

IN RE: ARIEL J. STRAUSS

NO. BD-2016-010

S.J.C. Order of Term Suspension entered by Justice Duffly on July 22, 2016, with an effective date of August 21, 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 THE COUNTY OF SUFFOLK
DOCKET NO. BD-2016-010

IN RE: ARIEL J. STRAUSS

MEMORANDUM OF DECISION

This matter came before me on an information and record of proceedings, and a vote by the Board of Bar Overseers (board) recommending that the respondent be indefinitely suspended from the practice of law. The respondent was admitted to the practice of law in the Commonwealth on December 17, 2004. He has maintained a general practice as a solo practitioner since his admission to the bar. During the period at issue, the respondent operated his part-time law business from his home. He also was engaged in opening another small business -- a frozen yogurt shop -- which he continued to own and operate at the time of the disciplinary proceedings.

The two-count petition for discipline was filed with the board on August 25, 2014. Count 1 alleged that the respondent violated a number of record keeping and reconciliation requirements with respect to his IOLTA account between June, 2012, and September, 2013. Count 2 alleged that the respondent

misused client funds, with deprivation, in January, 2013, by failing to timely pay a client the proceedings from a personal injury claim that the respondent had settled (with her consent) on her behalf in December, 2012, until March 6, 2013.¹ The respondent's motion to limit testimony to matters charged in the petition for discipline, and his motion for confidentiality with respect to the financial matters of another client, his father, Anthony Strauss,² were denied in April, 2015. After an

¹ The claim was settled in early December, 2012, and a lien was placed on the settlement in mid-December, 2012. Around December 14, 2012, the respondent asked the defendant's insurer to send payment for the amount not subject to the lien, on an expedited basis, so the client could have the funds before she traveled out of the country. The client had requested the funds in cash due to the difficulty of cashing checks in the country where she would be traveling, and the respondent had agreed to provide them in cash. The client left the United States before the respondent received the insurer's check and was able to obtain cash for those funds. The client returned to the United States at some point in January, 2013.

² At the time of these proceedings, Anthony Strauss, the respondent's father, was a licensed construction contractor and real estate developer in the city of Boston. He also owned a Boston restaurant with a liquor license, was a corporate director, and was a Boston-area landlord. His multiple businesses were substantial; he testified that, at the time of the events at issue, he maintained at least \$1 million in liquid assets available at all times so that he was prepared to act quickly on real estate investment deals. The committee stated that it made no findings as to the credibility of this testimony. The respondent provided certain services to Anthony Strauss with respect to his rental agreements, including returning rental security deposits on Anthony Strauss's request. In his filings, the respondent described Anthony Strauss as his client.

Bar counsel subpoenaed Anthony Strauss to testify at the disciplinary proceedings, and introduced evidence of his numerous business activities, purportedly to challenge his credibility.

evidentiary proceeding in May, 2015, at which the respondent, Anthony Strauss, and the client who is the subject of count 2 testified, a hearing committee recommended that the respondent be indefinitely suspended from the practice of law. The respondent appealed from that recommendation; following a non-evidentiary hearing, in December, 2015, the board adopted the committee's findings of fact and recommended sanction. Bar counsel's petition also recommends an indefinite suspension.

For the reasons set forth below, I conclude that the recommendation is not in accord with the record in this case, and does not comport with the evidence of the respondent's conduct that was introduced at the disciplinary proceeding. Accordingly, having carefully considered all of the circumstances, I conclude that the appropriate sanction is a six-month suspension from the practice of law, with conditions.

1. Respondent's conduct. Count 1. In Count 1, the petition asserts that, between June 1, 2012, and September 30, 2013, the respondent committed a number of violations of the record keeping requirements for his IOLTA account, by failing to maintain an appropriate check register for that account, listing

Without making any findings on this issue, the committee at times suggested that the services that the respondent provided Anthony Strauss were not legal services, and at other points suggested, again without findings, that the respondent should have performed additional legal services, such as tax filings and currency disclosures, for him. See discussion, infra.

each transaction with a particular client identifier, and by failing to perform a three-way reconciliation of the account every sixty days.

The respondent concedes that he did not maintain the proper records with respect to his IOLTA account, and did not perform the necessary reconciliations. On bar counsel's request, during the course of these proceedings, the respondent undertook efforts to reconstruct the records with respect to his IOLTA account. He provided bar counsel with an initial set of records, that were not fully consistent with the reporting requirements of and provided bar counsel one set of reconstructed records, then additional records in response to a further request. Thus, it is undisputed, as the board found, that the respondent's conduct violated Mass. R. Prof. C. 1.15(f)(1)(B) and 1.15(f)(1)(E).

The respondent asserts, and bar counsel does not dispute, that he has changed his method of operating his practice since the time of these proceedings, has undertaken training in the proper method of maintaining his IOLTA account records and performing three-way reconciliations, and that his current process conforms with Mass. R. Prof. C. 1.15.

Count 2. Count 2 of the petition asserts that with respect to one client, the respondent intentionally misused client funds, with deprivation, from January, 2013, through March 6, 2013.

In March, 2012, the client hired the respondent to settle a

tort injury claim on her behalf, on a contingent fee basis of one-third of the settlement amount, plus expenses. The respondent ultimately settled the claim, with the client's consent, for \$5,000. The client requested that the respondent pay her the settlement proceeds in cash, because she was planning to travel to another country in December, 2012, where cashing a check would have been extremely difficult. The respondent ultimately agreed to pay the client in cash, and requested that the settlement check be expedited so it would arrive before the client's departure, but the client left the United States before the cash was available. At some point, a lien in the amount of \$558.51 was placed on the settlement.

On December 20, 2012, the respondent received a check in the amount of \$4,441.49 in settlement of the claim. The respondent deposited the check in his IOLTA account. The respondent's insurer also sent a separate check in the amount of \$558.51, payable to the lien holder. On December 21, 2012, the respondent withdrew his fee of \$1,666.67 from the IOLTA account, leaving a balance in the account of \$2,774.82. That amount was due to the client. The respondent did not notify the client that he had withdrawn his fee, and did not provide her with a statement of the amount of the withdrawal, a statement of the balance of her funds left in the IOLTA account, or a statement explaining the outcome, the amount due to her, and the method of calculating

this amount.

On December 28, the respondent deposited \$800 in cash, unrelated to the client, to his IOLTA account. On January 13, 2013, the respondent wrote a check in the amount of \$3,400 from his IOLTA account, on Anthony Strauss's request, to pay condominium fees for one of his properties. At that point, the amount in the IOLTA account was \$174.82, \$2,600 less than was due the client. As a result of a \$25 error in arithmetic, the check for the condominium fees was returned for insufficient funds. On January 23, 2013, bar counsel received notice that the check had not been honored, and began what ultimately became a two-year investigation of the respondent's business practices and a review of all of the respondent's client files. At some point in January, 2013 (the client testified that she returned in January, but was not sure specifically when in January), the client returned to the United States.

In early March, 2013, the client contacted the respondent and said that she wanted to be paid, in cash. On March 6, 2013, the respondent gave the client the entire \$2,774.82 due to her, plus the \$558.51 in the amount of the medical lien, in cash, and had her sign a receipt.³ The respondent paid the \$558.51 from

³ The client lived and worked in Brockton, and the respondent's office was in his home in Brookline. The client relied on public transportation, and it was difficult and time consuming for her to travel from Brockton to Boston. The respondent drove to her house for the initial meeting when she

his own funds, still believing that the amount of the medical lien was not proper.⁴

The petition for discipline states that this conduct violated Mass. R. Prof. C. 1.15(b)(1) (failing to keep client funds in a trust account); Mass. R. Prof. C. 1.15(c) (failing to promptly pay client); Mass. R. Prof. C. 1.15(d) (failing to provide notice of withdrawal of fee and amount of fee, itemized bill, and notice of balance left in client's account); Mass. R. Prof. C. 1.15(f)(1)(C) (causing negative balance in IOLTA account); Mass. R. Prof. C. 1.15(c)(3) (paying client in cash); Mass. R. Prof. C. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation; and Mass. R. Prof. C. 8.4(h) (conduct otherwise reflecting adversely on respondent's fitness to practice law). The hearing committee, and the board, adopting the hearing committee's findings, concluded that the respondent's conduct violated this rule, and recommended that he be indefinitely suspended from the practice of law on that basis.

The board found that, at the time of these events, the respondent was in the process of opening a frozen yogurt store.

engaged his services to represent her on the tort claim relative to an automobile accident, and again when he delivered the settlement payment. Those were the only times that the respondent and the client met in person.

⁴ The receipt stated that the client had requested to be paid in cash, and that the respondent was paying her the amount of the lien, but accordingly would retain any of the lien amount that he was able to recover.

The respondent testified that he was working in the store approximately 100 hours per week during that period, and that his attention was distracted from the conduct of his part-time law practice. He testified that, since the store has been fully operational, he spends much less time on day to day operations. The board found that, during the period from December, 2012, through February, 2013, the respondent spent the "vast majority" of his working time at the frozen yogurt store, and, at the time of the disciplinary proceeding, he was spending approximately twenty percent of his working time there. The board stated further that it declined to consider any "distractions or time commitments of the yogurt shop" in mitigation.

2. Disciplinary proceedings. Prior to the evidentiary hearing, bar counsel subpoenaed Anthony Strauss anticipating that he would testify to having given the respondent cash in the fall of 2012 that was to be used for specific purposes on his behalf. Approximately one month prior to the hearing, apparently based on the lines of questioning bar counsel intended to pursue, the respondent moved to exclude testimony on matters unrelated to the conduct alleged in the disciplinary petition. That motion was denied. The respondent also moved to have treated as confidential information relating to Anthony Strauss's financial records. That motion also was denied, without prejudice to refile with reference to specific documents.

Although there were no bank records of the transaction, and it was undisputed that the respondent's client had been paid in full (and in cash), assistant bar counsel began the hearing by telling the committee that, "Bank records don't lie. People lie (TR 5 -8)." He argued, "If something isn't consistent with the bank records, it's incorrect. If something isn't consistent with common sense, it's not true." This set the tone for the entire proceeding. Bar counsel relied on repeated assertions that the respondent and Anthony Strauss were lying, resulting in a proceeding that placed the burden on the respondent to disprove bar counsel's assertions, rather than requiring bar counsel to establish, on the basis of substantive evidence, that the respondent engaged in each element of the asserted misconduct. See In re Balliro, 453 Mass. 75, 84 (2009), citing Rule 3.28 of the Rules of the Board of Bar Overseers (2008) ("The burden of proof in a disciplinary proceeding is always on bar counsel").

The respondent testified before the hearing committee that the client had requested to be given cash for the settlement she was due to her because she was going to be out of the United States, in a country where cashing checks was at best extremely difficult. The respondent eventually agreed to do so. The client and the respondent testified that she left the United States before the funds from the settlement check were available in cash; the committee credited this testimony.

The respondent further testified that he had received a large sum of cash from Anthony Strauss (for whom the respondent performed work⁵ such as certain management duties with respect to some of his rental units) in September, 2012, and that he had deposited some of it into his IOLTA account and kept some cash available in an envelope on his desk.⁶ The respondent testified

⁵ The respondent testified that the total amount was \$20,000, in increments of \$4,000. Anthony Strauss testified that it was "about" \$20,000, was intended to be used for his rental tenants' security deposits, and was intended to cover security deposit returns for a three-month period, into December, 2012. The committee did not make any finding on the specific amount, but expressed scepticism that the amount was \$20,000, because of the differences in how the respondent and Anthony Strauss described the amount. The committee's decision stated that these differences meant that Anthony Strauss's testimony had not "specifically corroborated" the respondent's testimony. The committee found, however, based on cash deposits in his IOLTA account, that the respondent had received at least \$16,000 in cash at that point, that he had deposited in increments of \$4,000.

⁶ The committee stated in their decision that they took a "generally dim" view of the respondent's credibility, and specifically found that the respondent did not "earmark" the additional \$4,000 in cash for the client. Among the reasons the committee cited for their determination that the respondent was lying about having kept the \$4,000 in cash was that "there was no good reason for the respondent to be given, and to hold," \$4,000 for "more than three months without depositing it in a bank account," and that "the respondent's testimony that he 'earmarked' cash for [the client] does not make sense," because there was no reason to earmark cash for the client until the settlement check arrived too late to convert it to cash to deliver to the client. Rule 1.15 (e) (3) of the rules of professional conduct, however, prohibits withdrawal of funds from an IOLTA account "by ATM, check payable to cash, or other method that does not identify the recipient," and prohibits cash payments to a client from an IOLTA account. The committee found that the respondent did not violate this rule as charged, because there was no evidence that the cash he used to pay the client was

that, as he argued in his filings and at the hearing before me, Anthony Strauss regularly gave him cash to send to one of his relatives, who was at that time in prison and could receive money only in a money order, not a check, and also to use to return security deposits to Anthony Strauss's rental clients. Anthony Strauss testified that he had given the respondent "around twenty thousand" in cash in September, 2012. He testified that the month of September is "a time when leases are up in Boston, especially among the student population, which ends on August 31st, and security deposits have to be returned. And it is my practice that I like to have an attorney return those deposits to kind of forestall any conflict with the tenants."

The respondent testified that in January and February, 2013, after having sent the check for the lien amount on the client's settlement to the lien holder, he made a number of attempts to contest the lien that he believed was due the client, and to negotiate with the lien holder, but was not successful in having the lien removed. At some point before March 6, 2013, the respondent spoke with the client and told her that he was still working to resolve the lien and that he had not yet been successful. He said he would pay her both the settlement amount and the lien amount at one time, in cash. The client responded, "Okay."

withdrawn from an IOLTA account.

The committee found that it was no longer important to the client to receive cash after her return to the United States, and that the client "wanted as much of her money as the respondent could give her lien-free as soon as he could give it; she did not insist on payment in cash and she did not authorize the respondent to hold the lien-free portion of the settlement until the lien was resolved." These findings are not fully supported by the client's testimony about what she wanted after her return.

As the board noted, it is not clear from the testimony whether the client spoke with the respondent at any point before the conversation that she described in March, 2013, shortly before the respondent delivered the settlement funds to her at her house. During that conversation, the client testified that she said she did want the funds in cash. It is also not clear, and there was no testimony to the effect, that the client informed the respondent at an earlier point that she no longer wanted cash, or that she said to him before the March conversation that she wanted the funds immediately, and did not want to wait for resolution of the lien. Although the client testified that she wanted the funds because the respondent said he had them, and she would have taken those funds available without the lien, ("I want to . . . I mean, he has it, so I said I can take it"), she also testified that, in response to the respondent's discussion of the lien, his ongoing efforts to

obtain those funds, and his statement that he would deliver them together, in cash, she said, "Okay." When asked by a committee member if she did not receive payment until March, 2013, the client testified, "Yes. I spoke to [the respondent] in March. That's when I got the money."

3. Appropriate sanction. The primary consideration in determining the appropriate sanction to be imposed in attorney disciplinary proceedings "is the effect upon, and perception of, the public and the bar." Matter of Crossen, 450 Mass. 533, 573 (2008), quoting Matter of Finnerty, 418 Mass. 831, 829 (1994). The sanction imposed should be sufficient to deter other attorneys from similar conduct, and also to protect the public. See Matter of Foley, 439 Mass. 324, 333 (2003), citing Matter of Conceml, 422 Mass. 326, 329 (1996). In addition to these considerations, the sanction imposed should not be "markedly disparate from what has been ordered in comparable cases." See Matter of Goldberg, 434 Mass. 1022, 1023 (2001). At the same time, 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 Pudlo, 460 Mass. 400, 404 (2011), quoting Matter of Crossen, supra.

The presumptive sanction for intentional misuse of client funds, resulting in actual deprivation, is indefinite suspension or disbarment. Matter of Sharif, 459 Mass. 558, 565 (2011);

Matter of McBride, 449 Mass. 154, 163-164 (2007); Matter of Schoepfer, 426 Mass. 183, 187 (1997). Whether restitution has been made is a critical consideration in determining whether disbarment or indefinite suspension is appropriate. See Matter of LiBassi, 449 Mass. 1014, 1017 (2007). Where restitution has been made, and in the absence of mitigating factors, an indefinite suspension is likely to be appropriate. See id; Matter of McCarthy, 23 Att'y Discipline Rep. 469, 470 (2007) (making of restitution "is an important consideration on an application for reinstatement"). Here, the respondent paid the amount due, in full, within approximately two months of the client's return to the United States, before bar counsel began an investigation of the client's matter; he also paid the client the full amount of the lien which he had paid the lien holder, from his own funds. Compare Matter of McCarthy, supra (petition for reinstatement denied due to respondent's "failure to pay anything [in restitution] in the absence of any court . . . requiring him to do so"). The committee and the board considered this repayment in their recommendation of an indefinite suspension.

Nonetheless, our decisions make clear that "we do not agree that the sanction of disbarment or indefinite suspension should presumptively apply to all such cases. Rather, our previous disciplinary decisions suggest that the appropriate sanction is disbarment, indefinite suspension, or a term of suspension,

depending on the facts of the case." Matter of Sharif, supra at 566. While the presumptive sanction is not mandatory, "'[a]n offending attorney has a heavy burden to demonstrates' that the sanction should not be applied, and we will not depart from the presumed sanction without providing 'clear and convincing reasons for doing so.'" Id. at 567, quoting Matter of Schoepfer, supra at 187, 188.

The respondent contests the conduct of the hearing in a number of respects, and the committee's and the board's conclusions with respect to his intent, but asserts that he does not dispute the findings of fact. He nonetheless also continues to dispute that there was either an intent to deprive the client, or actual deprivation. Most significantly, the respondent challenges the propriety of the disciplinary proceedings, asserting that they were unfair and in violation of his right to due process. The respondent contends that the committee improperly considered evidence of uncharged conduct that he had no opportunity to refute; his motion to limit testimony to evidence relative only to charged conduct should have been allowed; and the committee misconstrued the client's testimony. The respondent maintains also that evidence introduced purportedly to challenge the credibility of Anthony Strauss's testimony was not relevant to any fact at issue and some of it was anonymous hearsay that was not competent for any purpose; the

volume of evidence introduced on collateral issues or on issues that were not relevant to the asserted misconduct, in order to challenge Anthony Strauss's credibility, was unfairly prejudicial, and the committee relied on it in reaching its credibility determinations. Lastly, the respondent argues that, even assuming he had engaged in all of the charged misconduct, the sanction is far more harsh than those that have been imposed for similar misconduct in other cases, and is not appropriate to the facts of this case.

Having carefully reviewed the transcripts, the record, and the findings of the hearing committee and the board, I agree with the respondent that the volume of irrelevant or incompetent evidence, assertedly introduced to challenge the credibility of bar counsel's subpoenaed witness, Anthony Strauss, was unfairly prejudicial to the respondent. The extent of the problem is evident beginning with the denial of the respondent's motion to limit testimony to "matters charged in the petition for discipline." Rather than being focused on the respondent's asserted misconduct, the proceeding focused largely on Anthony Strauss's asserted business practices, unsupported by competent evidence.

For example, an anonymous statement, apparently by a disgruntled tenant, posted on a website that permitted anonymous postings, that Anthony Strauss as a landlord "is terrible about

money," was introduced by bar counsel purportedly to challenge Anthony Strauss's ability to testify credibly about having given the respondent sums of cash in September, 2012. In seeking to introduce this anonymous internet posting, bar counsel asserted, without supporting evidence, and without citation to any statute, that the anonymous comment was relevant to establish "Anthony Strauss' track record as a landlord of not depositing tenant deposits into a separate interest bearing account, as required by law, and the respondent assisting him in violating this law."

The questioning concerning this type of incompetent or irrelevant evidence did not elicit substantial affirmative evidence relevant to the charged misconduct, but the questions themselves served to introduce suggestions of other, unrelated misconduct, beyond that charged in the petition for discipline. Questions of the respondent such as whether he had filed Federal taxes on Anthony Strauss's behalf, or knew if he had done so himself, were irrelevant to any element of the charged misconduct, or to any misconduct by the respondent, where there was no suggestion that the respondent had any responsibility for Anthony Strauss's tax filings. These types of questions, unsupported by evidence, are not competent evidence as to Anthony Strauss's (or the respondent's) credibility. Indeed, they served no purpose other than to imply or suggest that Anthony Strauss was a person of bad character who had engaged in some form of

improper or illegal conduct, and that the respondent had somehow assisted him in such actions, distracting the hearing committee from consideration of the charges before it. Cf. Commonwealth v. Howard, 469 Mass. 721, 744-745, 749-750 (2014); Commonwealth v. Butler, 445 Mass. 568, 573-574 (2005); Commonwealth v. Helfant, 398 Mass. 214, 224-227 (1986)

Moreover, notwithstanding bar counsel's argument that the committee reached its decision as to the appropriate sanction without reliance on this incompetent evidence, and only discussed these assertions "in dicta" after having determined the appropriate sanction, the committee clearly relied on such incompetent evidence in its credibility determinations, as well as in its determination of the appropriate sanction.

The committee's decision described some of the irrelevant evidence and questions as "certain features that, while not central to our findings, we find disturbing." The committee's discussion of considerations should the respondent eventually seek reinstatement relies entirely on its implicit adoption of bar counsel's unsupported assertions. The committee opined, for instance, that the respondent's repayment of Anthony Strauss's renters' security deposits occurred "under questionable circumstances," and said that the respondent's acceptance of cash in \$4,000 increments appeared "designed to avoid currency reporting laws." The committee "suggest[ed]" that "any hearing

panel considering the respondent's reinstatement" should "examine the respondent's ability to maintain his independent professional judgment despite familial pressure."⁷

The board's assertion, without more, that none of these assumptions or irrelevant evidence had any impact on the committee's credibility determinations is unavailing. The committee's decision makes evident that it considered these and other similar assumptions in concluding that the respondent lied when he said he had held funds in cash for the client, and used the client's funds in the IOLTA account on behalf of Anthony Strauss (another client). Based on this determination that the respondent and Anthony Strauss were not credible, the committee concluded that the respondent falsified documents provided to bar counsel in his efforts to comply with bar counsel's instruction to reconstruct the records, and then relied on this (uncharged) falsification, to support its conclusion that the respondent engaged in repeated misconduct, as well as to support its conclusion that the repeated misconduct was a factor in aggravation. Without reaching any explicit finding, the

⁷ After a two-year investigation of the respondent's and Anthony Strauss's records by bar counsel, the petition for discipline did not charge the respondent with any misconduct relative to any work for Anthony Strauss, and no evidence was introduced to show any wrongdoing by Anthony Strauss with respect to any of his business operations. In addition, the committee, the board, and bar counsel have no statutory authority to investigate or regulate matters such as restaurant licensing, construction contractor licensing, or landlord-tenant matters.

committee stated that "evidence suggests" that Anthony Strauss was not the respondent's client, while at the same time the decision implied, again without findings, that in several areas the respondent should have provided other legal services to Anthony Strauss (such as tax work), given those he had provided.

In sum, given the lack of relevant substantive evidence, and the overwhelming volume of incompetent or irrelevant evidence, the committee were not in a position to make the credibility determinations they relied upon. See S.J.C. Rule 4:01, § 8(4) ("subsidiary facts found by the [b]oard and contained in its report filed with the information shall be upheld if supported by substantial evidence, upon consideration of the record"). See also Soja v. Fligier, 261 Mass. 35, 36-37 (1927) ("incompetent and immaterial" evidence "tends to confuse the issues; it introduces what is immaterial and collateral matter; and it is consistent with too many innocent and reasonable explanations other than the single inference sought to be drawn from it in corroboration of the plaintiff's assertion. . . ."; introduction of such evidence is prejudicial error where it "might have been taken by [the fact finder] to constitute proof [of the plaintiff's assertion]").⁸ Compare Commonwealth v. Howard, 42

⁸ I note without reaching any determination based on this that the committee also made a number of inconsistent findings in reliance on the incompetent or irrelevant evidence. For example, the committee found that the respondent had no reason to, and did not, keep cash from Anthony Strauss in an envelope without

Mass App. Ct. 322, 324-326 (1997) (improper admission of incompetent evidence not prejudicial where evidence corroborated by several other witnesses and expert testimony).

In addition, even if there had been substantial competent evidence before the board to establish all of the asserted misconduct, the circumstances here present "clear and convincing reasons" to depart from the presumptive sanction. See Matter of Sharif, 459 Mass. 558, 566-567 (2011). The single instance of misuse, for a brief period, in circumstances such as these, where there was no evidence of intent to deprive the client of her funds, or of misuse of the funds for the respondent's personal benefit, the respondent was working many hours per week beyond full time to establish a new business, and had a broken ankle that would have made driving from Brookline to Brockton difficult,⁹ is far less egregious than in other cases where a

depositing it in his IOLTA account, but the respondent paid the client with cash (from an unnamed source) that was not withdrawn from his IOLTA account, and found implicitly that the respondent was assisting Anthony Strauss in a money laundering scheme. See Matter of Barrett, 447 Mass. 453, 460 (2006), quoting Matter of Hachey, 11 Mass. Att'y Discipline Rep. 102, 103 (1995) (committee is sole judge of credibility of witnesses and their credibility determinations "will not be rejected unless it can be 'said with certainty' that [a] finding was 'wholly inconsistent with another implicit finding'").

⁹ The client relied on public transportation from her home in Brockton; the respondent went to her home each of the two times that he met with her in person during the course of the representation. The committee recognized that the client had difficulty in traveling to Boston to testify at the disciplinary proceedings, because of the length of time that it took her to

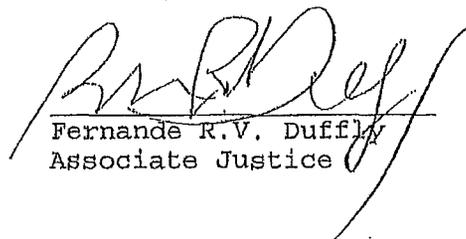
sanction of a term suspension has been imposed. See, e.g., Matter of Pudlo, 460 Mass. 400, 404-408 (2011) (suspension for one year where attorney spent entire amount of unearned legal fees due client to pay his own expenses, lost all records related to those amounts, and receipt and disbursement of funds, and could not determine how client funds had been used); Matter of Cedrone, 30 Mass. Att'y Disc. R. ___ (2014) (suspension of one year and one day where attorney deposited \$25,949 in client trust funds directly into her operating account, and intentionally spent approximately \$13,000 of funds belonging to client on matters unrelated to her, after paying \$11,877 on behalf of client, in addition to misconduct in three other client matters and inadequate record keeping as to both IOLTA and operating accounts). Cf. Matter of Ryan, 24 Mass. Att'y Disc. R. 621 (2008) (prior to Matter of Murray, 455 Mass. 872 (2010); nine-month suspension for misuse of \$25,000 in client funds for eighteen months, holding funds during that time and then withdrawing funds to pay attorney's personal expenses (taxes), not providing accounting to client, not maintaining adequate records for IOLTA account, not disbursing any funds to client

travel, and her need to be at her job at a pharmacy, where she was paid on an hourly basis. After discussion with counsel for both parties, the committee determined that it would make several changes in the hearing date and the time of the hearing, in order to permit the client to testify at the hearing and return to Brockton in time for her scheduled shift.

until after client filed complaint with bar counsel, making false statements to bar counsel, and misconduct and incompetence in unrelated client matter, where attorney had good reputation in community, accounting errors were inadvertent, and size of practice was small, but attorney had prior discipline, and had given deliberately false testimony at disciplinary hearing).

An order shall enter suspending the respondent from the practice of law in the Commonwealth for a period of six months. During that time, and as a condition of reinstatement, the respondent shall take a continuing education course, acceptable to bar counsel, on management of IOLTA accounts. For a period of two years from the date of his reinstatement, the respondent also shall engage an accountant, who will undertake a quarterly review of the respondent's IOLTA account, and who will report to bar counsel quarterly on the status of the respondent's compliance with the record keeping requirements of Mass. R. Prof. C. 1.15.

By the Court


Fernando R.V. Duffly
Associate Justice

Entered: July 22, 2016