

IN RE: STUART I. AUGUST

S.J.C. Order of Term Suspension entered by Justice Cordy on August 10, 2001.¹

SUMMARY²

The respondent was admitted to the Bar on November 30, 1972. In January 1998, and pursuant to former Canon Nine, DR 9-103, Bar Counsel received four notices of eight dishonored checks totaling \$4387 from the bank at which the respondent maintained his IOLTA account. Five of these checks were payable to the respondent for fees and the other three, totaling \$1737, were payable to or on behalf of clients. The three payees other than the respondent were reimbursed by the respondent immediately upon receipt of the notices from the bank.

Commencing at least as of 1996 and continuing until 1999 (after the notices of dishonored checks were sent and Bar Counsel became involved), the respondent's record keeping in his IOLTA account was generally inadequate. Individual client ledgers were not maintained; an accurate check register was not maintained; earned fees were deposited into the account; retainers were not withdrawn from the account as earned and, when paid, were withdrawn without reference to bills to clients or even to particular client matters; and the account was not reconciled.

As a result of these problems, the respondent made assumptions, sometimes incorrectly, as to whose funds comprised the balance in the account and how much was due the respondent. These problems ultimately led to the deficiencies in the account that caused checks to be dishonored and further led to the problems described below.

In the first matter, the respondent on April 11, 1996, deposited into his IOLTA account a check in the amount of \$71,000 payable a client, to be held pending the client's further instructions. On or about August 30, 1996, the respondent wrote a check drawn on his IOLTA account in the amount of \$25,369.06. This check was written for purposes unrelated to the client for whom the respondent was holding \$71,000. After payment of this check, the balance in the respondent's IOLTA account was \$47,280.16. Because of the inadequate record keeping described above, the respondent was unaware that, apart from the \$71,000 being held for the client, the IOLTA account held insufficient funds to cover the check. He therefore negligently used a portion of the funds due the client in payment of this check.

In a second matter, the respondent on October 17, 1996, deposited into his IOLTA account a check in the amount of \$75,000, representing settlement of a claim for another client. After withdrawal of fees and costs, the amount due to the client was \$49,495. The client requested that the respondent hold her funds pending resolution of questions concerning her school costs.

On or about December 4, 1996, the respondent wrote a check in the amount of \$71,000 from his IOLTA account to the client in the first matter. After payment of this check, the balance in the IOLTA account was \$20,838.23. Because of the inadequate record keeping described above, the respondent was unaware that, apart from the funds held in the second matter, the account held insufficient funds to cover the check to the client in the first matter. He therefore negligently used a portion of the second client's money in payment of this check.

The client in the second matter requested her funds from the respondent in October 1997.

The respondent forwarded her a check in the amount of \$49,495, written on the IOLTA account and covered in part by fees due the respondent that remained in the account.

In a third matter and commencing in or about 1988, the respondent acted as informal trustee for another client. In this capacity, he made payments to her as needed from a certificate of deposit opened with her funds. The respondent routed the client's funds from the CD through his IOLTA account before disbursement.

Commencing as of July 1994, the respondent made transfers totaling \$93,228.11 from the CD into his IOLTA account. However, between July 1994 and May 1998, the respondent disbursed \$115,023 to or for the benefit of the client. Because of the inadequate record keeping described above, the respondent was unaware until August 1997 that the IOLTA account at various points held insufficient funds of the client to cover the distributions to her.

However, at least as of August 15, 1997, the respondent was aware that the client's certificate of deposit had been exhausted and that the respondent held no more funds with which to make payments to her. He nonetheless continued to make disbursements to or for the benefit of the client until May 20, 1998. In total, the respondent paid the client \$21,794.89 more than he deposited on her behalf. Because of the inadequate record keeping described above, the respondent believed, in some instances correctly and in some incorrectly, that the funds used to make these payments were earned fees which he had not previously withdrawn from the IOLTA account. Any deficiencies in the trust account balance were in fact eventually covered by earned fees without deprivation to any client.

In all of the above matters, the respondent's negligent misuse of client funds, without intent to deprive and with no deprivation resulting, his commingling of client funds with personal or business funds, and his inadequate and improper record keeping is conduct in violation of Canon Nine, DR 9-102(A),(B)(3),(4) and, after January 1, 1998, Mass. R. Prof. C. 1.15(a).

The respondent also failed to reply to letters from Bar Counsel concerning the dishonored checks and another unrelated matter. As a result of this failure to cooperate, Bar Counsel on May 26, 2000, filed a petition for administrative suspension with the Supreme Judicial Court. On June 9, 2000, an order of immediate administrative suspension was entered against the respondent. Also on May 26, 2000, Bar Counsel requested that the Board issue a subpoena to compel the respondent's appearance. The respondent did not appear for the subpoena meeting on June 15, 2000.

When the respondent also failed to complete and return the compliance forms required as a result of his administrative suspension, Bar Counsel's investigator on October 12, 2000, hand-delivered to the respondent's office documentation relating to all open matters. On October 18, 2001, the respondent telephoned Bar Counsel and scheduled a meeting. The respondent retained counsel, appeared for the meeting, and has since cooperated with Bar Counsel.

The respondent's failure to cooperate with Bar Counsel's investigation is conduct in violation of Supreme Judicial Court Rule 4:01, §3, and Mass. R. Prof. C. 8.4(g).

The matter came before the Board of Bar Overseers on a stipulation of facts and disciplinary violations and a joint recommendation for a nine-month suspension, retroactive to December 12, 2000 (the date the respondent filed his compliance with the administrative suspension), with automatic reinstatement conditioned upon execution of a two-year accounting probation agreement. On July 9, 2001, the Board voted to accept the stipulation and to recommend the agreed-upon disposition to the Supreme Judicial Court. The Court so ordered on August 10, 2001.

¹ The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

² Compiled by the Board of Bar Overseers based on the record before the Court.

Please direct all questions to webmaster@massbbo.org.

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