

IN RE: GAIL A. BALSER

NO. BD-2015-064

**S.J.C. Order of Term Suspension entered by Justice Duffly on May 16, 2016,
nunc pro tunc April 15, 2016.¹**

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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-2015-064

IN RE: GAIL E. BALSER

AMENDED MEMORANDUM OF DECISION

This matter came before me on an information and record of proceedings, together with the unanimous vote of the Board of Bar Overseers (board) recommending that the respondent be suspended from the practice of law in the Commonwealth for a period of four years for multiple misconduct involving three different sets of clients.

In a four-count petition for discipline, bar counsel asserted that the respondent: 1) engaged in a conflict of interest and converted real property to her own use by filing a falsified deed for a property where she was a trustee; 2) made false representations to a client and before a tribunal in telling potential purchasers of a condominium unit, in a transaction in which she was acting as the broker, that the unit had no history of water in the basement, when the respondent knew the basement had flooded on prior occasions; 3) intentionally misused \$10,000 that she was supposed to be holding on behalf of her clients, as down payment for a property she was selling, but

without deprivation because the clients were paid all the money they were due at the time of the closing; and 4) failed to cooperate with bar counsel in the course of the disciplinary investigation.

After a seven-day evidentiary hearing at which eight witnesses testified and eighty-nine exhibits were introduced, a hearing committee of the board found that the respondent had engaged in the misconduct alleged, and recommended that she be disbarred. Both parties appealed to the board. The board adopted all of the hearing committee's findings of fact and conclusions of law, but recommended that the respondent be suspended from the bar of the Commonwealth for four years. The recommendation of a lesser sanction was based on mitigating factors that the board found to exist -- domestic violence that the respondent had suffered at the hands of the complainant in this case -- whereas the hearing committee had concluded that there were no mitigating factors.

Bar counsel filed a memorandum with the county court, separately recommending that the respondent be disbarred.

At a hearing before me on October 15, 2015, the respondent's counsel challenged the sufficiency of the evidence of the asserted misconduct, a number of the board's evidentiary determinations and factual findings, and the severity of the recommended sanction. I allowed the respondent's request for an

extension of time in which to file additional documents in support of her contention that the board's findings are not supported by the evidence. On November 2, 2015, the respondent's counsel submitted an extensive letter, with citations to testimony before the hearing committing, challenging the credibility of a number of bar counsel's witnesses.

Having carefully reviewed the record, I conclude that the hearing committee's findings, adopted in full by the board, are well supported in the record, both through testimony and in documentary evidence such as deeds, copies of checks, and financial records. I conclude also that the imposition of a four-year term of suspension adequately takes into account the asserted mitigating factors in this case, as well as the severity and repeated nature of the respondent's misconduct. Accordingly, an order shall enter suspending the respondent from the practice of law in the Commonwealth for a period of four years.

1. Background and prior proceedings. I summarize the hearing committee's findings and conclusions, adopted in full by the board. The respondent was admitted to the practice of law in the Commonwealth on 1983. Throughout her career, she has maintained a solo law practice, which has included bankruptcy, domestic relations, and workers' compensation matters.

Bar counsel commenced disciplinary proceedings against the respondent in March, 2013, based on asserted misconduct in three

client matters. In the first matter, bar counsel asserted that the respondent, acting as trustee of a corporate real estate trust, fraudulently conveyed property owned by the trust to herself through filing an altered deed. In the second matter, bar counsel asserted that the respondent deliberately made material and significant misrepresentations to the potential purchasers of a condominium where she was acting as the real estate broker, telling the purchasers that there had never been any problem with water in the basement, when she knew that there in fact had been previous problems with water in the basement. Bar counsel relied in this respect on a Superior Court jury's finding that the respondent had made deliberate misrepresentations to the sellers, and the jury's award of money damages. In the third matter, bar counsel contended that the respondent misused \$10,000 of a client's funds, converting it to her own use.

The hearing committee allowed bar counsel's motion for an order on issue preclusion as to the asserted misconduct in count two, concerning the sale of the condominium; the jury's findings were deemed conclusive proof of the respondent's conduct in that case. An evidentiary hearing on all three counts subsequently was held over eight days in October, 2014; eighty-nine exhibits were introduced. In addition to a number of other witnesses, including the attorney who had been involved in assisting the

corporation to reclaim the property that was the subject of the altered deed, both the respondent and O'Brien testified at the evidentiary hearing. Based on the determination on issue preclusion, while documents such as the pleadings and the judge's decision were introduced as to the water damaged condominium in count two, testimony concerning that count was not permitted. In December, 2014, the hearing committee concluded that the respondent had engaged in the asserted misconduct, and recommended that she be suspended from the practice of law indefinitely. Following extensive additional filings on appeal, in June, 2015, the board adopted the hearing committee's findings of fact and rulings of law, but, in consideration of mitigating circumstances, recommended that the respondent be suspended from the practice of law for a period of four years.

As stated, the respondent appeared at a hearing before me on October 15, 2015, at which I allowed her request for additional time to file supplemental argument and documentation. In November, 2015, the respondent's counsel submitted an eight-page letter with record citations, challenging many of the board's findings; particularly as to count 1, concerning the alteration of a deed, the respondent's counsel challenges the "weak" testimony of certain witnesses. The disputed details of that and the other two matters that the respondent's counsel challenges before me are not relevant to this summary; the respondent's

conceded actions; summarized below, alone warrant, at a minimum, a lengthy suspension.

Count 1. The misconduct in this count involves a closely-held corporation created for the purpose of a real estate development project in which Shawn E. O'Brien, the father of the respondent's daughter,¹ serves as president, and the respondent as secretary.² Bar counsel asserts, and the board found, that the respondent converted real estate to herself individually by amending a deed that was sent to her in her official capacity as a trustee of the real estate corporation's trust, changing the name of the grantee from a corporation to herself, and recording that deed. The respondent thereafter recorded deeds to different condominium units in that parcel to herself and to her mother, later renting or selling those units for profit, and subsequently lying under oath about having done so.³

¹ At the time of these events, the respondent was no longer involved in a romantic relationship with O'Brien.

² O'Brien apparently has been convicted of a number of Federal offenses, including drug charges and perjury. The respondent contends that these convictions render all of his testimony before the hearing committee not credible.

³ The respondent states that she agreed to enter into the planned real estate development project for which the corporation was created at the insistence of O'Brien, during a period shortly before the mortgage crisis, when the real estate market was booming. The respondent asserts that she was afraid of O'Brien, that he had made verbal and written threats to herself and her daughter.

The respondent maintains also that she did not alter the

Nonetheless, as the hearing committee found, and the documentary record fully supports, it is clear that the respondent did engage in amending portions of a deed and recording that amended deed with herself as grantee.

Count 2. As to the misconduct in the second count, the respondent misrepresented to potential buyers that a condominium she was selling as a real estate broker had not sustained water damage, when she knew that in fact it had indeed suffered from water in the basement. When the buyers later filed a claim against her for the harm they experienced due to the water damage, having learned that the condominium was not habitable without substantial mold remediation, and having had to pay substantial amounts to repair the unit, the respondent gave false deposition and trial testimony. Following a jury-waived trial, a Superior Court judge found that the respondent, acting as the

deed, but rather merely recorded the amended deed, and that O'Brien himself had amended the deed to convey the disputed property to her. She claims that, according to an arrangement with O'Brien, she was to receive one hundred per cent ownership of the property at issue, and of certain condominium units contained therein, in order to resolve a purportedly improper previous conveyance by O'Brien, without the respondent's consent, of other lots in the condominium, and his asserted conversion of approximately \$600,000 in proceeds from that sale of more than \$1 million to himself. The respondent asserts further that O'Brien attempted to defraud her of a portion of the benefit of the real estate deal after another project of his in Florida was unsuccessful and he lost all of his substantial investment in that project. In essence, the respondent's contention is that she believed she was due the proceeds from the anticipated sale of the parcel which was the subject of the (fraudulently) amended deed.

real estate broker, made significant and material misrepresentations concerning whether there had been problems with water in the basement; although the respondent knew that there had been issues with water in the basement, she informed the potential purchasers that there had been no such problems. The judge entered judgment in favor of the purchasers and awarded them damages in the amount of \$45,000, doubled pursuant to G. L. c. 93A, § 9, and also ordered the respondent to pay the buyers' reasonable attorney's fees and costs.

During the disciplinary proceedings, bar counsel's motion for issue preclusion on this count was allowed, and the facts of count 2 were deemed already determined, based on the findings in the Superior Court. Accordingly, testimony on the facts of that count was not permitted at the hearing, notwithstanding the respondent's ongoing challenge to what she claims was inappropriate issue preclusion concerning the judge's findings of fact.

Count 3. With respect to the third count of misconduct, the respondent converted to her own use \$10,000 of a client's funds that had been sent to her in trust as payment to the client. The respondent was representing the client in conjunction with a short sale, and claimed that withdrawal of the funds from that account rather than another was inadvertent. The respondent made restitution of the funds within forty-five days of the

withdrawal.

Board's findings. The board found that the respondent's misconduct violated, inter alia, Mass. R. Prof C. §§ 8.4(c) (dishonesty, deceit, misrepresentation, or fraud) and (h) (conduct otherwise reflecting adversely on fitness to practice).

In aggravation, and charged as count 4, the respondent failed to cooperate with bar counsel over the course of the investigation, knowingly gave false testimony at the disciplinary hearing, and presented fabricated evidence. The respondent's testimony before the hearing committee demonstrated a lack of candor and a failure to appreciate the wrongfulness of her conduct, as well as an ongoing pattern of deceit and dishonesty toward the beneficiaries of the trust, and bar counsel. See Matter of Eisenhauer, 426 Mass. 448, 456, cert. denied, 524 U.S. 919 (1998). In addition, the respondent engaged in various different types of misconduct with different clients, involving multiple offenses in each of multiple matters, and caused harm to her clients in two of the three matters. Further, the misconduct, including deliberate misrepresentations and falsifications, occurred in situations where the respondent owed a duty of utmost loyalty. In one instance, she took advantage of her position as trustee to alter a deed, for her personal financial gain. In another case, she engaged in a scheme to

syphon funds for her personal use from a trust to which she owed a fiduciary duty of utmost loyalty, and to deprive the trust of those funds, in violation of multiple rules of professional conduct. In the third matter, acting as a broker upon whom the purchasers relied, she made deliberately false statements about the property involved, to the detriment of the purchasers and to her financial gain. See Matter of Saab, 406 Mass. 315, 326-327 (1989). Further, at the time of the misconduct, the respondent was an attorney with more than twenty years of legal experience and substantial knowledge of financial matters. See Matter of Crossen, 450 Mass. 533, 580 (2008).

2. Discussion. Both parties made largely the same arguments before me as they did before the board. In addition, before me, the respondent asserted that many of the committee's findings were inaccurate or based on incorrect credibility determinations. As noted, I allowed the respondent's counsel time to file additional arguments and supporting documentation with respect to the respondent's claims and counsel's claims of improper fact finding, and the respondent filed an eight-page supplement.

a. Standard of review. Bar counsel bears the burden, in all attorney disciplinary proceedings, of proving misconduct by a preponderance of the evidence. See Mass. R. Prof. C. § 3.28; Matter of Mayberry, 295 Mass. 155, 167 (1936). See also Matter

of Budnitz, 425 Mass. 1018, 1018 n.1 (1997); Matter of Kerlinsky, 428 Mass. 656, 664 n.10 (1989). Supreme Judicial Court Rule 4:01, § 8(5)(a), recognizes the hearing committee as the "sole judge of the credibility of the testimony presented at the hearing." See Matter of Tobin, 417 Mass. 81, 85 (1994). As with any finder of fact, the hearing committee is entitled to believe some portions of a witness's testimony and disbelieve others. "The hearing committee . . . is the sole judge of credibility, and arguments hinging on such determinations generally fall outside the proper scope of our review." Matter of McBride, 449 Mass. 154, 161-162 (2007). "The hearing committee's credibility determinations will not be rejected unless it can be said with certainty that [a] finding was wholly inconsistent with another implicit finding." Matter of Murray, 455 Mass. 872, 880 (2010).

As stated, the respondent's opposition to the hearing committee's and the board's findings, and the sanction imposed, rests largely on her contention that much of the testimony before the hearing committee was false. She points particularly to evidence, explicitly taken into account by the hearing committee, that would tend to undermine O'Brien's credibility. Having reviewed the hearing committee's findings, adopted in full by the board, and the hearing transcripts, I conclude that the hearing committee's factual findings have ample bases in the record, and that its credibility determinations were not inconsistent or

contradictory; to the contrary, they are more than amply supported in the record. See Matter of Curry, 450 Mass. 503, 519 (2008), quoting Matter of Barrett, 447 Mass. 453, 460 (2006).

b. Appropriate sanction. I turn to the remaining question of the appropriate sanction. The fundamental consideration in imposing a disciplinary sanction is "the effect upon and the perception of, the public and the bar." Matter of McBride, *supra* at 163, quoting Matter of Alter, 389 Mass. 153, 156 (1983). The appropriate sanction to be imposed is one which is necessary to deter other attorneys from similar behavior and to protect the public. Matter of Foley, 439 Mass. 324, 333 (2003), citing Matter of Concemi, 422 Mass. 326, 329 (1996). While the board's recommendation of the appropriate sanction is accorded "substantial deference," Matter of Crossen, *supra*, quoting Matter of Griffith, 440 Mass. 500, 507 (2003), it is not binding. The sanction imposed must not be "markedly disparate" from sanctions imposed on other attorneys found to have committed comparable violations. See Matter of Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited. At the same time, however, the sanction must be appropriate to the particular circumstances. "Ultimately, we decide each bar discipline case 'on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances.'" Matter of Balliro, 453 Mass. 75, 85-85 (2009), quoting Matter of the Discipline of an Attorney, 392

Mass. 827, 837 (1984).

Here, as to counts one and three, the presumptive sanction for intentional misuse of client funds with deprivation is indefinite suspension or disbarment. See Matter of Schoepfer, 426 Mass. 183, 187 (1997). In choosing between these two sanctions, the court "generally considers whether restitution has been made." Matter of LiBassi, 449 Mass. 1014, 1017 (2007). Making restitution "is an outward sign of the recognition of one's wrongdoing and the awareness of a moral duty to make amends to the best of one's ability. Failure to make restitution, and failure to attempt to do so, reflects poorly on the attorney's moral fitness." Matter of McCarthy, 23 Att'y Discipline Rep. 469, 470 (2007). In this case, the respondent voluntarily made restitution as to the third client. See Matter of LiBassi, supra, quoting Matter of Hollingsworth, 16 Mass. Att'y Discipline Rep. 227, 236 (2000) ("recovery obtained through court action is not 'restitution' for purposes of choosing an appropriate sanction"). After the hearing before me, I allowed the respondent time to obtain the funds and to pay the judgment entered against her in the second matter, which she stated that she had been financially unable to pay previously, and to provide documentation whether the judgment had been paid; it appears that the judgment ultimately was not satisfied. In these circumstances, the intentional deprivation of trust funds might

tip toward disbarment, and clearly would merit at a minimum an indefinite suspension. See Matter of McBride, supra at 163-164; Matter of Dasent, 446 Mass. 1010, 1012-1013 (2006); Matter of Dragon, 440 Mass. 1023, 1023-1024 (2003):

The hearing committee determined that an indefinite suspension from the practice of law would be appropriate. The board adopted the hearing committee's findings of fact and conclusions of law, but recommended a reduced sanction of a four year suspension, due to what it considered to be mitigating circumstances. In addition to the above-discussed aggravating factors, the board noted substantial mitigating factors with respect to the issue of domestic violence. I agree with the board's conclusions in aggravation and in mitigation.

To begin, the respondent has no history of prior discipline. See Matter of Ryan, 24 Mass. Att'y Discipline Rep. 632, 641 (2008). Nonetheless, she acted from a selfish motive to benefit herself financially, see Matter of Lupo, 447 Mass. 345, 354 (2006), rather than unintentionally depriving the trust of the real estate, or inadvertently withdrawing funds from the wrong bank account. With respect to counts one and two, her actions caused substantial harm to others. See Matter of Crossen, 450 Mass. 553, 581 (2008). In addition, her misconduct took advantage of those to whom she owed a fiduciary duty. See Matter of Pemstein, 16 Mass. Att'y Discipline Rep. 339, 345 (2000).

Further, she knowingly made false statements to bar counsel during the course of the disciplinary proceedings, gave knowingly false testimony at the hearing, and refused to acknowledge the wrongfulness of her conduct. Indeed, even in his post-hearing filing, the respondent's counsel continues to maintain that there is no evidence of forgery of the deed; alternatively, the respondent's counsel argues that, even accepting the "weak" evidence of forgery, the respondent's amendment of the deed was as a result of "necessity." See Matter of Kerlinsky, supra at 665. The respondent's deliberate misrepresentations to bar counsel and to the hearing committee alone "reflect[] adversely on the attorney's fitness to practice law." Matter of Garabedian, 416 Mass. 20, 25 (1993).

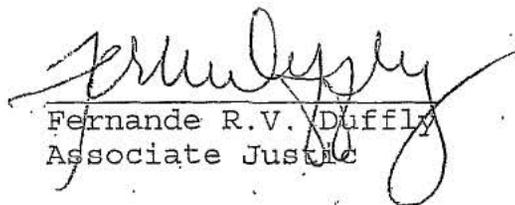
On this record, absent mitigating circumstances, disbarment would not be "markedly disparate" from the sanction imposed in similar cases. See Matter of Goldberg, supra. Nonetheless, "[o]ur rule is not mandatory. If a disability caused a lawyer's conduct, the discipline should be moderated, and, if that disability can be treated, special terms and considerations may be appropriate." Matter of Schoepfer, 426 Mass. 183, 188 (1997). See Matter of Balliro, 453 Mass. 75, 87-89 (2009) (domestic violence suffered by respondent reduced presumptive suspension of two years suspension to six months for testifying falsely under oath in criminal trial). I conclude, as did the board,

particularly with respect to the respondent's conduct in count 1, concerning the real estate development, that it was undertaken in part, and continued in part, at O'Brien's insistence, in a context of fear of disobeying him, and in a belief that she was due profits from the project and that he had deprived her of those funds.

In sum, the board's recommendation of a reduction in the suspension to four years strikes the appropriate balance between the severity of the multiple instances of misconduct and the disability due to the asserted domestic violence. See, e.g., In re Angwafo, 453 Mass. 28 (2009); Matter of MacDonald, 23 Mass. Att'y Disc. R. 411, 417 (2007); Matter of Johnson, 20 Mass. Att'y Disc. R. 272 (2004).

3. Disposition. A judgment shall enter suspending the respondent from the practice of law in the Commonwealth for a period of four years.

By the Court


Fernande R.V. Duffly
Associate Justice

Entered: May 16, 2016