SJC-13038

IN THE MATTER OF RICHARD W. GANNETT.

March 16, 2022.

Attorney at Law, Disciplinary proceeding, Disbarment, Commingling of funds, Duty to nonclient, Indorsement of check.

The respondent attorney, Richard William Gannett, appeals from the judgment of a single justice of this court disbarring him from the practice of law.[1] The matter came before the single justice on the information and record of proceedings filed by the Board of Bar Overseers (board). The board determined that the respondent intentionally misused trust funds and engaged in other misconduct. The board recommended, and the single justice ordered, that the respondent be disbarred. We affirm.

1. Prior proceedings. On March 23, 2018, bar counsel filed a petition for discipline against the respondent. As amended, the petition alleged that the respondent wrongfully deposited into his interest on lawyers' trust account (IOLTA) trust funds in the form of a check in which a third party, Lee Bank, claimed an interest, and that he intentionally misused the funds, in violation of multiple rules of professional conduct. Through counsel, the respondent answered the petition, denied any misconduct, and raised affirmative defenses.

The matter was referred to a hearing committee of the board. After an evidentiary hearing at which the respondent was

[1] This bar discipline appeal is subject to the court's standing order governing such appeals. See S.J.C. Rule 2:23, 471 Mass. 1303 (2015). Pursuant to our standing order, we dispense with oral argument.

represented by counsel, the committee filed a report of its findings of fact, conclusions of law, and recommendation that the respondent be disbarred. The board thereafter considered the respondent's appeal and issued a report generally adopting the hearing committee's findings of fact, legal conclusions, and recommendation; an information was filed in the county court. A single justice of this court reviewed the record and accepted the board's recommendation, and a judgment of disbarment entered. The respondent appealed.

On appeal to this court, the respondent asserted that the proceedings before the board had violated his right to due process. He claimed, for the first time, that his counsel at the hearing had had an unwaivable conflict of interest stemming from alleged malpractice in an unrelated case.[2] We remanded the matter to the single justice for her consideration of the issue in the first instance, including whether the claim had been waived, as bar counsel argued. On remand, she determined that the claim had not been properly raised, declined to exercise her discretion to consider it nonetheless, and denied as moot the respondent's motion to expand the record. The respondent again appealed, and both appeals are now before us.

2. Factual background. We summarize the facts found by the hearing committee that, with the exception of one factor in aggravation of sanction, were adopted by the board.[3] See note 7, infra. We agree with the single justice that the facts are supported by substantial evidence. See S.J.C. Rule 4:01, § 8 (6), as appearing in 453 Mass. 1310 (2009). The respondent does not challenge on appeal her determination in that regard.

On October 31, 2012, Lee Bank lent $115,000 to Amaral Enterprises, LLC (Amaral), pursuant to a promissory note and a mortgage on certain commercial property owned by Amaral. That same day, Lee Bank lent $70,000 to Bearbones, Inc. (Bearbones), which operated a bakery on that property; that loan was secured by a second mortgage on the property, and it was guaranteed by

---

[2] In essence, the respondent alleged that his counsel at the hearing, who also had represented the respondent in an unrelated civil matter, engaged in malpractice by failing to oppose a motion for summary judgment in that civil matter.

[3] We therefore treat and reference the hearing committee's factual findings as those of the board. See Matter of Eisenhauer, 426 Mass. 448, 449 n.1, cert. denied, 524 U.S. 919 (1998).

Amaral. The property was insured by Peerless Indemnity Insurance Company (Peerless). Although the lender, Lee Bank, was not listed on the declarations page of the insurance policy, and the policy listed the mortgage holder as "none," Peerless was aware that Lee Bank was a mortgage holder. On February 19, 2013, the property sustained water damage. The bakery business ceased operations, and soon thereafter, Lee Bank alleged that the loans were in default.

Beginning in April 2013, the respondent represented Amaral and Bearbones in connection with their water damage insurance claim. In the summer of 2013, Lee Bank and Bearbones entered into a forbearance agreement for the period September 1, 2013, to December 31, 2013. The respondent drafted, or participated in drafting, the agreement. The forbearance period was extended multiple times; both Bearbones and Amaral were included as parties in the forbearance extension agreements. The last agreement extended the forbearance period to September 30, 2016; the respondent was aware of the agreement. Retaining language from prior agreements, the last agreement stated:

> "Borrower shall immediately deliver to Lender future insurance proceeds relative to the Insurance Claim. Until the loans are re-paid to Lender's satisfaction, the Lender in its sole and absolute discretion shall determine how the money received from the Insurance Claim is distributed."

No later than May 10, 2013, the respondent was aware that Lee Bank was a mortgagee of the property, and that any insurance proceeds were to be held in trust for Lee Bank. By July 2013, the respondent was aware that the forbearance agreement gave Lee Bank sole discretion over how funds received from his clients' insurance claim would be allocated and distributed.

On August 4, 2015, an attorney for Peerless mailed a check to the respondent in the amount of $42,227.28, representing proceeds of the insurance claim. The check was made payable to the respondent's firm, Amaral and Bearbones, and Lee Bank. On August 6, 2015, an attorney for Lee Bank sent a letter to the respondent stating both that the bank was aware of the check and that the respondent was not authorized to negotiate the check on the bank's behalf, including by depositing it into his escrow account. The respondent received the letter. The bank's attorney also sent an electronic mail message to the respondent on August 7, 2015, repeating that the respondent was not authorized to deposit the check into his IOLTA account. The message further stated that the forbearance agreement required

that the insurance proceeds be paid to Lee Bank and that Lee Bank had decisional authority over any disbursements. The respondent received the message.

Notwithstanding Lee Bank's communications, on August 8, 2015, the respondent deposited the $42,227.28 check into his IOLTA account. Lee Bank did not authorize the deposit, and the check did not contain an endorsement by Lee Bank. Between August 10, 2015, and June 1, 2016, the respondent wrote nine checks from his IOLTA account debited from the check proceeds. Each of the checks was made payable to the respondent, and the checks totaled the precise amount of the deposit. The respondent claimed that the disbursements were for legal fees and expenses authorized by his client.

3. Discussion. In bar discipline cases, "subsidiary facts found by the [b]oard and contained in its report filed with the [i]nformation shall be upheld if supported by substantial evidence, upon consideration of the record." S.J.C. Rule 4:01, § 8 (6). Claims that were not raised before the hearing committee or the board have been deemed waived. See Matter of Balliro, 453 Mass. 75, 85 n.9 (2009); Matter of Firstenberger, 450 Mass. 1018, 1019 (2007), cert. denied, 553 U.S. 1069 (2008) (due process claims); Matter of Cobb, 445 Mass. 452, 477 (2005), citing Sugarman v. Board of Registration in Med., 422 Mass. 338, 347 (1996) (due process). "We do not consider issues, arguments, or claims for relief raised for the first time on appeal." Cariglia v. Bar Counsel, 442 Mass. 372, 379 (2004).

a. Due process. Before the board, the single justice, and this court, the respondent asserted that his right to due process was violated during the disciplinary proceedings, albeit for different reasons. Attorneys facing bar discipline proceedings are entitled to due process of law, the hallmarks of which are fair notice of the charged misconduct and the right to be heard. See Matter of Eisenhauer, 426 Mass. 448, 454, cert. denied, 524 U.S. 919 (1998); Matter of Kenney, 399 Mass. 431, 436 (1987). See also Matter of Abbott, 437 Mass. 384, 391 (2002); Matter of Ellis, 425 Mass. 332, 339 (1997). Because bar discipline proceedings are civil in nature, however, a respondent attorney is not entitled to the full panoply of due process protections that criminal defendants receive. See Matter of Eisenhauer, supra. In this case, the respondent was given adequate notice of the charged misconduct, an opportunity to present and challenge evidence, and to appeal. See id. He has not demonstrated that more was required.

While the underpinnings of the respondent's due process claim have evolved and shifted over time, they each rest on the premise that he was denied due process by the actions and inactions of his counsel. In his appeal to the board, the respondent asserted that his counsel failed to advise him of the possible consequences of proceeding to a hearing rather than accepting bar counsel's proposed stipulation and joint recommendation as to sanction. He also claimed that his counsel agreed to proposed exhibits without consulting the respondent and inadequately prepared the respondent's client to testify. In addition, the respondent asserted that, when he was unable to pay counsel fees after the hearing, his counsel "abandoned him" by failing to prepare proposed findings and recommendations and by failing to file an appeal from the findings and recommendation of the hearing committee by the extended date.[4]

The board correctly rejected the claims. As the single justice also observed, we have not recognized either a right to counsel in bar discipline proceedings or a claim of ineffective assistance of counsel in that regard. See Matter of Eisenhauer, 426 Mass. at 454; Matter of Jones, 425 Mass. 1005, 1007 (1997). See also Matter of Haese, 468 Mass. 1002, 1006 (2014). Before the single justice, the respondent repackaged his due process argument as a denial of the opportunity "to be heard at a meaningful time and in a meaningful manner." Matter of Kenney, 399 Mass. at 435. The gist of the argument, however, remained rooted in the "actions and inaction of counsel." The single justice correctly rejected the claim.[5] See Matter of Eisenhauer, supra.

---

[4] As the single justice noted, the claim that the respondent was not warned of the consequences of missing the deadline for appealing from the decision of the board is moot, since he subsequently was permitted to file an appeal.

[5] Because they had not been raised before the board, the single justice declined to consider on appeal certain new arguments that the respondent claimed demonstrated the denial of his due process right to be heard in a meaningful time and in a meaningful manner. See Matter of Cobb, 445 Mass. at 477. The respondent claimed that the inaction of his counsel led the board to assume incorrectly that the respondent was self-represented, and that it was improperly influenced by that assumption; that his counsel failed properly to prepare the respondent for the hearing; and that, by the time the respondent filed his appeal, the board already had made its decision. There was no error in the single justice's decision in that

On appeal to this court, the respondent again rewrapped his due process claim, this time raising the new argument that he was denied due process at the hearing because his counsel had an "unwaivable conflict of interest" stemming from that attorney's alleged malpractice in an unrelated case. On remand, the single justice determined that the respondent became aware of the facts underlying the alleged conflict before the hearing committee issued its report, but he failed to petition to reopen the hearing committee proceedings or to raise the argument before the board or the single justice prior to the entry of judgment.[6] See Rule 3.59(a) of the Rules of the Board of Bar Overseers (2017) (reopening of record). In the circumstances, there was no error in her decision not to reach the issue on its merits. Like the single justice, we decline to consider it. See Cariglia, 442 Mass. at 379. See also Matter of Jones, 425 Mass. at 1007.

b. Sufficiency of the evidence. As stated, the respondent does not challenge on appeal the evidence of misconduct. In summary, the single justice concluded there was ample evidence to support the hearing committee's finding, adopted by the board, that the respondent intentionally misused trust funds when he negotiated a $42,227.28 check made payable to Lee Bank and others. He did so without Lee Bank's consent and over its express objection, and then he disbursed the funds to himself with knowledge that loan documents and forbearance agreements gave the bank a right to the funds. Regardless of the reason the respondent withdrew the funds, the testimony, the IOLTA records, and the respondent's answer to the petition for discipline support the hearing committee's findings.

As the board determined and the single justice agreed, the evidence established that the respondent violated Mass. R. Prof. C. 1.15 (b) (2) (ii), as appearing in 471 Mass. 1380 (2015), by withdrawing trust funds knowing his right to the funds was

---

regard.

[6] The respondent concedes that he did not claim before the board or the single justice that his counsel had had an "unwaivable conflict" of interest. Although he argues that the affidavit submitted in support of the claim that counsel had rendered ineffective assistance was sufficient to preserve the argument, the single justice properly rejected the claim. A bald recitation of facts is not sufficient to preserve any particular argument on appeal.

disputed and failing to restore the funds until the dispute was resolved; Mass. R. Prof. C. 1.15 (c), by failing to notify promptly a third party, Lee Bank, upon receipt of funds in which the bank had an interest, and failing to promptly deliver the funds it was entitled to receive; and Mass. R. Prof. C. 8.4 (c) and (h), as appearing in 471 Mass. 1483 (2015), by engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation, and other conduct that adversely reflects on fitness to practice.

c. Sanction. In bar discipline matters, the board's recommendation as to sanction is given substantial deference. See Matter of Griffith, 440 Mass. 500, 507 (2003). Here, the single justice accepted the board's recommendation that disbarment was appropriate. On appeal, we consider whether that sanction "is markedly disparate from judgments in comparable cases." Matter of Finn, 433 Mass. 418, 423 (2001).

From a sanction perspective, the most serious misconduct involved intentional misuse of trust funds with deprivation resulting. The usual sanction for misconduct of that type is disbarment or indefinite suspension. See Matter of Hilson, 448 Mass. 603, 618 (2007) (indefinite suspension for misuse of third-party funds); Matter of Schoepfer, 426 Mass. 183, 187 (1997) (client funds). While the respondent argued below that the misconduct was neither intentional nor dishonest, and that it did not fall within the scope of Matter of Schoepfer, supra, the board's contrary conclusion is supported by substantial evidence. See Matter of Lupo, 447 Mass. 345, 356 (2006) (declining to provide "a point-by-point rebuttal to the respondent's arguments" [citation omitted]).

Both the hearing committee and the board considered whether there were factors in mitigation or aggravation of sanction. Although the hearing committee found no matters in mitigation, there were several factors it weighed in aggravation. The board considered the aggravating evidence as "plentiful." The respondent was an experienced lawyer in general, and he was experienced in insurance work in particular. The hearing committee concluded, and the board accepted, that the respondent lacked candor in his testimony before it, that he was motivated by greed and self-interest, and that he failed to appreciate the wrongfulness of his conduct.[7] The single justice rejected the

[7] The board disagreed with the hearing committee on one aggravating factor. Although the committee found that the respondent charged and collected an excessive fee, the board

respondent's claim that those findings were not supported by substantial evidence, and he does not claim error on appeal.

4. Conclusion. Considering the misconduct, as well as the aggravating factors, the choice between disbarment and indefinite suspension is plain. We agree with the single justice that the respondent must be disbarred.

Judgment affirmed.

The case was submitted on the record, accompanied by a memorandum of law.

Richard W. Gannett, pro se.

---

declined to weigh that factor in aggravation.