IN RE: DAVID M. HASS

NO. BD-2016-016

S.J.C. Order of Term Suspension entered by Justice Spina on June 1, 2016, with an effective date of July 1, 2016.[1]

Page Down to View Memorandum of Decision

[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-2016-016

IN RE: DAVID M. HAAS

MEMORANDUM OF DECISION

Following a recommendation by a majority of a hearing committee (committee) that the respondent, David M. Haas, be suspended from the practice of law for three months, the respondent appealed to the Board of Bar Overseers (board). The majority found that the respondent made intentional false representations to two litigation funding companies that induced them to make loans to a client, that that he failed to comply with his client's written instructions required under the loans, that he failed to promptly notify one litigation funding company that he had received the settlement funds, and that he failed to pay that litigation funding company. Bar Counsel cross-appealed and sought a suspension of six months. In its memorandum the board adopted the committee's findings of fact and conclusions of law, but, focusing its attention on the respondent's failure to notify, the board recommended that the respondent receive a public reprimand. Bar Counsel demanded, pursuant to § 3.57(a) of the Rules of the Board of Bar Overseers, that the board file an information with the county court seeking review of the board's recommendation of a public reprimand. The board filed an information. Bar Counsel now seeks a suspension of three months. The respondent seeks dismissal of the board's memorandum.

The facts found by the committee and its conclusions of law are summarized as follows. The respondent settled a personal injury case against the Massachusetts Bay Transportation Authority (MBTA). The parties understood that the settlement would not be paid until the

beginning of the next fiscal year, July, 2013, when funds would next be available. The client informed the respondent that she wanted to pursue "litigation funding" to assist her financially until the MBTA paid the settlement amount. The respondent understood from experience that he would be required to acknowledge the lien of any litigation funding company before the client could receive a cash advance. He also understood that he would be required to agree to pay the litigation funder from the client's share of the settlement proceeds before disbursing any such funds to the client.

Arrangements were made with two companies, Global and Excel Legal Funding, to provide cash advances to the client. The respondent confirmed with Global by writing dated February 26, 2013, that he would honor Global's lien on the client's settlement and repay Global. On March 15, 2013, he did essentially the same with Excel. The Excel paperwork contained an irrevocable letter of instruction signed by the client directing the respondent to contact Excel before disbursing any proceeds to confirm the amount due, to promptly notify Excel of any assignments or liens on the client's claim and, in the event of a disagreement, to notify Excel in writing and place all settlement monies in escrow and seek court intervention to determine the rights of Excel. The respondent notarized the client's signature on the irrevocable letter of instruction.

The client received cash advances from Global on or about March 4, 2013, and again in April, 2013. The respondent received papers from Global on March 4 in conjunction with the money it advanced to his client on that date. The client received a cash advance from Excel on or about March 15, 2013. The respondent received papers from Excel on March 15 in conjunction with the money it advanced to his client on that date. He represented to Excel in writing that "to my knowledge the [client] has not received any prior cash advances against his/her claims." After

Global provided its second advance to the client, in April, the respondent affirmed in writing to Global that "the [client] has NOT previously received a cash advance against his/her legal claim similar to the attached agreement."

At the end of June, 2013, the respondent received the client's settlement proceeds from the MBTA. The check was deposited in his IOLTA account. He obtained a pay-off figure from Global, but not from Excel. In early July, 2013, the respondent disbursed his legal fees to himself, the amount owed to Global, and the balance to the client, thereby exhausting the entire settlement proceeds. At that time Excel was owed $1,265.

The respondent ignored all requests from Excel for status reports from May, 2013 through August, 2013. On September 19, 2013, the respondent informed Excel that he had disbursed all the client's settlement proceeds. On December 31, 2013, Excel requested an investigation by Bar Counsel. On January 8, 2014, Bar Counsel forwarded Excel's request to the respondent, together with a letter requesting an explanation of his conduct. On February 25, 2014, the respondent and Excel entered into a "Mutual Release" agreement under which the respondent would pay Excel $700 in full satisfaction of all claims. The respondent paid Excel $700. On May 15, 2014, Bar Counsel filed a petition for discipline against the respondent.

A majority of the hearing committee found that the respondent's written representation to Excel that his client had not received any prior cash advances was knowingly false and misleading. His similar written representation to Global in April, 2013, also was knowingly false and misleading. The committee determined that the respondent's intentionally false representations violated rule 4.1(a) [making a false statement of material fact or law to a third person] and rule 8.4(c) [engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation] of the Massachusetts Rules of Professional Conduct. See Supreme Judicial Court Rule 3:07.

The committee unanimously determined that the respondent had violated rule 1.2(a) [a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter] and rule 1.3 [a lawyer shall act with reasonable diligence and promptness in representing a client] of the Massachusetts Rules of Professional Conduct by failing to comply with the client's letter of instructions to contact Excel to obtain the pay-off amount of any lien and to pay Excel from the proceeds of the settlement before disbursing any proceeds to the client.

The committee also unanimously determined that the that the respondent violated rule 1.15(c) [a lawyer shall give prompt notice of receipt of trust funds to a client or third person who has an interest in such funds, and promptly deliver such funds to the client or third person entitled to receive them] of the Massachusetts Rules of Professional Conduct by failing to promptly notify Excel that he had received the settlement funds and by failing to promptly deliver funds owed to Excel.

A majority of the committee did not credit any of the respondents explanations for his conduct. It found no factors in mitigation. It found several aggravating factors, as follows. First, the respondent had substantial experience in personal injury law and practice, and he had experience assisting his clients in working with litigation funding companies. See Matter of Luongo, 416 Mass. 308, 311-312 (1993); Matter of Pemstein, 16 Mass. Att'y Discipline Rep. 339, 345 (2000). Second, the majority found that he demonstrated a lack of insight into his ethical obligations and disciplinary violations. See Matter of Clooney, 403 Mass. 654, 657 (1998). Third, the majority of the committee found that the respondent demonstrated a lack of remorse, and a lack of candor in the proceedings before the Committee. See Matter of Eisenhauer, 426 Mass. 448, 457, cert. denied, 524 U.S. 919 (1998). The majority was particularly troubled by the respondent's extensive efforts to justify non-payment on the ground that the loan was usurious,

despite testifying that he did not pay Excel because he had not remembered its financing. Fourth, the committee determined that notwithstanding the respondent's settlement with Excel, he was not entitled to a finding of restitution as a mitigating factor because he should have paid Excel the entire sum that it was owed.

The respondent's primary argument before me is that the advances from Global and Excel were loans that were both usurious and illegal, and that the underlying premise of Bar Counsel's petition for discipline is therefore a nullity. See G. L. c. 271, § 49 (usurious loan voidable); G. L. c. 140, §§ 96, 110 (loan by unlicensed lender is business of making small loans is void). See also Beach Assocs., Inc. v. Fauser, 9 Mass. App. Ct. 386, 390-391 (1980); Bernhardt v. Atlantic Fin. Corp., 311 Mass. 183, 187 (1942); Cuneo v. Bornstein, 269 Mass. 232, 237 (1920) (where loan is void under small loans statute because lender is unlicensed, then principal as well as interest is uncollectable). There is a significant dispute as to whether the respondent has adequately raised this issue, and whether the issue even can be resolved by the board.[1] Cuneo, supra ("By [G. L. c. 140] § 103, the loan may be declared void by the Supreme Judicial Court or Superior Court in equity upon petition by the person to whom the loan was made").

The flaw in the respondent's argument is that even if he is correct in his view that the loans were void, it has no bearing on the heft of Bar Counsel's petition. The majority of the committee and the board found that the respondent's written representations to Excel that his client had not received any prior cash advances was knowingly false and misleading, and that he knowingly

---

[1] The Board of Bar Overseers (board) discussed the evidentiary issues surrounding the respondent's failure to properly adduce evidence of the illegality of the loans. The respondent also could have offered a certificate from the commissioner of banking concerning the licensure of the litigation funding companies, or lack of such licensure, see Mass. G. Evid. § 1005 (b) (2016 ed.), and any advertising done by them in Massachusetts. The board also noted the respondent's failure to show how he was prejudiced by the failure of Excel to produce all the documents requested by the Hearing Committee chairperson. See Board Memorandum, at 12.

failed to notify Excel that he had received the settlement funds. Excel advanced funds to the client on two occasions based on the respondent's representations. Had he not made those representations, Excel would not have advanced any funds to his client. Excel relied on the respondent's representations. The legality of the loans had nothing to do with his intent or his ethical obligations at the time.[2] His ethical obligations in these circumstances are independent of the validity of the loans. "The most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law." Matter of Hilson, 448 Mass. 603, 619 (2007), quoting ABA Standards for Imposing Lawyer Sanctions § 5.0, Introduction (1991).

Similar reasoning applies to the finding that the respondent failed to notify Excel of this receipt of the settlement funds, and his failure to follow his client's written directions. The majority of the committee discredited the respondent's explanations, and found that his conduct violated rules 1.2(a), 1.3, and 1.15 (c). These findings and conclusions are complicated by Bar Counsel's argument that the respondent made "intentional misrepresentations that induced third parties to entrust him with a fiduciary obligation," which in turn supports the imposition of a lengthy (six months) suspension. If, as the respondent argues, the loans were void and entirely uncollectable, see Cuneo v. Bornstein, 269 Mass. at 237; Beach Assocs., Inc. v. Fauser, 9 Mass. App. Ct. at 390-391, there could be no fiduciary relationship arising out of the loans. There is an inference that can be drawn from the evidence of Excel's failure to produce documents requested by the committee chairperson, and the evidence of Excel's election to file a complaint with bar

[2] The dissenting member of the hearing committee (committee) found that "the respondent's explanation that he had no incentive or logical reason not to repay [Excel] at the time of the distribution of the settlement funds and that his failure to do so was a mistake on his part," and that the respondent "conced[ed] that [the claimed illegality of the loans] was not an argument he had thought of contemporaneous with his interactions with [Excel] (and not the reason for non-payment)." Hearing Report, at 18 (dissenting opinion).

counsel rather than, or to the exclusion of, a civil action, to the effect that Excel was not licensed under G. L. c. 140, § 96, by the commissioner of banking to engage in the business of making small loans. Neither the committee not the boarddrew that inference, and both suggested that the respondent failed to meet his burden of proving the illegality of the loans, see Cuneo, supra, which necessarily includes a failure to prove the absence of a fiduciary relationship. However, as both the majority of the committee and the board determined, the validity of the loans has no bearing on the fact that the respondent promised to place all settlement monies in escrow and seek court intervention to determine the rights of Excel in the event of a dispute. His failure to honor that promise is a violation of his ethical obligations, even if there were no fiduciary relationship. The findings in this regard also support the further finding in aggravation that the respondent lacked insight into his ethical obligations.

The findings of the committee and its majority were based largely on credibility determinations. As such, they are entitled to deference unless unsupported by the record. See S.J.C. Rule 4:01, § 8(5)(a); B.B.O. Rules, § 3.53; Matter of Kerlinsky, 428 Mass. 656, 663, cert. denied, 526 U.S. 1160 (1999); Matter of Anderson, 416 Mass. 521, 524-525 (1993). Those findings, adopted by the board, are consistent with the record. I now adopt the findings and conclusions of the committee, its majority, and the board.

Turning to the appropriate sanction, and guided by the principle of comparability as it relates to due process, see Matter of Alter, 389 Mass. 153, 156 (1983), I am persuaded that some period of suspension is warranted. The respondent's misconduct warrants more that a public reprimand. It was more serious than just a failure to promptly notify a third party and deliver funds to satisfy a lien, as was the focus of the board. See Matter of Hughes, 25 Mass. Att'y Discipline Rep. 277 (2009); Matter of Kelleher, 26 Mass. Att'y Discipline Rep. 281 (2010). Both

of those cases, on which the board relied, involved primarily a failure to notify, plus mitigation by full restitution.

Closer cases are Matter of Phillips, 24 Mass. Att'y Discipline Rep. 547 (2008), and Matter of Rafferty, 21 Mass. Att'y Discipline Rep. 550 (2005), both involving a three-month suspension. Phillips involved an intentional breach of a fiduciary duty and the violation of a court order to create a trust for the benefit of the client's child but the attorney then facilitated the client's access to the trust funds. Full restitution was made. Rafferty involved the failure to place the net proceeds of a tort settlement in a separate interest-bearing account for a client who was a minor, paying half the proceeds to the minor's landlord, and then losing track of the funds, all in violation of a court order to preserve the funds for the minor. The three-month suspension was agreed-upon, with a condition of full restitution. Matter of Kirby, 29 Mass. Att'y Discipline Rep. 366 (2013), on which the board relied, involved a public reprimand for misrepresentation to conceal the attorney's neglect, together with a finding in aggravation that the attorney lacked candor during the hearing. The instant case involves more serious misconduct, namely, misrepresentations made to the detriment of a third party plus the findings of lack of candor by the respondent and a lack of insight into his ethical obligations.

Taking into consideration the question about the existence of a fiduciary relationship, there were misrepresentations made as to the client's non-receipt of prior loans taken against the expected settlement to the detriment of a third party, and there were promises made to the effect that the respondent would place the settlement proceeds in escrow and seek court intervention to determine the rights of Excel in the event of a dispute. The respondent's misconduct, as well as his lack of insight into his ethical obligations, warrant a term suspension. I believe that the respondent's misconduct comes closest to the misconduct in the Phillips and Rafferty cases, both

of which involved a three-month suspension. However, because there well may not have been an actual fiduciary relationship between the respondent and Excel, I believe that a two-month suspension, rather than a three-month suspension, is appropriate.

An order is to enter suspending the respondent from the practice of law for two months.

Francis X. Spina
Associate Justice

ENTERED: June 1, 2016

A True Copy
Attest
6/1/16
Date
Assistant Clerk