IN RE: MICHAEL R. LEVIN

NO. BD-2017-038

S.J.C. Order of Term Suspension entered by Justice Hines on August 18, 2017.[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.

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SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. BD-2017-038

IN RE: MICHAEL R. LEVIN
MEMORANDUM OF DECISION

The Board of Bar Overseers (board), has filed an information pursuant to S.J.C. Rule 4:01, § 8 (6), as appearing in 453 Mass. 1310 (2009), recommending that the respondent, Michael R. Levin, be suspended from the practice of law in the Commonwealth for two years. In a one-count petition for discipline pursuant to S.J.C. Rule 4:01, § 8 (3), bar counsel asserted that the respondent allowed an unaffiliated attorney to use the respondent's IOLTA account to convert funds belonging to the attorney's employer and the employer's clients. For the reasons discussed below, I conclude that the recommendation of the board is the appropriate sanction for the conduct established by the substantial evidence in the record.

Procedural history. Bar counsel commenced disciplinary proceedings against the respondent before the board on October 19, 2015. The petition charged that the respondent allowed another attorney to deposit the attorney's clients' funds into the respondent's IOLTA account, which ultimately resulted in the respondent enabling that attorney to misuse the funds. The respondent filed an answer to the petition for discipline on

April 21, 2016. The Hearing Committee (committee) held two days of hearings, and on November 28, 2016, filed its report with the board recommending that the respondent receive a one year suspension with six months stayed for twelve months, with conditions.

Bar counsel appealed the committee's findings and recommended sanction to the board on December 30, 2016, arguing that the committee's recommended sanction was too lenient in light of the respondent's "egregious level of negligence," his prior discipline for related misconduct, the harm to consumers and his previous employer, the respondent's efforts to "downplay" his misconduct, and his "unwillingness to acknowledge his responsibility for his wrongdoing." Thereafter, the respondent filed a response to bar counsel's appeal, arguing in support of the committee's recommended sanction. On March 13, 2017, the board voted unanimously to adopt the committee's findings and conclusions, but rejected the committee's recommended sanction. Instead, the board recommended that the respondent be suspended from the practice of law for two years.

Background facts. The respondent was admitted to the Massachusetts bar on December 19, 1980. At all times, the respondent was a sole practitioner, focusing on residential real

estate transactions and debtor bankruptcy matters.[1] From August, 2010, until October 14, 2014, the respondent failed to reconcile periodically his IOLTA account and keep individual client ledgers.

In 2010, the respondent's longtime friend Ross Annenberg, was employed as an associate attorney by a law firm with which the respondent was not associated. As an associate, Annenberg received an annual salary plus a "rain-maker" fee. The committee credited the employer's testimony that Annenberg was not going to do cases outside of the firm. At some point during 2010, Annenberg told the respondent that his employer was in financial distress, and asked to use the respondent's IOLTA account to deposit money from cases for his own personal injury clients. At first the respondent refused, telling Annenberg that it was "not Kosher," and suggested that Annenberg open his own IOLTA account.

Some time later, Annenberg renewed his request, and by August, 2010, the respondent was allowing Annenberg to deposit checks that Annenberg received on behalf of clients into the respondent's IOLTA account. The respondent assumed that Annenberg did not have his own IOLTA account, and did not inquire further why Annenberg did not open one. The committee credited the respondent's testimony that he ultimately agreed to

[1] The respondent is also a licensed real estate broker.

Annenberg's request out of concern for Annenberg, who indicated to the respondent that he was not receiving his share of fees and was unable to pay his bills. The committee, however, did not credit the respondent's testimony that prior to granting Annenberg's request, he received independent information of Annenberg's employer's financial situation. Rather, the committee found that the respondent did not receive verification from anyone other than Annenberg concerning the financial condition of Annenberg's employer until after the respondent had already allowed Annenberg to deposit funds into his IOLTA account.

The committee credited the respondent's testimony that he did not think about whether the employer had any interest in the funds deposited into his IOLTA account and the respondent's denial that he knew Annenberg was taking money from his employer's cases. Nevertheless, the committee found that the respondent was "grossly negligent" in accepting Annenberg's representations and in failing to consider that the funds Annenberg deposited into the respondent's IOLTA account were funds in which Annenberg's employer might have an interest.

The respondent understood that Annenberg handled personal injury cases, and that in the ordinary course, Annenberg's clients had some interest in the funds being deposited in the respondent's IOLTA account. However, the respondent did not

check the definition of "trust property" in the rules of professional conduct to determine whether the money constituted trust funds, nor did he seek guidance from bar counsel or some other authority regarding the ethical implications of Annenberg's request. Although the committee credited the respondent's testimony suggesting that, at the time, it did not occur to him that the clients might have had some questions about Annenberg's proposal, the committee concluded that this oversight did not excuse the respondent or mitigate his grossly negligent misconduct.

From August 25, 2010, through March 23, 2013, Annenberg deposited six checks payable to or on behalf of six clients, totaling $152,947.86, into the respondent's IOLTA account. The respondent did not review or supervise the deposits of these funds into his IOLTA account. The respondent did not consider Annenberg to be his client with regard to holding the funds, nor did he consider the six clients whose funds he was holding to be his clients. At no point did the respondent contact any of the six clients to determine whether they had consented to Annenberg depositing the funds in the respondent's IOLTA account.[2] Further, the committee found that the respondent did not notify

[2] The committee credited the respondent's testimony that he did not have the contact information for the six clients whose funds Annenberg deposited into the respondent's IOLTA account.

Annenberg's employer of the respondent's receipt and disbursement of the funds.

Following each of the six deposits, the respondent wrote himself a check in an amount from $350 to $500. The committee credited the respondent's testimony that he did not negotiate with Annenberg to receive payment for allowing Annenberg to use his IOLTA account. The committee also credited the respondent's testimony that he believed that the checks paid to him were deducted from Annenberg's fee from the settlement funds, and thus, presenting no issue of client consent. Nevertheless, the committee found that the respondent "acted in his own self-interest" when he accepted the funds from Annenberg.

The committee further found that Annenberg intentionally misused the funds disbursed to him by the respondent for his own business or personal use unrelated to the clients. In 2015, the Court accepted Annenberg's affidavit of resignation and disbarred him, based on his admission that bar counsel could prove that he intentionally misused $50,780 in client funds. Thereafter, the respondent sent Annenberg's employer all monies retained from the funds that he personally received from Annenberg.

Based on these facts, the committee concluded that the respondent's misconduct constituted violations of: Mass R. Prof. C. 1.15(c); Mass R. Prof. C. 1.15(d)(1); and Mass R. Prof. C.

8.4(h). The committee also made several findings in aggravation, including the respondent's history of discipline, the respondent's unwillingness to acknowledge responsibility for his wrongdoing and pattern of attempting to shift blame from his own ethical failures onto others, the respondent's substantial experience in the practice of law at the time of his misconduct, the harm the respondent's misconduct caused or enabled as to third parties, and the respondent's failure to comply with the record keeping requirements for his IOLTA accounts. The committee treated as a mitigating factor, the fact that the respondent made restitution to Annenberg's employer, thus surrendering any personal financial benefit he had received. Last, the committee also credited in mitigation the respondent's testimony that he was duped by a "charming young man" with somewhat similar background and interests, but noted that this factor did not relieve the respondent in any large measure from his responsibility for his personal misconduct.

Discussion. Neither the respondent nor bar counsel directly challenges the committee's findings of fact or conclusions of law. Therefore, the sole issue before me is the appropriate sanction. The committee recommended that the respondent be suspended for one year, with six months stayed for one year with conditions. The board, however, rejected the committee's recommendation, concluding that the committee failed

to give sufficient weight to the respondent's prior discipline and the fact that the respondent's gross negligence extended to his failure to take certain steps required by the rules of professional conduct that likely would have protected the clients whose funds Annenberg misused. My review of the record supports the board's position.

The board's recommendation on the appropriate sanction is "entitled to great weight." Matter of Murray, 455 Mass. 872, 879 (2010). See Matter of Barrett, 447 Mass. 453, 464 (2006). Review of the board's recommendation is guided by our rule that disciplinary action against an attorney should not be "markedly disparate from those ordinarily entered by the various single justices in similar cases." Matter of Alter, 389 Mass. 153, 156 (1983). See Matter of Goldberg, 434 Mass. 1022, 1023 (2001). However, "[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 Murray, supra at 883, quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984).

Here, the respondent's grossly negligent misconduct facilitated another attorney's intentional misuse of funds belonging to his law firm employer. The board correctly concluded that the respondent's wrongdoing in this case is most analogous to two cases: Matter of Gordon, 20 Mass. Att'y Disc.

R. 166 (2004), where the attorney received a two-year suspension for violations including, delegating the responsibility for his IOLTA account to his secretary, who also served as office manager, and who intentionally converted clients' funds for her own purposes or for the benefit of the respondent's business; and Matter of Jackman, 444 Mass. 1013, 1013, 1015 (2005), where the attorney received a two-year suspension for violations including, "failing to properly oversee the receipt, maintenance, and disbursement of client funds, resulting in commingling of client and business funds," and ultimately enabling the conversion of client funds by a nonlawyer.

A term of suspension from the practice of law for two to three years has been deemed an appropriate sanction in cases involving knowing conduct. See e.g. Matter of McDonough, 27 Mass. Att'y Disc. R. 590 (2011) (three-year suspension where attorney converted employer law firm's funds for personal use and made other misrepresentations); Matter of Carreiro, 25 Mass. Atty'y Disc. R. 58 (2009) (three-year suspension where attorney converted two fee payments belonging to employer law firm for personal use, negligently handled client cases, and created fraudulent documents). Although the committee concluded that the respondent's conduct was grossly negligent, rather than knowing, aggravating factors, such as those present here, are

also relevant to determining the appropriate sanction, and support the recommended two-year suspension.

The board correctly concluded that the committee failed to give sufficient weight to the aggravating factors present when determining the appropriate sanction. Prior discipline is a "significant aggravating factor," Matter of Gross, 435 Mass. 445, 453 (2001), that holds even greater significance when the prior misconduct is similar to the current charge. See id. See also Matter of Kerlinsky, 428 Mass. 656, 664 (1999). As the board noted, like the above captioned matter, central to the respondent's prior discipline was a "willingness to put to one side ethical concerns that should have barred his helping another lawyer under highly suspicious circumstances." That a fundamental aspect of the misconduct here mirrors a fundamental aspect of the respondent's prior misconduct suggests that he failed to learn from his first disciplinary proceeding. The respondent's attempt to distance himself from and downplay the significance of his prior discipline is unavailing. Therefore, the existence of the respondent's prior disciplinary record supports the conclusion that the board's recommendation is the appropriate level of discipline to impose. See Matter of Bryan, 411 Mass. 288, 292 (1992) (existence of prior discipline is "substantial factor in selecting the level of discipline").

Additionally, I agree with the board that the committee failed to give proper weight to the other aggravating factors, namely the respondent's failure to acknowledge the wrongfulness of his actions, and instead attempt to reargue, and ultimately distance himself from, his prior disciplinary matters.

After considering all of the allegations and the nature of the conduct, I conclude that a two-year suspension is the appropriate discipline.

ORDER

For the foregoing reasons, the respondent is hereby suspended from the practice of law in the Commonwealth for two years. An order shall enter in accordance with this memorandum of decision.

Geraldine S. Hines

Associate Justice

Dated: August 17, 2017