IN RE: LUKE SWEENEY

NO. BD-2015-074

S.J.C. Order of Term Suspension entered by Justice Lenk on January 13, 2016, with an effective date of February 12, 2016.[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
NO. BD-2015-074

IN RE: LUKE SWEENEY

MEMORANDUM OF DECISION

This matter came before me on an information and recommendation of the Board of Bar Overseers (board) that the respondent be suspended from the practice of law in the Commonwealth for a period of eighteen months for the misuse of two clients' funds, in one instance with temporary deprivation to the client, and in the other instance with no deprivation. See S.J.C. Rule 4:01, § 8(6). After a two-day hearing at which four witnesses testified, including the second client's mother, the hearing committee recommended that the respondent be suspended from the practice of law for fifteen months, with three months suspended, on conditions, due to substantial mitigating circumstances. Bar counsel accepted the committee's findings of fact and conclusions of law, but challenged the hearing committee's findings in mitigation and the recommended sanction, suggesting that the appropriate sanction would be indefinite suspension or disbarment, see Matter of Sharif, 459 Mass. 558, 565 (2011); Matter of Schoepfer, 426 Mass. 183, 186 (1997), or,

at a minimum in these circumstances, a suspension of thirty months, thereby requiring the respondent to apply for reinstatement. See S.J.C. Rule 4:01, § 18(1)(b), (2)(c).

Adopting the findings of fact and rulings of law of the hearing committee, and emphasizing the uniquely compelling nature of the mitigating circumstances in this case, the board nonetheless concluded that the hearing committee's recommendation of a fifteen month suspension, with three months stayed on conditions, and automatic reinstatement, was "too lenient," based on the respondent's admitted misconduct, while bar counsel's recommendation was "too harsh." The board concluded that a suspension of eighteen months struck the "proper balance" between the nature of the respondent's acts and the nature of the mitigating circumstances.

Before this court, the respondent does not challenge the hearing committee's and the board's findings of fact, but states that he does not agree with the board's recommended sanction. Although the respondent has waived any hearing before me, and, in lieu of a memorandum in opposition, has submitted only a letter, he requests in that letter that I "review the appropriateness of the recommended sanction," without any suggestion of what he considers an appropriate sanction to be. For the reasons discussed below, I agree with the board that an eighteen month suspension is the appropriate sanction in this case.

Accordingly, an order shall enter suspending the respondent from the practice of law in the Commonwealth for a period of eighteen months. See S.J.C. Rule 4:01, § 17(3).

1. Facts. I summarize the facts found by the hearing committee and adopted by the board; as stated, the respondent does not contest the board's findings. The respondent was admitted to the Massachusetts bar on December 23, 1982. He has worked as a sole practitioner throughout his professional career. The misconduct at issue here involved the respondent's mishandling of his IOLTA account between January 1, 2011, and October 10, 2012, and two separate and distinct instances of misuse of client funds in that account during that time. Throughout this period, with respect to his IOLTA account, the respondent did not keep the required check register, Mass. R. Prof. C. 1.15(f)(1)(B); did not maintain individual client records, see Mass. R. Prof. C. 1.15(f)(1)(C); did not keep a ledger in which to record bank fees and charges, see Mass. R. Prof. C. 1.15(f)(1)(D); and did not perform three-way reconciliations of the account every sixty days, as was required under Mass. R. Prof. C. 1.15(f)(1)(E).

a. Leguerre matter. In the first case at issue, in January, 2011, the respondent entered into a contingency fee agreement to represent Jean Leguerre with respect to a personal injury claim. Under the terms of the agreement, the respondent

was to receive one-third of any settlement, plus expenses. After consulting with his client, and with the client's permission, the respondent agreed to settle the claim for $4,500. Leguerre then signed a release, which the respondent sent to the insurance company. On August 8, 2011, the respondent received a check in the agreed amount from the insurance company, signed Leguerre's name on the check, and deposited it into his IOLTA account. After that deposit, the total balance in the IOLTA account was $4,541.84.

On August 12, 2011, the respondent withdrew $4,000 from his IOLTA account, writing a check to another bank for that amount. He then used the money to purchase a cashier's check in the same amount, which he used to pay his daughter's tuition at a local college. The balance remaining in the IOLTA account after the withdrawal was $541.84. The respondent did not provide Leguerre with an itemized bill for his services, and also did not provide Leguerre written notice of his fee withdrawal and a statement of the amount of Leguerre's funds remaining in the account. See Mass. R. Prof. C. 1.15(b)(1). The respondent admitted to the hearing committee that, in undertaking these actions, he misused $2,124.84 of Leguerre's funds, but denied that he intended to misuse the funds or to deprive Leguerre of them. The respondent stated that he paid his daughter's college tuition both to maintain her health insurance, because no one else in the family

had health insurance or access to a health insurance plan, and because, in doing so, he "felt like I was saving her life. It was that important."[1] The respondent did not think that Leguerre would be deprived of his funds, because the respondent expected to have funds from another client within a few days. While concluding that the misuse was intentional, the hearing committee credited the respondent's statements, finding that the respondent "believed the violation would be corrected and no client would suffer."

A week later, on August 19, 2011, the respondent received a settlement check for $78,850, on behalf of another client, and deposited it in his IOLTA account. He used a portion of his earned fee from that settlement to issue a check for $3,000 to Leguerre; Legeurre picked up the check from the respondent the same day. The committee found that, although Leguerre was unaware of any actual deprivation, and the respondent "always intended to make things right and not to materially delay receipt of, or permanently take such funds," Leguerre was in fact deprived of the use of his funds from August 12 until August 19, 2011, and this deprivation was intentional. See Matter of Carrigan, 414 Mass. 368, 737 n.6, 9 (1993) ("There is deprivation

[1] Before the hearing committee, the respondent testified that, while he "knew it was wrong," he felt "compelled to do it to save my daughter, and I think I did." At another point, the respondent explained; "the reason I did it was to save that kid's life, and it worked."

of a client's funds whenever an attorney uses client funds for unauthorized purposes after the time these funds are due and payable"). The committee concluded that the respondent's failure promptly to notify Leguerre of the receipt of the funds, and to pay him the amount due, violated Mass. R. Prof. C. 1.15(c), and his intentional misuse of the funds violated Mass. R. Prof. C. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and (h) (conduct reflecting adversely on fitness to practice law).

Jane Doe matter.[2] In February, 2011, Jane Doe was in a serious motor vehicle accident. She was hospitalized for eight days following the accident; to assist with her recovery, hospital staff also conducted drug detoxification, which included maintaining a suicide watch. Over the course of many years, Jane's mother, Shirley, a long time acquaintance of the respondent,[3] had discussed with him Jane's addiction to numerous drugs, including heroin, Valium, Percocet, marijuana, and many

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[2] Jane Doe was at that point a young woman between the ages of eighteen and nineteen years old (she was eighteen when the accident resulting in the injury occurred, and nineteen when the case was settled). She was homeless and sometimes living in her automobile, "coming and going" from her mother's house at unpredictable intervals, addicted to a number of different drugs, and without a job or a bank account. To protect Jane's privacy due to her medical issues, the hearing committee chose to use a pseudonym, and I do the same.

[3] The respondent met Shirley in 1992, and had known her boy friend even longer.

other types of pills. With Jane's knowledge, Shirley telephoned the respondent from the hospital, seeking his legal assistance. In March, 2011, after she was released from the hospital, Jane went to the respondent's office with her mother and her mother's boy friend, and engaged him to represent her in her personal injury claim. The respondent and Jane entered into a contingent fee agreement under which the respondent would receive one-third of any settlement reached, in addition to his expenses. Jane and her mother agreed that her mother would help Jane with the legal matter, and would be, in the mother's words, "pretty much authorized to speak for her, make any decisions on her behalf." The hearing committee noted, however, that the respondent never prepared a power of attorney for Shirley, nor any other form of written agreement that Shirley would represent Jane.

The respondent eventually received a settlement offer of $8,500 for Jane's case; he recommended to her that she accept the offer. Jane agreed to do so, and signed a release at the respondent's office. The respondent received a settlement check for $8,500, and deposited it in his IOLTA account on February 22, 2012. Because Jane had no fixed address and no telephone, the respondent called Shirley and told her that he had received the settlement check, and had a check for Jane in the amount of $4,833.77 (the amount due after subtracting the respondent's fee and a Mass Health lien for medical services

rendered). Shirley asked the respondent to "cash [the check] out for us and have it available." When the respondent informed Shir that he had to give the check to Jane, Shirley asked that he not give Jane all of the money at once (because of Jane's drug use), stating that Jane had agreed to this. The respondent requested that Shirley ask Jane to contact him. On February 24, 2012, the respondent paid the Mass Health lien of $715.87, and wrote Jane a check in the amount of $4,833.27, but he had not heard from her and did not give the check to her; ultimately, the check was voided. On February 27, 2012, the respondent withdrew his fee of $2,950.77 from his IOLTA account, without first having provided Jane an itemized bill for services, notice of the fee withdrawal, and a statement of the amount of her remaining funds in the IOLTA account.

On March 12, 2012, the respondent withdrew $4,800 from the IOLTA account, with a check payable to himself, marked "partial Marsden." The respondent, however, did not obtain and deposit the settlement funds for the Marsden matter (from which a fee was due him) until April 2, 2012. After this withdrawal in March, the balance in the respondent's IOLTA account was $955.95, less than one-fourth of the amount due to Jane. Toward the end of March, 2012, the respondent spoke to Jane by telephone and she requested $1,200 in cash. On March 23, 2012, Jane, Shirley, and Shirley's boy friend went to the respondent's office and he gave

them the requested cash. Between March 28, 2012, and April 30, 2012, the respondent paid Jane an additional $3,000, in seven different checks issued from his IOLTA account (which at that point contained none of Jane's funds). On April 30, 2012, the respondent gave Jane the remaining $34 due her, in cash (he later averred that this was money taken from his own pocket, and stated at another point that it was taken from his office safe, because none of Jane's funds remained in the IOLTA account). The respondent recorded each disbursement to Jane by making manual entries on a settlement statement, noting the date and amount, and whether it was by cash or by check. The respondent admitted to the hearing committee that he had misused some of Jane's funds, but denied that he had deprived her of any of her funds.

The hearing committee concluded that the respondent's failure to maintain Jane's funds in a trust account violated Mass. R. Prof. C. 1.15(b)(1); his failure to provide proper notice and itemized bills violated Mass. R. Prof. C. 1.15(d); his disbursement of funds from his IOLTA account that caused individual client accounts to result in negative balances violated Mass. R. Prof. C. 1.15(f)(1)(C); and his intentional misuse of Jane's funds violated Mass. R. Prof. C. 8.4(c) and (h). The committee rejected bar counsel's assertion that the respondent's misuse resulted in deprivation, or that he failed to make prompt payment, in violation of Mass. R. Prof. C. 1.15(c).

The committee concluded that Jane, Shirley, and the respondent had agreed that Jane would not be paid any of the funds until she called and asked for them, and that, each time she called, the respondent promptly had paid her the amount requested.

2. Discussion. As stated, the respondent does not dispute the findings of fact of the hearing committee, adopted by the board, nor does bar counsel. All involved also agree that the presumptive sanction here would be an indefinite suspension, and that this case involves mitigating circumstances that should be considered in reducing the sanction imposed. The sole dispute concerns the degree to which mitigation should be taken into account when deciding on the appropriate sanction.

Presumptive sanction. The primary consideration in determining the appropriate sanction to be imposed in attorney disciplinary proceedings "is the effect upon, and perception of, the public and the bar." Matter of Crossen, 450 Mass. 533, 573 (2008), quoting Matter of Finnerty, 418 Mass. 831, 829 (1994). See Matter of Alter, 389 Mass. 153, 156 (1983). The appropriate sanction is one designed to deter other attorneys from the same type of conduct and to protect the public. See Matter of Foley, 439 Mass. 324, 333 (2003), citing Matter of Concemi, 422 Mass. 326, 329 (1996). The board's recommendation of the appropriate sanction is accorded "substantial deference." Matter of Crossen, supra, quoting Matter of Griffith, 440 Mass. 500, 507 (2003). At

the same time, while the sanction imposed should not be "markedly disparate from what has been ordered in comparable cases," see Matter of Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited, "[e]ach case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of Pudlo, 460 Mass. 400, 404 (2011), quoting Matter of Crossen, supra.

As to the Leguerre matter, the presumptive sanction for intentional misuse of client funds, resulting in actual deprivation, is indefinite suspension or disbarment. Matter of McBride, 449 Mass. 154, 163-164 (2007); Matter of Schoepfer, 426 Mass. 183, 187 (1997). In choosing between these two sanctions, the court "generally considers whether restitution has been made." Matter of LiBassi, 449 Mass. 1014, 1017 (2007). Where, as here, an attorney has made restitution, and in the absence of mitigating factors, the balances tips towards an indefinite suspension. Matter of LiBassi, supra. See Matter of McCarthy, 23 Att'y Discipline Rep. 469, 470 (2007). Making restitution as a result of court action is not considered a factor in mitigation. Matter of Bauer, 452 Mass. 56, 75 (2008).

The presumptive sanction for intentional misuse of client funds without deprivation is a term suspension. As to the Doe matter, the board cited a number of cases (improperly relied upon by the respondent with respect to the Leguerre matter, involving

temporary deprivation) in which a suspension of from six to nine months was imposed for intentional misuse without deprivation. See, e.g., Matter of Brown, No. BD-2013-107 (Jan. 9, 2014), Matter of Webster, No. BD-2015-016 (April 10, 2013); Matter of Daniels, 23 Mass. Att'y Disc. R. 102 (2007). In those cases, the misconduct involved intentional misuse of client funds for the attorney's own financial purposes, in conjunction with other violations such as IOLTA account or trust account violations, failure to cooperate with bar counsel, repeated violations, and aggravation due to prior misconduct. None of them involves the situation here, where funds were distributed in an unusual manner at the client's apparent request.

Factors in mitigation. In mitigation, both the hearing committee and the board relied extensively on what was termed a "horrific" car accident in which the respondent's eighteen year old daughter was severely injured on July 1, 2011. From that point through the respondent's misconduct on August 12, 2011, and thereafter, the respondent and his wife stayed with her around the clock, first at the hospital, and then at her bedside at home, switching night and day shifts so that each could continue working. Their daughter's left leg was severely injured and required several surgeries. She was unable to walk or care for herself, was in "great pain," and was depressed due to her physical circumstances, her complete dependence on her parents,

and a forthcoming criminal case on charges of speeding and driving to endanger, which led her to believe, inaccurately but sincerely, that she was going to be sent to prison and never see her parents again.

On August 4, 2011, having been released home, the respondent's daughter suffered a severe allergic reaction to a newly-prescribed medication; the respondent's wife found her slumped over, with swollen lips and difficulty speaking, and telephoned the respondent, who rushed home and took his daughter to a local hospital. The local hospital was unable to diagnose the problem, and, hours after arriving at the emergency room, the respondent and his wife drove their daughter, at the hospital's suggestion, to a second hospital in the early morning hours of August 5, where she was admitted suffering from cellulitis and a severe allergic reaction to the medication. On her return home, the respondent stayed at her bedside, sleeping in a chair, so that he could "watch to be sure she was all right."

While the respondent was driving her to a hearing in the Fall River District Court on August 11, 2011, to appear on the charges filed against her after the accident, the respondent's daughter was "'inconsolable'" and "irrationally convinced that she was going to jail and would not see her parents again." At the hearing, the charges were continued without a finding, and

her license was suspended for one year; the charges were to be dismissed if there were no other incidents during that time.

On the way back from the hearing, the respondent and his daughter decided that she would be able to return to college. The following day, the respondent withdrew $4,000 of Leguerre's funds from his IOLTA account, obtained a cashier's check, and then wrote the college a check for his daughter's tuition. The bill for $5,569.50 had been due on July 22, 2011, but the respondent had earlier notified the college that he was not sure whether she would be able to return, and had obtained an extension until August 15, 2011. No one in the family had health insurance, and the respondent knew that his daughter faced further surgeries; if she returned to college, she would be able to continue health insurance through the school. A few days after this misuse, the respondent used a portion of a properly-earned fee that he had just received to issue a check to Leguerre for the $3,000 he was owed (after subtracting the respondent's fee from the settlement amount).

The respondent testified about that period,

> "I was a wreck, my wife was a wreck, and the whole family was just not working in the normal fashion we normally would. . . . I was sleeping every night on the couch in [his daughter's] room, I was trying to take care of my business. I had other kids living there and my wife wanted some type of attention, and I was ignoring them completely. I was trying to keep it together for the family, and I was somewhat of a mess. And I think it's fair to say that I wasn't acting nor thinking in my usual manner during that time."

The hearing committee found this testimony credible and the board quoted it in its decision. See Matter of Curry, 450 Mass. 503, 519 (2008), quoting Matter of Barrett, 447 Mass. 453, 460 (2006), and cases cited (hearing committee is "sole judge of the credibility of testimony presented at the hearing" whose credibility determinations will be upheld unless court is "satisfied 'with certainty' that a credibility determination was 'wholly inconsistent with another implicit finding'"). The hearing committee also noted that they believed the respondent "is basically a decent, hard-working lawyer who encountered some challenging times," that he had cooperated with bar counsel and had shown remorse, and that they believed these circumstances were unique and he was not likely to violate any disciplinary rule in the future.

As bar counsel points out, the hearing committee's comments that the amounts of funds at issue were small, that Leguerre was unaware of any temporary deprivation, and that he suffered no actual harm, are not relevant to the nature of the misconduct or to a reduction in the sanction. While the hearing committee made these observations, however, it appears that neither the committee nor the board considered these facts in determining the factors in mitigation.

Appropriate sanction. "Our rule is not mandatory. If a disability caused a lawyer's conduct, the discipline should be

moderated, and, if that disability can be treated, special terms and considerations may be appropriate." Matter of Schoepfer, 426 Mass. 183, 188 (1997). See, e.g., Matter of Balliro, 453 Mass. 75, 87-89 (2009) (evidence in mitigation of domestic violence respondent has suffered reduced presumptive suspension of two years to six months for testifying falsely under oath in a criminal trial); Matter of MacDonald, 23 Mass. Att'y Disc. R. 411, 417 (2007) (court "weigh[s] heavily" mitigating circumstances, including depression, in determining sanction for, inter alia, misrepresentation under oath); Matter of Johnson, 20 Mass. Att'y Disc. R. 272 (2004) ("substantial financial difficulties, heavy drinking, depression, and emotional turmoil as a result of" respondent's brother's death mitigated presumptive indefinite suspension to thirty-month suspension).

The circumstances here are exceptional. The parties do not point to, and this court has not found, any disciplinary matter involving similar conduct or the same type of mitigating circumstances present here. Bar counsel points to Matter of Guidry, 15 Mass. Att'y Disc. R. 225, 256 (1999), where a thirty-month suspension was imposed on an attorney who paid three of his five clients the proceeds from the distribution of a will, but did not pay the other two clients, and instead used those funds for his own financial benefit. In that case, the board concluded that mitigating circumstances (whose details are impounded but

that involved the respondent's extreme financial difficulties and family stress over a two-year period) justified the reduction to the agreed-upon thirty-month suspension. The board observed that the respondent's misuse of funds in the Guidry matter there was "far more attenuated than the nexus at issue here." The board also noted Matter of Jebb, 24 Mass. Att'y Discr. R. 374 (2008) (relying on sanction imposed in Guidry where attorney suffered extreme financial and emotional distress, and imposing thirty month suspension where attorney intentionally converted client trust account funds to his own use, after law firm in which he worked was disbanded and attorney suffered depression and "severe financial and emotional distress" over a period of one year).

In both Guidry and Jebb, the source of the emotional distress was severe financial stress, and the attorneys involved intentionally converted funds over lengthy periods for their own financial benefit. Here, the root of the respondent's and his wife's distress was what they perceived, to whatever degree accurately or inaccurately, as the physical health and emotional stability of their child. The hearing committee heard and saw the respondent, his daughter, and his wife testify over a period of days, and stated repeatedly that they found his testimony honest and credible, and the depth of his desperation believable. It is for the hearing committee to determine the credibility of the witnesses. See Matter of Murray, 455 Mass. 872, 880 (2010),

citing S.J.C. Rule 4:01, § 8(4) and Matter of Concemi, 442 Mass. 326, 238 (1996). As the "sole judge" of the credibility of the witnesses, the hearing committee's credibility determinations "will not be rejected unless it can be 'said with certainty' that [a] finding was 'wholly inconsistent with another implicit finding.'" Matter of Murray, supra, quoting Matter of Barrett, 447 Mass. 453, 460 (2006). The board does not assert that it disagrees with the committee's assessment. Bar counsel's contention that there is no evidence of mitigation is not consistent with the record and was squarely rejected by the hearing committee and the board. And bar counsel's statement that the respondent's misuse of Doe's funds indicated that he had continuing financial problems, and used the funds for his own benefit, justifying, at a minimum, a thirty-month suspension, is unsupported by the record evidence.

While recognizing that its recommended sanction was far less severe than the presumptive sanction would be, the hearing committee found that the respondent honestly believed his action was necessary to save his daughter's life (and also that his actions may indeed have done so). Although it concluded that the hearing committee's recommendation was "too lenient," the board, too, noted the "powerful mitigating circumstances properly and supportably found by the hearing committee" in determining that bar counsel's recommendation sanction was "too harsh." Taking

into account both the extent and nature of the mitigating factors as well as the gravity of the misconduct, I agree with the board that what would be effectively a one year period of suspension, with automatic reinstatement, is too lenient a sanction. I conclude that the board's recommendation properly takes into account the extent of the unusual mitigating circumstances in this case, and is "the disposition most appropriate" here. See Matter of Pudlo, 460 Mass. at 404, quoting Matter of Crossen, 450 Mass. at 573.

Accordingly, an order shall enter suspending the respondent from the practice of law in the Commonwealth for a period of eighteen months.

By the Court

Barbara A. Lenk
Associate Justice

Entered: January 13, 2016