

**IN RE: PHILIP MORGAN MARKELLA****NO. BD-2016-024****S.J.C. Order of Indefinite Suspension entered by Justice Lenk on August 2, 2016, with an effective date of September 1, 2016.<sup>1</sup>****Page Down to View Memorandum of Decision**

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<sup>1</sup> 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-2016-024

IN RE: PHILIP MORGAN MARKELLA

MEMORANDUM OF DECISION

This matter came before me on an information and recommendation of the Board of Bar Overseers (board) that the respondent be suspended indefinitely from the practice of law in the Commonwealth for the intentional misuse of clients' funds, with temporary deprivation to the clients. See S.J.C. Rule 4:01, § 8(6). After the respondent was defaulted for failure to respond to the petition for discipline in a timely manner and in accordance with the rules of professional conduct, both sides were asked to file briefs with the board limited to the issue of the appropriate sanction. Bar counsel recommended that the appropriate sanction would be an indefinite suspension. See Matter of Sharif, 459 Mass. 558, 565 (2011); Matter of Schoepfer, 426 Mass. 183, 186 (1997); S.J.C. Rule 4:01, § 18(1)(b), (2)(c).

Before this court, as in his disallowed answers in his efforts to remove the default, the respondent does not challenge the board's findings of fact; indeed he acknowledges in both his answer and his filings in this court, that he engaged in the

misconduct asserted. Rather, the respondent contends that a more appropriate sanction would be a term suspension for nine months, suspended for three years on two conditions.<sup>1</sup> For the reasons discussed below, I agree with the board that an indefinite suspension is the appropriate sanction in this matter.

Accordingly, an order shall enter indefinitely suspending the respondent from the practice of law in the Commonwealth. See S.J.C. Rule 4:01, § 17(3).

1. Facts. I summarize the facts asserted in bar counsel's petition for discipline, which are deemed admitted because of the respondent's default. The respondent was admitted to the Massachusetts bar on December 19, 1996. He is a sole practitioner, with a practice focusing primarily on real estate conveyancing. During the period at issue, the respondent also served as a title insurance agent for the Chicago Title Insurance Company. He maintained three IOLTA accounts, one at Citizens Bank, one at Bank of America, and one at Rockland Trust. He also maintained a business account at Bank of America.

In August, 2015, bar counsel filed a three-count petition for discipline against the respondent, asserting that he

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<sup>1</sup> Those conditions are that he pass a Multistate Professional Responsibility Exam (MPRE) within one year, and that he file quarterly IOLTA reconciliation reports throughout the three-year period.

intentionally misused client funds in his IOLTA account, with resulting temporary deprivation to a number of clients.

a. Count I: Fratus matter. On June 15, 2011, the respondent received \$50,000 in escrow from Robert D. Fratus, Jr., who had engaged the respondent as his title insurance agent in connection with a sale of real estate. The respondent was to hold the funds in escrow, to be used in connection with the removal of a defect in title, with the balance to be returned to Fratus once the defect was removed. The respondent expected that removal of the defect might be a lengthy process, but he did not deposit the funds into an individual, interest-bearing trust account. Rather, the respondent deposited the funds in his Citizens Bank IOLTA account, the account he used in his conveyancing practice.

At the time the respondent deposited the funds from Fratus into his Citizens Bank IOLTA account, he had misused funds belonging to other clients that he had deposited in that IOLTA account. The respondent made partial restitution by depositing his own funds into the account, and misused approximately \$5,200 of Fratus's funds in order to repay the remaining balance of the other clients' funds. The respondent then further misused the escrow funds he was supposed to be holding for Fratus to pay personal and professional expense unrelated to the Fratus matter. By September 10, 2012, Fratus's funds were depleted.

The title issue for which Fratus had provided the respondent with the \$50,000 was resolved by late August, 2013. Counsel for Fratus notified the respondent that the title had been cleared, and, on a number of occasions in September, 2013, and October, 2013, requested that the respondent return the funds to Fratus. The respondent did not do so. On October 29, 2013, Fratus's counsel filed a complaint with bar counsel, and bar counsel began an investigation into the respondent's handling of his IOLTA account. On December 3, 2013, the respondent used personal funds that he had deposited in his Rockland Trust IOLTA account to wire \$50,000 to Fratus's counsel.

b. Count II: Wright matter: On November 1, 2011, the respondent prepared a settlement statement for a real estate transaction between the estate of Helen Wright as seller and Norman and Karen Robbins as buyers. Pursuant to the HUD-1 settlement statement, \$105,876.79 of the funds due to the estate were to be paid to the Commonwealth. On the same day, a total of \$171,946.61 was deposited in the respondent's Citizens Bank IOLTA account on behalf of the Robbinses, for payments and disbursements related to the transaction, including the funds due the Commonwealth. Also that day, the respondent issued a check from the IOLTA account to the Commonwealth for the \$105,876.79 due from the Wright estate.

By November 29, 2011, the respondent knew that the Commonwealth had not yet presented the check for the Wright estate for payment. Over a period of approximately ten months, the respondent used more than \$57,000 of the funds due to the Commonwealth from the Wright estate to pay personal and professional obligations unrelated to the estate. On September 10, 2012, the respondent paid the Commonwealth the \$105,876.79 due from the Wright estate, through his Bank of America IOLTA account, with funds belonging in part (\$4,876.79) to other clients, in part from the Wright estate (\$43,000), and in part drawn from his Bank of America operating account.

c. Count III: Williams and other matters. This count asserts multiple instances of commingling of personal and client funds, and misuse of client funds to pay expenses related to other clients, in a number of real estate matters, including the above-mentioned \$4,876.79.

On August 9, 2012, the respondent paid \$2,801.34 to Norman and Karen Robbins from his Bank of America IOLTA account, aware that none of the funds in that account belonged to the Robbinses in his Bank of America IOLTA account. On September 9, 2012, the respondent deposited \$101,000 into his Bank of America IOLTA account. This amount included \$58,000 withdrawn from the funds of other real estate clients, David and Pamela Williams, provided by their lender, Radius Financial Group, Inc., that the

respondent previously had transferred from his Bank of America IOLTA account to his Bank of America operating account.<sup>2</sup> When the respondent made that deposit, his Bank of America IOLTA account contained at least \$4,876.79 belonging to other clients. On May 7, 2012, the respondent paid \$3,047.80 to the town of Duxbury for real estate taxes due from the Williamses from his Bank of America IOLTA account, although he knew that there were no longer any funds belonging to the Williamses in that account.

2. Prior proceedings. The respondent did not timely file an answer to bar counsel's September, 2015 petition for discipline, and was defaulted on September 18, 2015. In September, October, and November of 2015, the respondent attempted to file answers to the petition, without first filing a motion to remove default, or properly serving bar counsel. In each instance, the respondent's motion was denied without prejudice and bar counsel advised him in writing concerning the proper steps to follow in order to remove the default; each time, the respondent made an additional filing, but failed to conform with the Rules of Professional Conduct and the board with respect to how filings must be made. Ultimately, on November 24, 2015, the respondent's motion for relief from default was denied. On December 3, 2015, the board notified the parties that it would

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<sup>2</sup> The respondent paid the \$57,394.65 due to the Williamses from his Citizens Bank IOLTA account.

conduct a meeting on the matter and directed the parties to file briefs limited to the issue of the appropriate disposition. At that meeting, the board voted, upon the respondent's default, to recommend that the respondent be indefinitely suspended from the practice of law in the Commonwealth.

3. Discussion. As stated, the respondent does not dispute the facts asserted by bar counsel and deemed admitted as a result of his default. Specifically, the respondent concedes that he misused client funds resulting in a temporary deprivation of those funds. Thus, the sole issue before me is the appropriate sanction to be imposed.

In determining the appropriate sanction, I accord substantial deference to the board's recommendation. See Matter of Griffith, 440 Mass. 500, 507 (2003), while also remaining cognizant that the sanction imposed must not be "markedly disparate" from sanctions imposed on attorneys found to have committed comparable violations. See Matter of Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited. At the same time, I must decide each case "on its own merits," Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984), and must ensure that the offending attorney "receives the disposition most appropriate in the circumstances." See Matter of Curry, 450 Mass. 503, 519 (2008),

The presumptive sanction for intentional misuse of client funds, with the intent permanently or temporarily to deprive the client, or where actual deprivation results, regardless of the attorney's intent, is indefinite suspension or disbarment. See Matter of Sharif, 459 Mass. 558, 565 (2011); 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). Where, as here, the offending attorney has made restitution, and in the absence of mitigating circumstances, the appropriate sanction generally tips toward indefinite suspension rather than disbarment. See id.

Although the presumptive sanction is not mandatory, an offending attorney has a "heavy burden" to establish that a lesser sanction should be imposed. See Matter of Schoepfer, supra. Mitigating factors have been deemed sufficient to diminish a presumptive sanction of indefinite suspension in situations such as where a respondent's misconduct was the result of "substantial financial difficulties, heavy drinking, depression, and emotional turmoil" after his brother's death. See Matter of Johnson, 20 Mass. Att'y Disc. R. 272, 275 (2004).

The respondent argues that there are mitigating factors in his case likewise sufficient to significantly reduce the presumptive sanction. He states that he has been an attorney in

good standing for twenty years and has no history of prior discipline, and suggests that his misuse of client funds merely was a result of inexperience in managing IOLTA accounts himself (where for approximately fifteen years he had hired outside bookkeepers to do so). The respondent also notes that, before bar counsel contacted him regarding his withholding of the Fratus funds, he had hired a bookkeeper to reconcile his IOLTA accounts; he states further that he has curtailed his conveyancing practice in order to avoid using IOLTA accounts in the future.

As the board found, these factors are not mitigating.<sup>3</sup> The intentional and extended nature of the respondent's misuse of IOLTA funds does not suggest mere negligence or inadequate bookkeeping procedures. The respondent concedes, for instance, that he improperly wired \$50,000 to a client from an IOLTA account containing none of the client's funds and that he "didn't even think" about doing so. Even had the misuse been unintentional, the deprivation to multiple clients would have warranted an indefinite suspension under the terms of Matter of Schoepfer, 426 Mass. 183, 186 (1997), and its progeny. In addition, the respondent's slight efforts to avoid additional

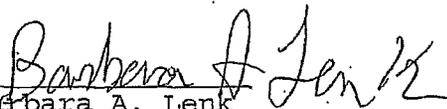
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<sup>3</sup> Nor are the respondent's additional assertions (in his initial untimely and unaccepted answer) that the time of the wiring of the Fratus funds was a "hectic" time for him, and he was distracted with arrangements for his children's return to school, the sale of his own house, and visits to college campuses.

misuse of client funds in his IOLTA accounts do not meet the "heavy burden" of justifying a departure from the presumptive sanction. See id. Accordingly, the board's recommendation of an indefinite suspension is "the disposition most appropriate" here. See Matter of Pudlo, 460 Mass. at 404, quoting Matter of Crossen, 450 Mass. 533, 573 (2008).

4. Conclusion. An order shall enter indefinitely suspending the respondent from the practice of law in the Commonwealth.

By the Court

  
Barbara A. Lenk  
Associate Justice

Entered: August 2, 2016