Disciplinary Lessons from 2019

By Dorothy Anderson July 2020

Here, a bit later than we might have hoped, are some attorney disciplinary highlights from 2019:

A Lawyer's Misuse of Employee Retirement Funds Leads to Severe Sanction

In **In re: Joseph P. Lussier**, BD-2018-092 (February 5, 2019), the SJC indefinitely suspended a lawyer who failed to properly maintain thousands of dollars that he withheld from his employee's paychecks over the course of seven years.

Lussier established a Saving Incentive Match Plan for Employees of Small Employers IRA Plan ("SIMPLE IRA") and gave his employees the opportunity to enroll. An employee enrolled and directed Lussier to withhold $100 from each of her paychecks. The law establishing the program required an employer to deposit and maintain the fund he withheld in the IRA and to make matching employer contributions. However, for approximately seven years, Lussier withheld the funds from the employee's paycheck while using most of the withheld funds for his own personal and business purposes. Nor did he consistently make the employer's required matching payments to the employee's IRA. The amount misused eventually totaled $24,471. To make matters worse, when the employee eventually learned of the deficit in her account and asked Lussier to deposit the missing funds, he delayed, and then made only a partial payment. Not until the employee filed a complaint with bar counsel did Lussier reimburse the employee's account all that she was owed.

Under disciplinary caselaw, particularly the 1997 full-bench decision in *Matter of Schoepfer,* intentional misuse of client funds generally results in disbarment, or where the lawyer has fully reimbursed the client, an indefinite suspension from practice. On the other hand, when an attorney misuses funds or funds held by the lawyer in some private or business capacity, a term suspension is generally imposed. That is known as the "private citizen" exemption to the *Schoepfer* rule.

In this, matter, however, the Court rejected the lawyers attempt to place himself in the "private citizen" exemption:

> Here, the respondent is the sole director and only attorney at his practice where the misconduct took place. Unlike in *Barrett*, where the attorney was the CEO of a completely different business that had nothing to do with the law, 94 to 96 percent of the respondent's business was from his practice of law. (citations omitted). The respondent's "central function" was that of an attorney, and without his practice of law there would be no business. Furthermore, the respondent was simultaneously [the employee's] employer and attorney at multiple junctures. This inescapable intertwining of the respondent's business and his practice of law distinguishes him from the attorney in *Barrett* and, thus, the respondent's misconduct does not fall within the private-citizen exception.

The upshot was that Lussier was treated as if he had misused client funds. Pursuant to the *Schoepfer* standards, he was sanctioned by indefinite suspension, rather than disbarment, only because he ultimately made full restitution to his employee.

Facebook is Not Always Your Friend

In **Matter of Frank Arthur Smith III,** Public Reprimand No. 2019-16 (November 16, 2019), the Board issued a decision which should give pause to Massachusetts lawyers who consider disclosing details of a client's case on Facebook or other social media.

Jane Doe (the actual name was not used in the decision) engaged Smith to represent her in seeking guardianship of her young grandson. In connection with seeking guardianship, Smith attended a Care & Protection proceeding in juvenile court that concerned custody of the child. On behalf of Doe, Smith moved to intervene in the matter. Citing concerns about the relationship between Doe and her daughter, the child's mother, the Department of Children and Families (DCF) opposed the motion.

On the following day, Smith posted about the hearing on Facebook. When two Facebook friends asked for further details, Smith made further posts. In the combination of his original post and his responsive posts Smith revealed: that he represented a grandmother seeking custody of her six year old grandson; that he had appeared on her behalf the day before at the Berkshire Juvenile Court in Pittsfield; that DCF had opposed the grandmother's request to obtain custody of the grandson; that DCF expressed concern that Does would not be able to control her daughter, the mother of the grandson; that DCF had "unspecific" "concerns"; and that the grandson was in his fourth foster care placement after having been removed from the grandmother's home in "late July".

Although Smith did not reveal the names of any of the parties, Doe's daughter saw the posts, recognized that the posts concerned her family, and informed Doe about them. The daughter was not a Facebook friend of Smith's.

The Board found that Smith had engaged in a violation of Mass. R. Prof. C. 1.6(a), which prohibits a lawyer from revealing confidential information concerning the representation of a client. Confidential information is defined in Comment [3A] to the rule as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the lawyer has agreed to keep confidential." Lawyers may also not reveal information that "could reasonably lead to the discovery of [confidential] information by a third person. Comment [4].

The Board agreed with bar counsel that Smith had violated Rule 1.6(a) because the revelations that Doe's grandson was in DCF custody and had previously been removed from her home, were likely to be embarrassing or detrimental to her. It also observed that the information was sufficiently specific as to allow Doe and her daughter to recognize that they were the subject of the posts and that it was reasonably likely others could also recognize them.

Smith received a public reprimand and the Board expounded that "…social media has increased the consequences of disclosing confidential client information: once a fact is on the internet, its scope and duration are virtually limitless. Given the reach of the internet, lawyers must use extra caution when discussion client matters of social media."

Misconduct by Florida Judges Results in Massachusetts Disciplinary Action

Two Florida judges, both members of the Massachusetts bar, were reciprocally disciplined in Massachusetts in 2019 for conduct in which they engaged while performing their judicial duties in Florida. In **In re: John Patrick Contini**, BD-2018-102 (April 5, 2019), the Florida Bar opened an investigation into misconduct alleged to have occurred while Contini was serving as a circuit court judge for the 17th Judicial Circuit in Broward County, Florida. As a result of the Florida Bar investigation, Judge Contini stipulated that there was probable cause for disciplinary proceedings based on several allegations of misconduct, and consented to disbarment in Florida. The allegations were that Judge Contini submitted inaccurate time reports, instructed his personal assistant to perform personal tasks for him and on several occasion entered orders without an adequate basis to do so.

Opposing bar counsel's petition for reciprocal discipline, Judge Contini argued that the allegations did not warrant sanction in Massachusetts because there were no corresponding rules prohibiting his specific conduct in Massachusetts and because the Florida Bar had not actually proved the allegations; rather he had stipulated that his misconduct could be proven. Rejecting both arguments, the single justice found that Contini's misconduct while performing judicial duties violated Mass. R. Prof. C. 8.4(d) (conduct prejudicial to the administration of justice) and that his stipulation and decision not to defend against the allegations were a sufficient basis for discipline. Judge Contini was suspended from practice in Massachusetts for five years.

In **In re: John Lakin**, BD-2019-050 (October 25, 2019), a second Florida judge was suspended. Judge Lakin had resigned his position as a Florida circuit judge amid allegations that he had accepted gifts from the lawyers of parties in active litigation before him. Specifically, in June 2015, Judge Lakin was presiding over a civil trial that lasted several days. Following a defendant's verdict, plaintiff's counsel in early July 2015, filed a motion for a new trial. While plaintiff's motion was pending before him, the judge requested and accepted tickets from plaintiff's counsel to a Tampa Bay Ray's baseball game. The day after he received the tickets, the judge ruled favorably on plaintiff's motion. He asked for and accepted tickets to two additional games before disclosing the gifts to defense counsel and recusing himself.

A Florida referee, assigned to hear the disciplinary matter, found that the judge was not influenced by the gift and did not cause injury to the parties. The referee also found that Lakin used the tickets as a means of spending time with his son, who was suffering from mental illness. The Supreme Court of Florida accepted those findings and suspended him for only two years. In the Massachusetts reciprocal matter, the SJC was also sympathetic, imposing a fifteen-month suspension and differentiating Lakin from **Contini** and **Matter of Nadeau,** 34 Mass. Att'y Disc.

R. 405 (2018) (concerning the misconduct of a Maine judge), on the grounds that Lakin had no ill intent and that his conduct resulted in no actual prejudice to the parties.

Suspension of Lawyer Who Delays and Dithers While Client Remains Behind Bars.

In re: Desmond Thomas Patrick More FitzGerald, BD-2018-038 (January 30, 2019) involved a years-long episode of neglect and incompetence by a lawyer representing a client in post-conviction matters. The client was convicted of several criminal charges in 2006 and sentenced to a lengthy state prison term. He engaged FitzGerald both to appeal from and move to vacate the conviction. As to the motion to vacate, FitzGerald filed a timely motion but failed to articulate grounds on which the conviction could be vacated; he then filed a memorandum in support of the motion almost a year later. Like the motion, the memorandum was inadequate and inaccurate, and the Superior Court denied the motion. FitzGerald later filed a second motion to vacate the conviction that was also denied. While the client requested that FitzGerald appeal the denial, FitzGerald never did so.

As to the appeal, the content of the record appendix filed by FitzGerald was incomplete, and included materials outside the trial record, some of which were damaging to the client and not relevant to the arguments. He also falsely asserted in the appeal that the client had been incarcerated continuously while awaiting trial; an assertion that was not true. Upholding the conviction, the Appeals Court characterized some of FitzGerald's arguments as speculative and unsupported, expressed concern about the false assertions and ruled that the lawyer's failure to appeal from the denial of the second motion to vacate, effectively waived the issues raised in the appeal.

The Board found, and the Court affirmed that FitzGerald failed to represent his client competently and diligently and engaged in conduct prejudicial to the administration of justice. In addition, in light of the poor quality of the services received by the client, the Court also affirmed that the $25,000 fee charged by FitzGerald was clearly excessive.

The Court imposed a four-month suspension, with two months of the suspension stayed for a year, with conditions.

Disbarment Certain for Lawyers Who Cannot be Trusted with Trust Funds

No years goes by in which a Massachusetts lawyer(s) does not yield to the temptation of borrowing estate or trust funds. In Re: David M. Thomas, 35 Mass. Att'y Disc. R. (December 15, 2019) is this year's exemplar. Thomas resigned and was disbarred after filing with the Board of Bar Overseers an Affidavit of Resignation in which he admitted that bar counsel could prove the following facts by a preponderance of the evidence.

A client of Thomas formed a corporation to take advantage of a certain investment opportunity. In 2015, while representing that client, Thomas also invested funds in the

corporation and later was listed as an officer and director of the corporation. During the same time period, in his capacity as an attorney, Thomas was appointed trustee of another client's trust and personal representative of his estate; roles that afforded Thomas access to more than $2,200,000 in trust and estate funds. In an obvious conflict of interest with the trust and the estate, Thomas used approximately $700,000 of those funds to make an extremely risky loan to the company of which he was an officer and investor.

Thomas obtained no security from the company and had little or no basis to believe that the loan would ever be repaid. Thomas failed to disclose the terms of the loan or the highly risky nature of the loans in writing to the trust and estate beneficiary, failed to obtain a waiver of the conflict of interest and failed to advise the beneficiary to have independent counsel review the transaction.

Making matters worse, Thomas loaned more trust funds to the company even after learning that a large portion of the funds previously loaned had been stolen by a former officer of the company. As of the date of his d

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investigation, seeking multiple extensions to deadlines and ultimately defying a subpoena issued by the Board of Bar Overseers and an SJC Order of Administrative Suspension.

This attorney will not be reinstated to the bar at the end of his year and a day suspension, without a formal reinstatement hearing at which he will have the burden of proving, among other pre-requisites, that his reinstatement will not impact negatively on the public and the bar.