (2008).

Turning to the question of appropriate discipline, I agree with the board that indefinite suspension – rather than suspension for a term of years, on the one hand, or disbarment, on the other – is the appropriate sanction. Intentional deprivation by an attorney of his client's funds, even if temporary, calls for suspension or disbarment. Schoepfer, 426 Mass. at 187. See Three Attorneys, 392 Mass. at 836. Restitution or its absence is "a factor in choosing between disbarment and indefinite suspension . . . ." Matter of Bryan, 411 Mass. 288, 292 (1991). In this case, there is no indication here that any of the respondent's clients were permanently deprived of funds – certainly as to the particular clients who are described in the petition for discipline, the record suggests that they all ultimately received the funds that were due to them. I agree with the board that restitution is to be encouraged, and I also agree that not all forms of restitution should be given equal weight. Here, even though the respondent at times engaged in a

practice of robbing Peter to pay Paul at least temporarily, restitution occurred and it was not compelled by legal process. Compare Matter of LiBassi, 449 Mass. 1014, 1017 (2007). Accordingly, my view is that indefinite suspension is the appropriate level of discipline to impose.

ORDER

It is ordered that judgement enter indefinitely suspending the respondent from the practice of law in the Commonwealth.

Margot Botsford
Associate Justice

Dated: July 30, 2015