NO. BD-2011-033

S.J.C. Order of Term Suspension entered by Justice Botsford on April 11, 2011, with an effective date of May 11, 2011.[1]

Page Down to View Board Memorandum

[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL, **Petitioner,**	)
vs.	)
WILLIAM R. HAMMATT, ESQ., **Respondent.**	)

BOARD MEMORANDUM

The respondent, William R. Hammatt, Esq., has appealed from a hearing committee report that recommends he be suspended for three months. The recommendation is based on the committee's findings that the respondent assisted another attorney's misrepresentations in her divorce by issuing a misleading letter purporting to describe his compensation arrangements with that other attorney (count one), and that the respondent failed to comply with certain requirements for trust funds and failed to supervise his staff adequately, resulting in the negligent misuse of funds without deprivation (count two). Oral argument was held before the full board. We adopt the hearing committee's findings of fact and conclusions of law, but recommend a one-month suspension.

1. Findings of fact and conclusions of law.

The first count concerns actions the respondent took in connection with an employee's divorce proceedings. During 2001, the respondent's staff included an

associate attorney named Kathleen Kilkenny (then Known as Kathleen Higgins). Around 2002, the respondent and Kilkenny negotiated an arrangement under which Kilkenny would work as an independent contractor. She would receive a weekly draw against fifty percent of the fees she generated for the respondent's office, with the balance of the fifty percent to be paid in a lump sum at the end of the calendar year. During the course of the year, the respondent would hold the accumulating balance in a separate account in his name, while his accountant kept a running total of the amounts to be paid to Kilkenny.

During Kilkenny's divorce proceedings in 2003, her husband sought to depose the respondent concerning Kilkenny's earnings. The respondent objected to the deposition. He offered to provide payroll records, but not the records of his bank accounts, one of which held the funds due Kilkenny at the end of the year. The respondent later provided materials disclosing Kilkenny's draws and the year-end disbursement for 2002, and her draws during 2003. He did not disclose the substantial amount – which he knew was then about $61,000 – that was to be distributed to Kilkenny at the end of 2003.

Seeing the year-end distribution for 2002, counsel for Kilkenny's husband pressed for more information. The respondent drafted a responsive letter that disclosed the oral agreement between Kilkenny and the respondent and their fifty-percent formula.

The respondent showed Kilkenny the draft, and she proposed several self-serving changes. Among other things, she asked that the letter be changed to omit reference to the oral arrangement for year-end payment of the undrawn balance of Kilkenny's fifty percent share of the fees. The letter, with those changes, went to counsel for Kilkenny's husband on October 22, 2003.

The revised letter stated that the three checks to Kilkenny for her lump-sum distribution at the end of 2002 "were bonus payments made to Kathleen in 2002." More generally, the letter stated:

> When [Kilkenny] became an independent contractor, I informed her that she would be given a weekly draw, and bonuses, said bonuses to be paid at my discretion, there being no specific method of determining how much I

> pay Kathleen in bonuses. My agreement to pay [Kilkenny] weekly draws and bonus income as I see fit [] is purely verbal.

Ex. 1.

The respondent acknowledged seeing the revised letter and discussing it with Kilkenny. The committee rejected his testimony that he did not redraft the letter and did not know how the letter came to be faxed to the husband's lawyer. It found that the revised version of the respondent's letter misrepresented the compensation arrangement by characterizing it as a purely discretionary year-end bonus.

In a letter to bar counsel dated May 9, 2008, the respondent said the following about the October 22, 2003 letter:

> In my first draft, I was relatively straightforward ... The final draft ... was the one I believe was sent ... from my office fax....
>
> The language in this final letter appears, at best, misleading, the purpose of drafting it in this form was done to show that Ms. Higgins had no ownership in the funds I was holding on her behalf nor any basis for a demand for the funds without my approval. This, in my opinion was true but misleading as I did have a verbal agreement to pay her 50% of the net fees she accrued for the benefit of the office.
>
> At the time I agreed to send the letter she had redrafted in favor [sic], I felt I was helping her by making [her husband's attorney's] job more difficult – the original draft ... was the most correct of the drafts.

The committee found that the respondent's conduct in providing Kilkenny with the misleading letter violated Mass. R. Prof. C. 8.4(c) (dishonesty, deceit, fraud, or misrepresentation), 8.4(d) (conduct prejudicial to the administration of justice), and 8.4(h) (conduct otherwise reflecting adversely on fitness to practice). It also found that, because the respondent's conduct knowingly assisted Kilkenny in concealing her true earnings from her husband's divorce counsel, it also violated Mass. R. Prof. C. 8.4(a) (knowingly assisting or inducing another attorney to violate the Rules of Professional Conduct).

Under the second count, the committee found that for about three years the respondent, as an estate administrator, held $225,000 of disputed estate funds in his IOLTA account. The committee credited the respondent's testimony that he did so

because he thought the dispute holding up distribution would be resolved promptly. The committee found that the respondent was aware of his ethical obligations to deposit the funds into a separate interest-bearing account.

Kilkenny unintentionally applied some of those funds to an unrelated real estate closing. The lender had funded the closing, but those funds had been deposited into a different account. The respondent promptly cured the error after his bookkeeper discovered a shortfall in the IOLTA account.

The respondent also failed to perform required periodic trust account reconciliations, or to cause those reconciliations to occur.

The committee found that the respondent's conduct under count two violated Mass. R. Prof. C. 1.15(e), which requires attorneys to hold trust funds that are not nominal in amount, or that are to be held for more than a short period, in a separate account bearing interest for the benefit of the client. The committee also found that the respondent had failed to perform the three-way reconciliations required by Mass. R. Prof. C. 1.15(f)(1)(E). Finally, the committee found that the respondent had failed to take reasonable measures to ensure that actions taken by his office staff complied with his professional responsibilities, and that he failed to supervise his bookkeeper adequately, in violation of Mass. R. Prof. C. 5.3(a) and (b).

In mitigation, the committee credited the respondent's testimony that he believed distribution of the disputed estate funds at issue in the second count would be delayed for only a short period. He has since attended a trust accounting seminar. In aggravation, the respondent's estate client was deprived of interest income. In further aggravation, the respondent had previously been disciplined for conflict of interest. AD No. 01-38, 17 Mass. Att'y Disc. R. 729 (2001).

2. The Respondent's Appeal.

The respondent's primary contention on appeal is that the hearing committee lacked any evidence to fault him for the content of the letter sent to counsel for

Kilkenny's husband. Taking into account the respondent's own admissions and all of the surrounding circumstances, the committee's finding that the respondent provided the misleading letter with knowledge of its intended use was amply supported.

The respondent's own letter to bar counsel admitted that he had knowingly agreed that the misleading letter be sent to counsel for Kilkenny's husband: "At the time I agreed to send the letter she had redrafted in favor [sic], I felt I was helping her by making [her husband's attorney's] job more difficult . . . ." Ex. 1. The respondent was the target of discovery, and he resisted. The letter from which he now seeks to distance himself was sent in an effort to satisfy the husband's demands for information from him relevant to Kilkenny's divorce. The committee rightly inferred that the respondent was not blind to the intended effect of that misleading letter, and his own blunt admission to bar counsel indicates that he was not. The committee, as the sole arbiter of credibility, S.J.C. Rule 4:01, § 8(3); Matter of Murray, 455 Mass. 872, 880 (2010), was entitled to reject the respondent's testimony about this letter and to infer an intent to mislead the husband's counsel. There is nothing in the letter itself that justifies the exculpatory gloss the respondent now urges.[1]

3. Disposition.

The respondent argues that he should receive a sanction far less severe than Kilkenny's for her part in the events of count one, and that the facts of this case are analogous to cases where attorneys received admonitions for misrepresentation. While we agree with the respondent that the discipline here should be less severe than that imposed on Kilkenny, we also agree with bar counsel that suspension is warranted.

The misconduct concerning trust account at issue in the second count, as aggravated by the failure to supervise his staff adequately and by the consequent

[1] During oral argument, the respondent suggested that his letter to bar counsel merely proposed one possible interpretation of the facts to help bar counsel prosecute the charges against Kilkenny. The letter to bar counsel is qualified by no wording that would support such a reading.

misapplication of the funds, itself warrants a public reprimand. Matter of Beatrice, 23 Mass. Att'y Disc. R. 31 (2007). Cf. Matter of Guida, 24 Mass. Att'y Disc. R. 314 (2008) (public reprimand issued for failing to supervise financial record-keeping and delegating signing authority, aggravated by employee's theft of funds and by delay in paying out funds due).

The misconduct at issue in the first count also warrants at least a public reprimand. Admonitions were imposed in the cases on which the respondent relies, because, unlike the respondent's deception, the misrepresentations at issue in them were far removed from factual disputes being actively litigated in a court proceeding, and because any resulting harm was purely speculative. See AD 09-14, 25 Mass. Att'y Disc. R. 678 (2009) (lawyer made misrepresentations to client about reasons for postponement of trial where a continuance had been granted as a courtesy to opposing counsel); AD 08-12, 24 Mass. Att'y Disc. R. 876 (2008) (attorney packaged documents he sent to taxing authority so as to make them appear to have originated with his ex-wife); AD 08-14, 24 Mass. Att'y Disc. R. 881 (2008) (attorney signed affidavit for client with permission but without disclosing that he had done so). On the other hand, the respondent's misrepresentations were not as egregious as those for which multiple-month suspensions have been imposed, and the conduct in those cases caused the misled party to suffer financial injury. See Matter of Harlow, 20 Mass. Att'y Disc. R. 212 (2004) (lawyer suspended for six months and a day for misrepresenting to DPH that an escrow fund had been established by client in accordance with DPH credit requirements when escrow had only been funded temporarily through a loan that was so restricted it could not have met DPH conditions); Matter of Connolly, 11 Mass. Att'y Disc. R. 43 (1995) (three-month suspension for preparing false HUD-1 closing statements to assist a client's false claim for reimbursement of relocation costs from employer).

We must also consider the cumulative effect of the respondent's several violations, Matter of Saab, 406 Mass. 315, 326-327, 6 Mass. Att'y Disc. R. 278, 289-290

(1989), as well as his prior discipline. Matter of McCarthy, 416 Mass. 423, 430, 9 Mass. Att'y Disc. R. 225, 233 (1993) ("The consideration of a lawyer's prior disciplinary record is essential in determining the appropriate level of discipline to be imposed in any case."), quoting Saab, 406 Mass. at 327, 6 Mass. Att'y Disc. R. at 291. Taking into account the nature of the misconduct and these aggravating factors, we conclude that the respondent should receive a short suspension.

We receive some guidance in setting the term of such suspension from the discipline the Court imposed on Kilkenny for her part in the matters at issue in count one. Kilkenny was suspended for three months for three distinct acts of deception or misrepresentation: (1) her part in changing Hammatt's letter, (2) twice failing to disclose her annual income on a financial statement executed under oath, and (3) misrepresenting to the court that, to the best of her knowledge, her financial disclosure had been full and complete. Matter of Kilkenny, SJC No. BD-2010-020 (May 25, 2010). Moreover, because some of Kilkenny's misrepresentations were under oath, her conduct was "qualitatively different" from, and more egregious than, the respondent's. See Matter of Balliro, 453 Mass. 75, 86, 25 Mass. Att'y Disc. R. 35, 48 (2009). Further, unlike the respondent's letter, Kilkenny's misrepresentations served her own immediate pecuniary interest. ABA Standards for Imposing Lawyer Sanctions, § 9.22(b) (1992). Given all these distinguishing factors, we conclude that a three-month suspension would be markedly disparate from the sanction imposed in Kilkenny. In the circumstances, we believe a suspension of one month is appropriate.

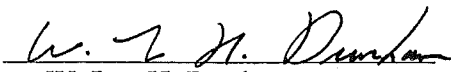
4. Conclusion.

For the foregoing reasons, we adopt the hearing committee's findings of fact and conclusions of law, but we modify its proposed sanction. An information shall be filed with the Supreme Judicial Court recommending that the respondent, William R.

Hammatt, be suspended from the practice of law for one month.

Respectfully submitted,

THE BOARD OF BAR OVERSEERS

By: 
W. Lee H. Dunham
Secretary

Voted: March 14, 2011