

IN RE: PHILLIP M. THOMPSON

NO. BD-2010-041

S.J.C. Judgment of Disbarment entered by Justice Lenk on July 3, 2012.¹

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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-2010-041

IN RE: Phillip M. Thompson

MEMORANDUM OF DECISION

This matter came before the Court, Cowin, J., on an information and record of proceedings pursuant to S.J.C. Rule 4:01, § 8(6), together with a vote of the Board of Bar Overseers (board). Upon Justice Judith A. Cowin's retirement, the matter was transferred to me. The respondent did not appear for his hearing before the board, and he was defaulted. Accordingly, the sole matter before me is the appropriate discipline to be imposed.

1. Background. Bar counsel's petition for discipline sets forth the details of five separate instances on which the defendant converted to his own use the funds of his clients or of third parties. Because the respondent was defaulted at the hearing, the allegations in the petition are deemed admitted. See S.J.C. Rule 4:01, § 8, as amended, 435 Mass. 1301 (2002).

In three of the instances discussed in bar counsel's petition, the respondent misdirected funds he obtained in trust as the result of three real estate closings. In the course of

one of these closings, the respondent falsified a closing protection letter,¹ which he then presented to his client, the lender. On a fourth occasion, the respondent failed to remit to his clients, plaintiffs in an insurance coverage dispute, the proceeds of the settlement agreement he negotiated with the insurer. On the fifth occasion, the respondent presented an overdrawn check to a bank in order to obtain provisional credit from that bank. He then transferred the provisional funds to a second institution.

The petition suggests that, all told, the respondent converted approximately \$1.2 million. He has made partial restitution in approximately one-tenth of that amount.

2. Procedural history. The respondent was admitted to the bar of the Commonwealth on December 18, 2002. He has been administratively suspended since June 8, 2010. On October 28, 2010, the board served respondent with a petition for discipline; when the respondent failed to answer the petition, the board entered a default on November 19, 2010. The respondent filed a motion for relief from default, a motion to enlarge time to answer the petition, and a motion to defer filing response pending grand jury proceedings. The board granted all three

¹ A closing protection letter is a document issued by a title insurance underwriter to indemnify the lender in a real estate transaction against losses resulting from the improper acts of the escrow agent, here, the respondent.

motions. On September 6, 2011, the board allowed bar counsel's motion to end deferment of disciplinary proceedings and ordered the respondent to file an answer to the petition within twenty days. The respondent did not comply, and on September 27, 2011, the board again entered a default against him.² Subsequently, the board voted to recommend that the respondent be disbarred.

3. Appropriate Sanction. The board's recommendation for disciplinary sanction generally receives substantial deference.

² At a hearing before me on December 22, 2011, the respondent claimed not to have received several notices from bar counsel because he was no longer regularly receiving mail at his office address. However, he indicated he had received notice of the recommendation of disbarment at that address. In any event, service by mail is complete upon mailing of notice "to the address furnished in the last registration statement filed by the respondent lawyer in accordance with Rule 4:02." S.J.C. Rule 4:01, § 21, as appearing in 425 Mass. 1330 (1997). Further, where, as here, an attorney is subject to an order of temporary suspension, it is incumbent upon that attorney to "file with the Office of the Bar Counsel . . . the residence or other street address where communications to the lawyer may thereafter be directed." S.J.C. Rule 4:01, § 17, as amended, 426 Mass. 1301 (1997). In other words, that the address in bar counsel's files was out of date is not a valid excuse.

The respondent stated also that he wished to mount a substantive defense to the allegations against him, but was unable to do so without the assistance of counsel or a forensic accountant. He added that he had been hesitant to cooperate with bar counsel lest information disclosed in the disciplinary proceedings be used against him at a criminal trial. These explanations are too little too late. The respondent could have moved for further continuances before the board, or he could have appeared before the board but refused to testify on Fifth Amendment grounds. See In re Pressman, 421 Mass. 514, 518 n.3 (1995), citing Spevack v. Klein, 385 U.S. 511, 514 (1967). He was not entitled, however, simply to ignore the bar discipline process. S.J.C. Rule 4:01, § 3, as amended, 430 Mass. 1314 (1999).

See In re Griffith, 440 Mass. 500, 507 (2003). Still, I must decide each case "on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984). The sanction imposed should not be markedly disparate from sanctions imposed on attorneys in comparable cases. See In re Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited. I must consider any mitigating circumstances, see In re Finn, 433 Mass. 418, 424 (2001), and cases cited, and the cumulative effect of all of the respondent's violations together with any other aggravating circumstances. See Matter of Palmer 413 Mass. 33, 38 (1992), and cases cited.

The board's recommendation of disbarment, in these circumstances, "is not markedly disparate from what has been ordered in comparable cases" in the Commonwealth. In re Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited. The presumptive sanction for cases involving intentional deprivation of client funds is either disbarment or indefinite suspension. In re LiBassi, 449 Mass. 1014, 1016 (2007); Matter of Schoepfer, 426 Mass. 183, 187 (1997).

Bar counsel's recommendation derives further support from the cumulative nature of the violations at issue here. See Matter of Palmer, 413 Mass. 33, 38 (1992), and cases cited. In addition to converting client funds, the respondent violated

Mass. R. Prof. C. 8.4(c) by acting deceitfully and engaging in misrepresentation, both in knowingly presenting a falsified check and in forging a closing protection letter. The respondent then failed to cooperate with Bar Counsel and the Board of Bar Overseers in investigating and resolving the charges against him. See Mass. R. Prof. C. 8.4(g), as amended, 427 Mass. 1301 (1998); Matter of Cronin, 22 Mass. Att'y Discipline Rep. 161 (2006). These further violations counsel in favor of disbarment.

I consider in mitigation that the defendant has made partial retribution. In general, a court should place "heavy emphasis" on whether the respondent's sanction should be mitigated because he has voluntarily made restitution. See In re LiBassi, 449 Mass. 1014, 1017 (2000), and cases cited. Here, however, the respondent has made full restitution only to one client, in the amount of \$75,234, and partial restitution in the amount of \$55,000 to one third party. These sums pale in comparison to the seven figure net loss suffered by the respondent's clients and third-party victims.³

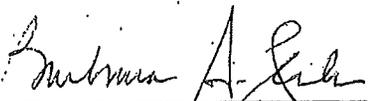
In light of the substantial aggravating factors present in this case, and the very limited nature of the restitution made by the respondent, I conclude that disbarment is the appropriate

³ I note that the sums converted by the defendant far exceed those involved in other cases where the court imposed a sanction of disbarment. See, e.g., Matter of Hollingsworth, 16 Mass. Att'y Discipline Rep. 227, 236 (2000) (disbarring attorney for depriving client of \$100,000).

sanction here.

3. Disposition. An order shall enter disbarring the respondent from the practice of law in the Commonwealth, nunc pro tunc to the date of his temporary suspension.

By the Court



Barbara A. Lenk
Associate Justice

Entered: July 3, 2012