

IN RE: JOHN W. CAPONE

S.J.C. Order of Indefinite Suspension entered by Justice Cowin on November 7, 2001, with an effective date of December 7, 2001.¹

SUMMARY²

The respondent was retained in March 1997 to represent a client in matters in connection with the death of her father. On April 4, 1997, the respondent received a check from a life insurance company in the amount of \$30,141.37 payable to his client. The check represented an annuity death benefit due to the client.

On April 7, 1997, the respondent deposited the check into his IOLTA account. At the time of deposit, the IOLTA account held only \$9.44. Thus, the total in the IOLTA account immediately after the deposit was \$30,150.81. Between April 7, 1997, and July 17, 1997, the respondent made no other deposits into his IOLTA account.

Between April 7, 1997, and July 17, 1997, the respondent withdrew a minimum of \$20,700.00 from his IOLTA account by checks payable to himself and an additional sum of \$7,350.00 by checks payable to cash. As of July 17, 1997, the IOLTA account had a balance of \$11.74. The respondent's client authorized some, but not all of the withdrawals. As of January 21, 1998, the respondent had made payments to or for the benefit of his client in a sum not greater than \$11,982.21. These payments were made from the respondent's IOLTA account, from additional bank accounts and from other unknown sources.

On January 30, 1998, new counsel for the client made written demand upon the respondent for a full accounting and for return of the balance. On February 12, 1998, the respondent replied and disputed the amount of funds owed. On April 2, 1998, the respondent and new counsel reached an agreement with regard to the satisfaction of the client's claim of entitlement to funds. The respondent agreed to pay the sum of \$18,264.82 plus 5% for a total of \$19,178.06. The parties agreed to the terms of payment; a lump sum payment of \$12,000.00 would be made on April 3, 1998, and the remaining balance would be paid on or before April 23, 1998.

On April 3, 1998, the respondent withdrew \$12,000.00 from his IOLTA account to purchase a treasurer's payable to the client and new counsel. In so doing, the respondent used \$11,956.76 in funds belonging to an unrelated client that had been deposited into the account on March 31, 1998.

The respondent subsequently failed to timely make the second promised payment. The respondent requested, and was given, several extensions and modifications of the original payment agreement. On July 31, 1998, new counsel sent one of several demand letters to the respondent pursuant to G.L. Chapter 93A. A civil suit was eventually filed. By January 13, 1999, the respondent had made full restitution.

The respondent intentionally used his client's funds and other client funds for his own personal or business purposes with intent to deprive those persons of their funds at least temporarily, and with actual deprivation resulting. For conduct prior to January 1, 1998, the respondent's conduct was in violation of Canon One, Disciplinary Rules 1-102(A)(4) and (6); Canon Seven, Disciplinary Rules 7-101(A)(1), (2) and (3) and Canon Nine, Disciplinary Rules 9-102(A),(B) and (C). For conduct on or after January 1, 1998, the respondent's conduct was in

violation of Mass. R. Prof. C. 1.3, 1.15 and 8.4(c) and (h).

In a second matter, on January 14, 1999, the respondent was settlement agent of a refinance loan transaction. On January 11, 1999, the respondent received loan closing proceeds in the amount of \$168,403.14, by funding check made payable to the respondent. On January 14, 1999, the loan transaction closed in the ordinary course and the HUD-1 settlement statement was executed by the borrowers. The respondent was then obligated, after a three-day right of rescission, to pay the sum of \$167,000.00 to discharge an existing mortgage.

On January 19, 1999, the respondent deposited the funding check into a non- IOLTA account entitled "real estate escrow account". Also on January 19, 1999, the respondent deposited a check from the borrowers in the amount of \$3,326.26 into the same account. Prior to the January 19, 1999 deposit, the account balance was \$0.00. Thus, the account balance after the deposit was \$171,729.40.

The borrowers did not exercise any right of rescission but the respondent failed to transmit the payoff funds to bank holding the existing mortgage. Between January 19, 1999, and February 23, 1999, the respondent withdrew \$12,131.97 from the account by checks payable to himself, cash, or third parties unrelated to the loan transaction.

In February of 1999, and in order to protect its rights, the lending bank paid the bank holding the existing mortgage and retained a collection attorney to recoup the funds. Between February 23, 1999, and March 4, 1999, the respondent deposited two checks totaling \$12,000.00 into his real estate escrow account, bringing the balance over \$167,000.00. He then purchased a bank check in the amount of \$167,000 and paid the sum to the collection attorney. In March of 1999, the respondent made a further payment in the amount of \$2,992.07 and in August 1999 the respondent made a final payment of \$3,149.15, representing interest due. Thus, as of August 1999, full restitution had been made.

The respondent intentionally used at least \$12, 131.97 of loan proceeds for his own personal or business purposes with intent to deprive the client or a third party of the funds, at least temporarily and with actual deprivation resulting. The respondent's conduct was in violation of Mass. R. Prof. C. 1.3, 1.15 and 8.4(c) and (h).

In a third matter, the respondent's letterhead as of August 1999 included the statement "Board Certified, Criminal-Civil-Juvenile-Domestic & Family Relations". At no time had the respondent been certified in these areas of law by any organization. The respondent's conduct in using deceptive and false letterhead was in violation of Mass. R. Prof. C. 7.4(a) and Mass. R. Prof. C. 8.4(c).

This matter came before the Board on a stipulation of facts and disciplinary violations and a joint recommendation for discipline by indefinite suspension. On October 15, 2001, the Board voted to accept the parties' stipulation and to recommend the agreed upon disposition to the Supreme Judicial Court. On November 7, 2001, the Court so ordered.

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.

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