

IN RE: FRANKLIN H. LEVY**NO. BD-2016-042****S.J.C. Order of Term Suspension entered by Justice Hines on August 26, 2016, with an effective date of September 25, 2016.¹****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-2016-042

IN RE: FRANKLIN H. LEVY

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 Franklin H. Levy (respondent) be suspended from the practice of law in the Commonwealth for a period of two years. In a three-count amended petition for discipline pursuant to S.J.C. Rule 4:01, § 8 (3), as appearing in 453 Mass. 1310 (2009), bar counsel asserted that the respondent misused funds belonging to two clients and his law firm, acted dishonestly, and failed to perform other safekeeping requirements. The respondent argues that he acted negligently, not intentionally, and that a two-year suspension is markedly disparate from similar cases. I have reviewed the record, considered the arguments of counsel, and held a hearing. For the reasons set forth below, I conclude that the appropriate discipline is a

suspension from the practice of law in the Commonwealth for one year and one day.

1. Procedural History. On August 29, 2013, the Office of Bar Counsel filed a two-count petition for discipline against the respondent. On January 7, 2014, bar counsel filed an amended petition adding a third count.¹ The matter was referred to a hearing committee, and in September and October, 2014, the committee conducted an evidentiary hearing over six noncontiguous days. Four witnesses testified: two attorneys from the respondent's former law firm, the respondent, and an expert witness called by the respondent in mitigation of the allegations. In March, 2015, the committee issued findings of fact and rulings of law and recommended that the respondent be suspended from the practice of law for two years.

The respondent appealed and the board heard arguments on that appeal on October 19, 2015. On March 7, 2016, the board adopted the hearing committee's findings of fact, conclusions of law, and the recommended sanction of a two-year suspension. The board then filed this Information in the county court, requesting that the respondent be suspended from the practice of law for two years.

¹ The hearing committee allowed bar counsel's motion to amend the petition over objection from the respondent.

2. Facts. The hearing committee found the following, as adopted by the board. The respondent was admitted to the Massachusetts bar in November, 1971. From approximately 2004 until 2006, and again from February, 2010, to October, 2011, the respondent was a partner in the Boston office of the law firm Duane Morris LLP.² The actions relating to this disciplinary petition occurred between the respondent's return to Duane Morris and his resignation on October 7, 2011.

a. Misuse of funds relating to Mongelluzzi representation (count one). In the spring of 2010, a business partner of the respondent, Curtis Pope, referred Frank Mongelluzzi to the respondent for legal advice in connection with a bankruptcy and related litigation matter pending in New Jersey. In October, 2010, the respondent told Mongelluzzi that representation would be "expensive" and asked him to send \$75,000 to Duane Morris. Mongelluzzi responded that he would not be able to raise that much money, but that he could obtain \$40,000. The respondent indicated that the firm would not charge Mongelluzzi anything beyond the \$40,000.

² The respondent left Duane Morris to work as counsel for Las Vegas Sands Corporation from 2006 to 2010.

On October 20, 2010, the respondent sent an electronic message (email) to Mongelluzzi, Mongelluzzi's wife, and Pope, asking for a \$40,000 "retainer" to be sent via wire transfer to Duane Morris. Pope telephoned the respondent on November 2, 2010 to ask for the firm's wiring instructions so that he could send the \$40,000 on behalf of Mongelluzzi. The respondent did not have the firm's wiring instructions immediately available and asked Pope to wire him the funds, and indicated that he would transfer them to Duane Morris. That same day, Pope wired \$40,000 to the respondent's checking account, entitled "Franklin Levy LLC." After two telephone calls from partners at Duane Morris, the respondent transferred the funds from his personal bank account to the firm on April 18, 2011.³

The respondent testified that the \$40,000 was to be a "flat fee" for the representation. The respondent placed a copy of an engagement letter in Mongelluzzi's file, which stated that Mongelluzzi would be charged \$575 per hour and

³ Joseph Aronica, a partner at Duane Morris, called the respondent to inquire about the \$40,000 after the wire transfer from Pope to the respondent's checking account was discovered in December, 2010, by an associate reviewing criminal charges against Pope in an unrelated matter. Michael Silverman, a partner at Duane Morris and its general counsel, telephoned the respondent in April, 2011, to inquire about the funds. The respondent wired the funds to Duane Morris a "day or two" after the conversation with Silverman.

pay a retainer of \$40,000. The respondent explained that he drafted the letter because he concluded that he would have "a very, very difficult time" obtaining approval from Duane Morris LLP for the flat-fee arrangement, and he denied sending the letter to Mongelluzzi. At the end of the representation on this matter, the respondent testified that he "reduced [his] time" as reflected on the bills so that Mongelluzzi would only be liable for approximately \$40,000 in legal fees. The hearing committee did not credit the respondent's claim that the \$40,000 was a flat fee, noting that his reduction of hours does not "convert a 'capped' fee into a 'flat' fee."⁴

Because the hearing committee found that the funds were a retainer and not a flat fee, the respondent was required to hold the funds in a trust account, under Mass. R. Prof. C. 1.5 (b), as appearing in 463 Mass. 1302 (2012), and he did not do so. Moreover, the committee found that the respondent negligently misused the client funds for his

⁴ The hearing committee credited the respondent's testimony that he never intended for Mongelluzzi to pay more than \$40,000 in legal fees for the matter and that he misled Duane Morris as to the fee agreement in order to handle this representation.

own personal or business purposes.⁵ Although the respondent had more than \$40,000 in his accounts at the bank where the respondent received the funds, the checking account into which the funds were transferred was as low as \$3,440.51 at one time.⁶

The board found that the respondent misused a client retainer in violation of rule 1.15 (b) (segregation of trust property) and (c) (prompt delivery of trust property), and Mass. R. Prof. C. 8.4 (h), as appearing in 471 Mass. 1483 (2015) (engaging in conduct adversely reflecting on fitness to practice law).

b. Misuse of Rudolph funds and Claims Adjusting Group check (count two). In March, 2011, a close friend and frequent client of the respondent's, Gregory Rudolph, deposited \$250,000 in an escrow account at Duane Morris in connection with a pending criminal case. The charges related to a serious tax matter, and Rudolph was represented by Joseph Aronica and Robert Dietrick of Duane Morris. Rudolph entered a guilty plea, and the court

⁵ The hearing committee noted that the evidence would have supported a finding of intentional misuse had bar counsel charged a violation of Mass. R. Prof. C. 8.4 (c).

⁶ The respondent held a checking and savings account at the same bank. He transferred \$40,000 from his savings account to his checking account before transferring the funds to Duane Morris.

ordered that the funds be held in escrow in exchange for Rudolph's release pending sentencing. The funds were held in an escrow account designated as "U2011-0002-Grand Jury Hearings" or "U2011/2." Under an order from the U.S. District Court for the District of Massachusetts, a court order was required before withdrawal from the account. The hearing committee did not credit the respondent's testimony that he believed money could be withdrawn from the account once Rudolph agreed to remain in the country.

In April, 2011, the respondent submitted a trust fund disbursement form to Duane Morris asking that \$25,000 from Rudolph's escrow account be disbursed to Krystalogic, LLC, an internet marketing company of which the respondent was part owner. The form referenced the client matter as "U2011/2," and the funds were withdrawn from the criminal escrow account. Although Rudolph sometimes had other accounts at Duane Morris, the criminal escrow account was the only funded account at the time of the withdrawal. The respondent did not follow Duane Morris's protocol, which would have required authorization from a partner handling the matter, such as Aronica. The respondent used the funds for his personal or business purposes.

In early fall of 2011, Aronica and an associate were preparing for Rudolph's sentencing hearing and discovered

the withdrawal. On October 4, 2011, Aronica telephoned Rudolph to ask if he knew of a company called Krystalogic. Rudolph responded that he did not. The following day, Rudolph told Aronica that the respondent had telephoned him to say that a mistake had been made and that \$25,000 had been withdrawn from the escrow account for the criminal charges, but it should have been taken from a different escrow account named "Ramirez." Rudolph told Aronica that the respondent did not have authority to withdraw \$25,000 from his account.

Michael Silverman, a partner at Duane Morris and its general counsel, called the respondent to discuss the matter. The respondent explained that Rudolph approved the withdrawal and that the payment represented an agreement for Rudolph to buy half of the respondent's ownership share in Krystalogic.⁷ The respondent told Silverman that he must have misunderstood this agreement, which he stated had been reached in March, 2011 while the two were on a business trip. He told Silverman that he would repay the funds.

⁷ The hearing committee did not credit this testimony. The committee noted that the absence of any documentation outlining the asserted stock transfer between a client and a business attorney supported its credibility determination.

Concerned that Rudolph would be subject to criminal liability for the reduction in the escrow account, Silverman instructed the accounting department to credit \$25,000 to Rudolph's account. Duane Morris credited the account on October 6, 2011.

On October 5 and 6, the respondent sent two checks to Duane Morris totaling \$24,999.75. One check, totaling \$9,727.75, was dated September 23, 2011, and was sent to the respondent by Claims Adjusting Group (CAG). The check related to a 2006 matter and was sent unexpectedly by CAG. The respondent knew that the check belonged to Duane Morris, not to him, and he did not alert Duane Morris to that information. The respondent testified that he intentionally misrepresented that the funds belonged to him because he expected that Duane Morris would withhold his capital contribution, in the amount of \$19,267, when he left the firm.

At the request of Duane Morris, the respondent submitted his resignation on October 7, 2011. The respondent attempted to obtain his capital contribution at various times in 2013. On July 9, 2013, he wrote to Duane Morris that it could deduct the amount of the CAG check from the refund of his capital contribution.

The board found that the respondent intentionally misused funds belonging to a client, misused funds belonging to Duane Morris, and misrepresented facts about both matters to Duane Morris in violation of Mass. R. Prof. C. 1.15 (b) (segregation of trust property), 1.15 (c) (prompt delivery of trust property to client or third person), 8.4 (c) (dishonesty, fraud, deceit, or misrepresentation) and 8.4 (h) (engaging in conduct adversely reflecting on fitness to practice law).

c. Improper billing for personal expenses (count three). In May, 2010, Rudolph retained the respondent to represent him in the sale of a house held in trust for the benefit of his wife. The matter was designated as "U2011-00003-House Closing" or "U2011-3" in the Duane Morris case management system. On or about May 14, 2010, the buyers of the Rudolph house conveyed \$215,000 to Duane Morris to be held in escrow. On October 27, 2010, the sale of the house closed and the seller, the trustee, received the full \$215,000 from Duane Morris with interest.

The respondent billed personal travel expenses to the account and, from June to September, 2010, billed \$7,568.82 for his personal airfare and lodging. In March, 2011, the respondent billed an additional \$2,714.23 of travel expenses to the account. These expenses were paid by Duane

Morris and were never invoiced to Rudolph. The respondent explained that the travel expenses related to a business deal that he was working on with Rudolph and that he expected Rudolph to repay Duane Morris for the expenses if and when the deal was finalized.

The board found that the respondent misused firm money for his own personal benefit in violation of Mass. R. Prof. C. 8.4 (c) and (h).⁸

d. Aggravation and mitigation. As two primary mitigating factors, the respondent asserted: (1) that he was preoccupied with a serious family medical issue during the pertinent time, which also exasperated certain substance abuse issues; and (2) there was no harm to any clients or to Duane Morris and no deprivation of funds.

The hearing committee did not consider the health issues or substance abuse allegations to be mitigating factors because the respondent failed to show a causal connection between these and the misconduct. The respondent's expert testified that the respondent was

⁸ The respondent and other Duane Morris attorneys used the "Rudolph house closing" matter as a "general file" for work related to Rudolph on miscellaneous projects. In February, 2011, the respondent entered two hours into the timekeeping system for the U2011-3 account for work related to a travel visa, not to the house closing.

"impaired" on account of the health issues, the substance abuse, and stress, but he did not testify that the issues caused or contributed to the misconduct. The committee did not credit the respondent's asserted inability to function or focus, based in part on the various tasks that the respondent was able to complete during this period.⁹

The hearing committee also rejected the respondent's asserted lack of harm as a mitigating factor, noting that Rudolph could have been subject to sanctions for violating a court order and that the funds were only repaid at the insistence of Duane Morris.

As aggravating factors, the hearing committee found that the respondent's extensive experience, multiple acts of misconduct, refusal to acknowledge the wrongfulness of his conduct, potential for harm to his clients, and lack of candor aggravated his rules violations.

3. Discussion. The respondent challenges several portions of the board's decision: (1) the finding that he acted intentionally; (2) reliance on multi-level hearsay; (3) the conclusion that the Mongelluzzi fee and CAG check

⁹ The respondent did not submit any medical records relating to the family health issues or substance abuse. The hearing committee accepted the respondent's description of the health issues, but was more skeptical of the asserted substance abuse.

were "trust property" subject to Mass. R. Prof. C. 1.15, as appearing in 471 Mass. 1380 (2015)¹⁰; and (4) the severity of the sanction:

a. Standard of review. The standard of review is well established. "[A]lthough not binding on this court, the findings and recommendations of the board are entitled to great weight." Matter of Fordham, 423 Mass. 481, 487 (1996), cert. denied, 519 U.S. 1149 (1997), citing Matter of Hiss, 368 Mass. 447, 461 (1975). Subsidiary facts shall be upheld if "supported by substantial evidence." S.J.C. Rule 4:01, § 8 (4), as appearing in 453 Mass. 1310 (2009). "Arguments hinging on credibility determinations made by the hearing committee generally fall outside the proper scope of our review." Matter of Barrett, 447 Mass. 453, 460 (2006). "'We generally afford substantial deference to the board's recommended disciplinary sanction,' but must ultimately decide every case 'on its own merits [such that] every offending attorney . . . receive[s] the disposition most appropriate in the circumstances'" (citations omitted). Matter of Lupo, 447 Mass. 345, 356 (2006).

¹⁰ The board did not specify which version of Mass. R. Prof. C. 1.15 that it analyzed in its memorandum dated March 9, 2016. The rule was amended March 26, 2015. See 471 Mass. 1304-1305, 1380-1395 (2015). The hearing committee cited the 2012 version of the rule in its report dated March 19, 2015.

Applying these standards, I conclude that the appropriate sanction here is a suspension of one year and one day.

b. Findings regarding the respondent's state of mind.

The respondent argues that the board erred in finding that he acted intentionally and that, at most, he acted negligently. Determining appropriate sanctions for the attorney's conduct takes into consideration whether the misconduct was negligent or intentional. See Matter of Pudlo, 460 Mass. 400, 406 (2011). Here, the board found that the respondent intentionally misused \$25,000 from Rudolph's escrow account, intentionally misused the CAG check belonging to Duane Morris, and intentionally misled Duane Morris regarding his travel expenses. The respondent argues that the errors were at most negligent because he was distracted by a family health issue and impaired by substance abuse. His expert opined that the issues "decreased his attention to detail; . . . his judgment; and . . . his acumen," and the respondent argues that the board and hearing committee erroneously dismissed this evidence.

The respondent's argument regarding the CAG check and travel expenses is negated by his own admissions. He admitted that he intentionally misused the CAG check as "self-help" against an expected dispute regarding the return of his capital contribution. He also admitted that

travel billed to Rudolph's account was not connected to legal representation but to a future business deal and that he expected the would be paid back at a later time when a deal came through. He testified that this practice was consistent with his handling of deals with Rudolph dating back to 1983, even if inconsistent with procedure at Duane Morris. [H 10/7/14: 207-208] Even if he was impaired during the applicable period of time, his admissions demonstrate that he intentionally misused funds in these two circumstances.

Additionally, the hearing committee's finding that the respondent intentionally misused \$25,000 from the escrow account connected to Rudolph's criminal matter is supported by the record. A hearing committee's determinations of intent and credibility "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, 882 (2010), quoting Matter of Barrett, 447 Mass. 453, 460 (2006). At the hearing, Aronica testified that Rudolph had never heard of Krystalogic and that the respondent did not have authority to withdraw from his account. Except for the respondent's

testimony, this evidence is not contradicted.¹¹ Further, the evidence reflects that the respondent knew that withdrawals from Rudolph's criminal escrow account were not permitted. The respondent participated closely in Rudolph's affairs, was involved in creating the escrow account, and did not seek authority from a partner on the criminal matter before submitting the withdrawal.

The respondent's asserted impairment does not negate his intent as there was no causal connection between such impairment and the unauthorized withdrawal. See Matter of Gustafson, 6 Mass. Att'y Disc. R. 140, 141 (1989) (alcohol abuse evidence not mitigating where no causal connection and conduct of misappropriation "quite different from alcohol related incompetence, inattention, or negligence").

¹¹ Rudolph did not testify, but he submitted an affidavit stating that he has "complete faith in [the respondent's] honesty and integrity. Notwithstanding the allegations in this case, [he] continue[s] to place [his] trust in [the respondent] wholeheartedly." The affidavit does not address the alleged Krystalogic agreement or authority to withdrawal. The respondent asserts that the affidavit demonstrates that the mistake was a "negligent misunderstanding." Where Rudolph did not directly address the challenged statements or the transaction, however, we do not discern the same meaning from the affidavit. Moreover, the hearing committee was not obligated to credit the respondent's version of the Rudolph transaction even if it had not been contradicted by Aronica's testimony. See Matter of Barrett, 447 Mass. 453, 460 (2006).

c. Hearsay. In connection with the Rudolph funds, the respondent argues that the board's finding is further compromised by reliance on multi-level hearsay. The respondent properly acknowledges that hearsay evidence is admissible in disciplinary proceedings when it bears sufficient indicia of reliability, but argues that Rudolph's statements about his knowledge of Krystalogic and authorization of the respondent's withdrawal should have been excluded on the basis that Aronica's testimony, which relayed the statements, was unreliable.

The respondent's claim suffers from two defects. First, we look at the reliability of the hearsay statements, not the reliability of the in-court witness relaying those statements, who is available for cross-examination.¹² See Covell v. Department of Social Servs., 439 Mass. 766, 786 (2003). See also Crawford v.

¹² The respondent also challenges the ruling by the hearing committee, which was adopted by the board, to deny the respondent access to notes that Silverman took during his conversations with the respondent and Rudolph on the basis of attorney-client privilege and work product. Although bar counsel sought to introduce out-of-court statements by Rudolph to Silverman, the chairman excluded the statements after the respondent's objection. As Silverman was not a party to the conversation between Aronica and Rudolph, when the admitted hearsay statements were made, the notes would have limited benefit. In any event, the notes taken by Silverman, as general counsel to Duane Morris, were properly excluded.

Washington, 541 U.S. 36, 61 (2004) (reliability tested through cross-examination). Accordingly, any biases that Aronica may have had against the respondent are not relevant to this determination. Second, the hearsay statements meet the reliability requirements for admissibility. Factual detail is indicative of reliability. See Commonwealth v. Durling, 407 Mass. 108, 121 (1990) (reviewing hearsay admitted at probation revocation hearing). Rudolph's statements were detailed and included his lack of knowledge about Krystalogic, the respondent's explanation of the withdrawal, and details of the "mistake" that the respondent claimed had occurred. Moreover, the respondent provided corroboration in his acknowledgment that Rudolph did not authorize the withdrawal, arguing only that he negligently misunderstood there to be an agreement.

d. Trust property. The respondent argues that the board erred in finding that the Mongelluzzi fee and the CAG check were "trust property" subject to Mass. R. Prof. C. 1.15, as appearing in 471 Mass. 1380 (2015). "Trust property" is defined as "property of clients or third persons that is in a lawyer's possession in connection with a representation and includes property held in any fiduciary capacity in connection with a representation,

whether as trustee, agent, escrow agent, guardian, executor, or otherwise." Mass. R. Prof. C. 1.15 (a) (1). A retainer that is paid to an attorney for anticipated legal fees and expenses is "trust property."¹³ Mass. R. Prof. C. 1.15 (b) (3). The rule does not require a flat fee to be deposited in a trust account. Mass. R. Prof. C. 1.15, comment 2A. The respondent argues that he reasonably believed that the Mongelluzzi payment was a flat fee, not a retainer of unearned client funds, and that the provisions of rule 1.15 did not apply to either the Mongelluzzi payment or the CAG check because neither were "trust property."¹⁴

¹³ "[W]here a client pays an attorney a sum of money for legal fees before the legal fees have been earned, the fees advanced, often referred to as a retainer, belong to the client until earned by the attorney and must be held as trust funds in a client trust account." Matter of Sharif, 459 Mass. 558, 564 (2011), citing Mass. R. Prof. C. 1.15.

¹⁴ As noted by the petitioner, the amended petition alleges that the \$40,000 belonged to Duane Morris. If the funds were a retainer, they would have been owned by the client until earned and indisputably subject to the requirements of rule 1.15. If the funds were a flat fee, they would have belonged to Duane Morris and the respondent argues that funds belonging to his law firm are not "trust property" under rule 1.15. In either case, the respondent intentionally misled Duane Morris as to the capped nature of the fee or its structure (hourly or fixed) and failed to promptly transmit the funds to Duane Morris for safekeeping or for payment on the client matter.

Assuming without deciding that rule 1.15 did not apply to these funds, the respondent knew that the Mongelluzzi payment did not belong to him. It belonged to either Mongelluzzi or Duane Morris. Nonetheless, it took him five months and multiple telephone calls from Duane Morris before he delivered the funds to the firm. Similarly, the respondent intentionally misrepresented to Duane Morris that the funds in the CAG check belonged to him. Whether or not the Mongelluzzi funds were a "flat fee" or the respondent's law firm was a "third party" under rule 1.15, the evidence supports the board's finding that the respondent intentionally misappropriated the CAG check and negligently misused the Mongelluzzi funds and thereby violated Mass. R. Prof. C. 8.4 (c) and (h), as appearing in 471 Mass. 1483 (2015).

e. Appropriate sanction. The respondent argues that the appropriate sanction in this case is, at most, a brief or stayed suspension, not the recommended two-year suspension. When considering a disciplinary sanction, I examine whether the sanction "is markedly disparate from judgments in comparable cases." See Matter of Brauer, 452 Mass. 56, 74 (2008), quoting Matter of Finn, 433 Mass. 418, 423 (2001). The board's recommended sanction is entitled to "substantial deference." Matter of Brauer, supra.

The evidence supports several instances of wrongdoing, most particularly the respondent's intentional misuse of the CAG check belonging to Duane Morris, the intentional misuse of \$25,000 of funds in the Rudolph matter, the negligent misuse of \$40,000 of funds in the Mongelluzzi matter, and improper billing of travel expenses. There was no deprivation and no evidence of the respondent's intent to deprive a client of funds.¹⁵ Although Rudolph could have suffered serious harm from the respondent's \$25,000 withdrawal, no client was harmed by the respondent's misconduct, and the record reflects that Mongelluzzi and Rudolph did not complain about the respondent's actions and he remains on good terms with both.

The intentional misuse of client funds, where, as here, there is no finding of intent to deprive a client of funds or actual deprivation of those funds, "normally calls for 'a term suspension of appropriate length.'" Matter of Schoepfer, 426 Mass. 183, 187 (1997), quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 836 (1984) (the Three Attorneys case). In considering the length of the suspension, it is appropriate to consider the cumulative

¹⁵ There was evidence that the respondent intended to deprive Duane Morris of funds from the CAG check as "self-help" against his capital contribution held by the firm.

effect of multiple violations. Matter of Tobin, 417 Mass. 81, 88 (1994), citing Matter of Palmer, 413 Mass. 33, 38 (1992). After careful review of relevant cases, including those relied on by the board and cited by the respondent and bar counsel, I conclude that a suspension of one year and one day is the appropriate discipline.

For the respondent's intentional misuse of Rudolph's funds, the board cites cases where an attorney was suspended for periods between four months and one year and one day.¹⁶ In regard to the CAG check, the board cites cases where an attorney was suspended for periods between two and three years for intentional misappropriation of

¹⁶ Matter of Long, 29 Mass. Att'y Disc. R., BD-2013-047 (2013) (nine-month suspension with reinstatement on conditions for attorney who intentionally misused trust funds, without deprivation, on ten occasions over a three-year period); Matter of O'Reilly, 26 Mass. Att'y Disc. R. 470 (2010) (suspension for a year and a day for attorney who intentionally misused \$50,000 of estate funds without deprivation, plus failure to file estate returns and extensive misrepresentation to client); Matter of Wilsker, 25 Mass. Att'y Disc. R. 625 (2009) (nine-month suspension with seven months stayed, with probation and conditions, for a single instance of intentional misuse of escrowed real estate funds without deprivation); Matter of MacCallum, 24 Mass. Att'y Disc. R. 452 (2008) (four-month suspension with conditions for a single instance of misuse of escrowed real estate funds without deprivation); Matter of O'Keefe, 21 Mass. Att'y Disc. R. 530 (2005) (nine-month suspension misuse of escrowed settlement funds on two occasions without deprivation and use of misleading firm name).

funds from the attorney's law firm or employer.¹⁷ There was no deprivation of funds in two of these three cases cited by the board. All of the attorneys in the misappropriation cases, however, had prior discipline. Moreover, the attorneys conducted extensive cover ups in an attempt to hide their wrongdoing.

The respondent's wrongdoing in this case is most analogous to two cases cited by the board and bar counsel: Matter of O'Keefe, 21 Mass. Att'y Disc. R. 530 (2005), where the attorney received a nine-month suspension; and Matter of O'Reilly, 26 Mass. Att'y Disc. R. 470 (2010), where the attorney received a suspension of one year and one day. In Matter of O'Keefe, supra, the experienced attorney twice intentionally withdrew funds from his client's escrow account and used the funds for personal expenses. The attorney also commingled funds and used an

¹⁷ Matter of Barrett 447 Mass. 453, 22 Mass. Att'y Disc. R. 58 (2006) (two-year suspension for attorney who misappropriated funds of a corporation for which he was chief executive officer and attempted to hide misappropriation through lies and creating fraudulent accounting documents); Matter of Carreiro, 25 Mass. Att'y Disc. R. 58 (2009) (two-year suspension for misappropriation of legal fees owed to the firm and misrepresentations, including fabricated check); Matter of McDonough, 27 Mass. Att'y Disc. R. 590 (2011) (three-year suspension for converting two fee payments belonging to employer's firm for lawyer's own use, negligent handling of client cases, and creating fraudulent documents).

improper name for his law firm. There was no deprivation and no intent to deprive. The board adopted the joint recommendation of a nine-month suspension, and the single justice so ordered.

In Matter of O'Reilly, supra, the experienced attorney had withdrawn \$50,000 from an estate account and used a significant portion of it for personal and business purposes. He repaid the account and there was no evidence of intent to deprive. Additionally, the attorney did not file estate taxes and prepared fraudulent documents to misrepresent to the beneficiaries, during the course of three years, that he had paid the estate taxes. The single justice rejected the attorney's claim that a nine-month suspension was more appropriate than the board's recommendation of one year and one day, noting the absence of any suggestion of sloppiness. The single justice adopted the board's recommendation.

Here, the funds at issue were larger amounts, as in Matter of O'Reilly, but the respondent did not conduct an extensive cover up in an attempt to hide his actions. He promptly repaid the Rudolph funds after being questioned by Duane Morris. The hearing committee did not credit the respondent's testimony that he believed Rudolph was able to withdraw from the escrow account, but the committee stopped

short of finding that the respondent knew that the withdrawal would violate a court order.¹⁸ Accordingly, the potential for harm against Rudolph does not seriously magnify the appropriate sanction.

Because of the respondent's prompt repayment of funds, absence of a finding that the respondent withdrew from Rudolph's account knowing that he could subject Rudolph to criminal sanctions, and the affidavit from Rudolph, I conclude that the respondent's conduct in regard to the Rudolph funds did not significantly impair the public's confidence in the integrity of the profession. See Matter of Foley, 439 Mass. 324, 337 (2003), quoting Matter of Kerlinsky, 428 Mass. 656, 664 (1999) ("the most significant harm arising from the respondent's conduct is its effect on the profession and the public's confidence in its integrity").

Based on the Rudolph funds alone, the respondent should receive a sanction less than Matter of O'Reilly and more in line with the nine-month suspension in Matter of O'Keefe for multiple intentional acts of misuse of client funds without deprivation. All misconduct is considered

¹⁸ Conversely, the committee found that the respondent's testimony that Rudolph had authorized a withdrawal of \$25,000 was knowingly false.

cumulatively, however. There is ample evidence that the respondent acted negligently as to the Mongelluzzi funds, intentionally misappropriated the CAG check, and improperly billed travel expenses. The CAG check and travel expenses were disputes between the respondent and his law firm. The respondent's negligence with regard to the Mongelluzzi funds was without deprivation or intent to deprive. These additional counts of misconduct do not raise the sanction appropriate here to a two-year suspension.

After considering all of the allegations and the nature of the dispute between the respondent and his law firm that led to this disciplinary proceeding, I conclude that a two-year suspension is markedly disparate from similar cases of wrongdoing.

4. Disposition. An order shall enter suspending the respondent from the practice of law in in the Commonwealth for one year and one day.

By the Court


Geraldine S. Hines
Associate Justice

Entered: August 26th 2016