IN RE: PAUL ALAN MANOFF

NO. BD-2013-009

S.J.C. Order of Public Reprimand entered by Justice Gants on August 2, 2013.[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
NO: BD-2013-009

IN RE: PAUL ALAN MANOFF

MEMORANDUM OF DECISION AND ORDER

In the underlying proceeding, the Board of Bar Overseers (board) adopted the recommendation of the hearing committee and voted to discipline attorney Paul Alan Manoff by public reprimand, conditioned on a two year period of "accounting probation, during which [Manoff's] trust accounts shall be reviewed for compliance with Mass. R. Prof. C. 1.15 not less than once every six months by an accountant" who is knowledgeable and experienced in the requirements for lawyer trust accounts, and acceptable to bar counsel. Bar counsel objected to having the formal proceedings conclude by public reprimand and demanded that the board file an information with this Court under Supreme Judicial Court Rule 4:01, § 8(6), as appearing in 453 Mass. 1301 (2009), which it did. Bar counsel contends that the appropriate disciplinary sanction in this case is a period of suspension from the practice of law. After hearing, I agree with the board that the appropriate disciplinary sanction for Manoff's misconduct is a public

reprimand, conditioned on the satisfactory completion of a two year period of "accounting probation."

Background. I summarize the relevant facts and conclusions of law found by the hearing committee and adopted by the board. Manoff had a solo law practice in Boston, focusing on representing plaintiffs in employment and contract disputes. He represented many clients on a contingent fee basis and kept his own records. He kept a joint checking account (joint account) with his wife that the couple used to pay their household and personal expenses. He also used this account for business purposes related to his practice of law. Manoff also had a trust account (IOLTA account), but was not aware of the IOLTA rules. He mistakenly believed that an IOLTA account needed to be used only for client funds that he held for an extended period of time. Because the only funds he held were settlement funds that he normally dispersed promptly, Manoff thought they did not need to be held in his IOLTA account.[1] He also failed to perform three-way reconciliations of his check register, individual client ledgers, and bank statements as required by Mass. R. Prof. C. 1.15(f)(1)(E), as appearing in 440 Mass. 1338 (2004); and failed to maintain a chronological check register

[1] In January, 2008, the bank closed Manoff's IOLTA account due to inactivity. On January 31, 2008, he opened a new account that, because of bank error, was not properly designated as an IOLTA account. On learning of the error, Manoff caused the bank to open a proper IOLTA account.

and client ledger and retain them for six years after termination of the representation as required by Mass. R. Prof. C. 1.15(f). He has since completed a trust accounting course designated by bar counsel and changed his banking and accounting methods to comply with the rules.

In January, 2007, a client retained Manoff on a contingent fee basis to represent her in a fee dispute she had with another attorney.[2] By the end of the month, Manoff had settled the client's claims. On February 13, 2007, he received a check for $4,000 from the attorney's malpractice insurer, of which $2,666.67 was owed to the client. He deposited the check into his joint account. He or his wife used at least some of the money due the client for personal expenses because, between February 28 and March 1, the joint account did not have sufficient funds to pay the client. Other than during this two day period, sufficient funds were available in the account. The client received her share of the settlement on April 24, 2007, by check drawn on the joint account. Manoff's mishandling of client funds during this approximately seventy day period was due to his negligence and his focus on the health of his father,

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[2] Manoff failed to keep a copy of the contingent fee agreement for seven years in violation of Mass. R. Prof. C. 1.5(c), as appearing in 440 Mass. 1338 (2004).

who was seriously ill and Manoff thought was near death. The temporary mishandling of funds did not cause any deprivation.[3]

In another matter, Manoff deposited a $5,000 settlement check into the joint account on January 2, 2008.[4] On January 16, he issued a check for $3,333.33 to pay the client's share of the settlement. When the client presented the check for payment, first on January 23 and again on January 28, the bank refused to honor the check because the Internal Revenue Service (IRS) had levied the joint account. The client informed Manoff that the check had not cleared, and Manoff explained that the IRS had a levy on the account and told the client that he would pay him as soon as he could. On February 29, Manoff deposited personal funds into a new IOLTA account, and on March 5 he issued a check drawn from that account and payable to his client for $3,358.33, representing the settlement proceeds plus $25.00 to reimburse the client for bank fees relating to the dishonored check. The delay in paying the funds to this client resulted in temporary deprivation that arose from negligent, rather than intentional,

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[3] The hearing committee concluded that Manoff did not intentionally violate Mass. R. Prof C. 1.15(c), which declares that a "lawyer shall promptly deliver to the client . . . any funds or other property that the client . . . [is] entitled to receive." The board concluded that bar counsel "need not show an intent to postpone payment beyond what constitutes prompt payment" to establish a violation of rule 1.15(c), but noted that "[t]he issue here is not so much 'promptness' as deprivation."

[4] The check was issued to Manoff on December 14, 2007.

mishandling of client funds. Because of the levy on the joint account, Manoff deposited personal funds into his new IOLTA account and paid personal creditors by check from this account.

Manoff's conduct in depositing client settlement funds into the joint account violated Mass. R. Prof. C. 1.15(b). His deposit of personal funds into and his issuance of personal checks from his IOLTA account violated Mass. R. Prof. C. 1.15(e)(4).

Additionally, Manoff failed to appear at payment review hearings in numerous small claims cases brought by a court reporter, and capiases issued for his arrest. He allowed default judgments to be entered against him and belatedly paid the judgments. Manoff did not appear at any of these small claims hearings because he was ashamed and did not wish to contest that he owed the court reporter the amounts claimed. By intentionally violating court orders to appear at payment review hearings, Manoff violated Mass. R. Prof. C. 3.4(c), 426 Mass. 1389 (1998); and Mass. R. Prof. C. 8.4(d) and (h), 426 Mass. 1429 (1998).[5]

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[5] In a separate matter, Manoff tried and lost a civil case a lawyer had brought against him to recover referral fees. When Manoff failed to pay the judgment, an execution issued. Manoff failed to appear when summonsed for the examination, and another capias was issued. When he learned of the capias, he appeared in court, was purged of contempt, and commenced paying the judgment. The hearing committee credited Manoff's testimony

Before this case, Manoff had no history of discipline. He cooperated fully with bar counsel in its investigation. He repaid in full all persons harmed by his misconduct before bar counsel became involved in this matter.

The board concluded that Manoff's delay in paying settlement funds to his two clients was "a species of carelessness, not wrongful intent or callousness, and it does not warrant suspension." The board noted that the delay in the first case was brief and attributable to Manoff's "neglect and distraction" arising from personal problems, not the absence of funds. It also noted that the delay in the second case arose from the commingling of client funds with personal funds in the joint account, but was caused by the IRS's levy, not any misuse of client funds by Manoff. The board concluded that a public reprimand was appropriate for the trust fund and record keeping violations, and that the capiases arising from his failure to appear at the payment review sessions arose from a single course of events and did not warrant increasing that sanction to suspension.

Standard of review. The court "afford[s] substantial deference to the board's recommended disciplinary sanction." In re Lupo, 447 Mass. 345, 356 (2007), quoting Matter of Griffith,

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that he never received the summons and concluded that no rule violation had occurred.

440 Mass. 500, 507 (2003). See Matter of Doyle, 429 Mass. 1013, 1013 (1999). "When considering a disciplinary sanction, we examine whether the sanction 'is markedly disparate from judgments in comparable cases.'" In re Balliro, 453 Mass. 75, 85 (2009), quoting Matter of Finn, 433 Mass. 418, 423 (2001). The court "need not endeavor to find perfectly analogous cases, nor must we concern ourselves with anything less than marked disparity in the sanctions imposed." Matter of Hurley, 418 Mass. 649, 655 (1994). "Our primary concern in bar discipline cases is 'the effect upon, and perception of, the public and the bar,' and [the court] must therefore consider, in reviewing the board's recommended sanction, 'what measure of discipline is necessary to protect the public and deter other attorneys from the same behavior.' In re Lupo, supra, quoting Matter of Finnerty, 418 Mass. 821, 829 (1994) and Matter of Concemi, 422 Mass. 326, 329 (1996).

Discussion. Bar counsel contends that, where Manoff's negligent misuse of funds resulted in his clients being deprived of funds, a public reprimand is inadequate and he should instead be suspended from the practice of law for an appropriate term.

Under the presumptive standards set forth in Matter of the Discipline of an Attorney, 392 Mass. 827, 836-837 (1984), as clarified in Matter of Schoepfer, 426 Mass. 183, 185-188 & n.2 (1997):

> "Intentional commingling of clients' funds with those of an attorney should be disciplined by public reprimand. Unintentional, careless use of clients' funds should be disciplined by public censure.
>
> "Intentional use of clients' funds, with no intent to permanently or temporarily deprive the client, and no actual deprivation, should be punished by a term of suspension of appropriate length.
>
> "Intentional use, with intent to deprive or with actual deprivation, should be disciplined by disbarment or indefinite suspension."

Here, based on the facts found by the board, which are supported by substantial evidence, Manoff intentionally commingled clients' funds with the business and personal funds in his joint account and, with respect to the first case, he or his wife unintentionally and carelessly used some of these client funds. The board did not find that Manoff ever intentionally used client funds for his personal benefit. The board found no deprivation in the first case, where client funds carelessly were used by Manoff or his wife. The board found temporary deprivation in the second case, not because Manoff had put client funds to his personal use but because the IRS had levied on the joint account where the settlement proceeds were wrongly deposited. Once Manoff learned that the bank had not honored the settlement check he gave to his client because of the IRS levy, he took steps to make his client whole as soon as he obtained the funds to do so, well before his conduct came to the attention of bar counsel. Because Manhoff did not intentionally

use client funds, did not intentionally deprive a client of funds, and acted quickly to cure any deprivation, I conclude that the presumptive sanction is a public reprimand.

I recognize, as bar counsel notes, that suspensions have at times been imposed where an attorney has negligently commingled client and personal or business funds, and carelessly converted settlement or insurance proceeds, resulting in deprivation of funds to the client. See, e.g., Matter of Perlow, 20 Mass. Att'y Disc. R. 451 (2004); Matter of Landolphi, 20 Mass. Att'y Disc. R. 295 (2004); Matter of Blaha, 18 Mass. Att'y Disc R. 68 (2002); Matter of Walker, 17 Mass. Att'y Disc. R. 585 (2001). But these cases relied on by bar counsel involved aggravating factors not present in Manoff's case, and lacked the mitigating factors that are present. For example, in Matter of Landolphi, supra at 295-297, the respondent agreed to a three year suspension after he admitted to negligently misusing funds of three separate clients, depriving one client of funds for almost six years, and only remitting payment after bar counsel filed a petition for discipline against him. In Matter of Perlow, supra at 451-453, the respondent agreed to a suspension of one year and one day after he negligently comingling client and personal funds, used clients' settlement funds to pay personal or business expenses or unrelated clients, and failed to cooperate with bar counsel's investigation. Similarly, in Matter of

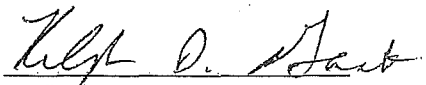
Blaha, supra at 68-71, the respondent failed to cooperate with bar counsel's investigation and committed offenses in addition to negligent recordkeeping and temporary deprivation of client funds, resulting in an eighteen month suspension. In Matter of Walker, supra at 594, where the deprivation of funds occurred over a six year period, the single justice did not believe that a public reprimand was appropriate in light of the respondent's two prior private disciplinary matters, one of which involved mishandling of client funds.

The facts of this case more closely resemble Matter of LaPre, 26 Mass. Att'y Disc. R. 302 (2010), where an attorney received a public reprimand where he negligently misused client funds in his IOLTA account, which resulted in a check he wrote to the client being dishonored due to insufficient funds, but restored the amount to his client from his personal funds as soon as he became aware of the deprivation. Similarly, in Matter of McCabe, 25 Mass. Att'y Disc. R. 367, 367-368 (2009), the respondent received a public reprimand where he negligently maintained two separate IOLTA accounts, which resulted in the bank not honoring a check the respondent had issued to a client, but promptly issued a replacement check to the client to repair the problem.

Manoff did not intentionally misuse client funds, promptly cured any deprivation, has completed a trust accounting course

recommended by bar counsel, changed his banking and accounting methods to comply with the rules, and has had no previous disciplinary issues. Additionally, the conduct resulting in the issuance of the capiases involved monies owed to a single court reporter and alone warrants nothing more than an admonition. See, e.g., Admonition No. 04-28, 20 Mass. Att'y Disc. R. 712 (2004). Accordingly, considering the totality of Manoff's conduct and all the surrounding circumstances, and giving the board's thoughtful and careful determination the deference to which it is due, I conclude that the appropriate sanction is a public reprimand conditioned on his participation in a two year period of accounting probation, during which his trust accounts will be reviewed for compliance with Mass. R. Prof. C. 1.15 not less than once every six months by an accountant reasonably satisfactory to bar counsel who is both knowledgeable and experienced in the requirements for lawyer trust accounts.

Conclusion. For the reasons stated above, I affirm the board's decision and order that Manoff be publicly reprimanded with the condition that he participate in a two year period of accounting probation.



Ralph D. Gants
Associate Justice

Entered: July 31, 2013