

IN RE: JOSEPH M. RIZZARI, JR.

S.J.C. Order of Term Suspension entered by Justice Cowin on April 25, 2002, with an effective date of May 25, 2002.¹

SUMMARY²

The respondent was suspended from the practice of law for eighteen months as a result of misconduct described in a five-count petition.

Commencing at least as of 1992, the respondent's IOLTA account was a commingled account into which he deposited both personal and client funds. His record keeping was generally inadequate. Bank statements, checks, and other financial records were not retained as required; individual client ledgers were not maintained; an accurate check register was not maintained; funds were withdrawn payable to the respondent or for his benefit without sufficient attention to whether the account held a sufficient balance of his personal funds or funds due him as fees to cover these disbursements; and the account was not reconciled.

In the first matter (Count One), the respondent in 1993 incurred a debt to a client who was also an old friend. The respondent repaid the debt with two checks drawn on his IOLTA account supported by personal funds deposited to the account. The respondent's conduct in commingling his own personal or business funds with client funds in his IOLTA account was in violation of Canon Nine, DR 9-102(A).

In the second matter (Count Two), a husband and wife in 1992 retained the respondent to represent them in a claim arising out of a motor vehicle accident. The respondent settled the clients' claims for damages in 1994 and remitted their shares of the settlement to them. The respondent in 1993 also collected personal injury protection (PIP) insurance payments of not less than \$5003 on behalf of the clients. He deposited the PIP funds to his IOLTA account. The respondent did not provide the clients with an accounting of PIP funds at the time of the liability claim settlements. He believes that the PIP monies were paid to the clients or their medical providers but, because of the inadequate record keeping described above, was unable to account for the disbursement of the PIP funds.

The respondent's failure to maintain and preserve financial records of the handling, maintenance and disposition of the clients' PIP funds in his possession from time of receipt to time of final distribution, and his failure to account to the clients regarding his handling and distribution of his funds, was conduct in violation of Canon Nine, DR 9-102(B)(3).

In a third matter (Count Three), the respondent in 1993 was retained to represent a client as defendant (and plaintiff-in-counterclaim) in a suit arising out of a deficiency after foreclosure of a mortgage. The plaintiff offered to settle the case with mutual dismissals the week before trial. The respondent attempted to accept the offer by fax to the plaintiff's counsel on the morning of trial, but plaintiff's counsel did not see the fax until after court. Because he erroneously thought the case would be dismissed, the respondent did not appear in court for the trial date. As a result, a default judgment was entered against the client in the amount of \$24,544, plus interest from 1990 to 1993 in the amount of \$2410 and costs in the amount of \$10,581. The client's counterclaim was dismissed.

At the direction of the client, the respondent filed a motion to vacate the default judgment. This motion was returned by the Court for failure to comply with Superior Court Rule 9A

opposition procedure. The respondent was experiencing recurrent medical problems and did not refile the motion. The plaintiff to date has never attempted to collect on his judgment.

The respondent's failure to appear in court on the date of trial, thus causing the client to be defaulted; his failure to file a motion to vacate the default judgment that was in accordance with the requirements of the rules of court; and his failure to refile the motion to vacate the default judgment after it was returned by the court when not properly filed, was conduct in violation of Canon Six, DR 6-101(A)(2),(3), and Canon Seven, DR 7-101(A)(1),(2),(3).

In a fourth matter (Count Four), another client retained the respondent in 1995 as successor counsel in a personal injury matter. The underlying claim had been settled by prior counsel, but there still remained an issue as to medical bills that the PIP carrier had refused to pay. On July 18, 1995, prior counsel transferred to the respondent \$3000 held in escrow pending resolution of the dispute concerning medical bills. The respondent deposited this sum to his IOLTA account. Although he took no action to resolve the dispute with the PIP carrier for over two years thereafter, he never transferred the funds to an individual client account earning interest for the benefit of the client.

In August 1997, when settlement discussions failed, the respondent filed suit on behalf of the client in district court. Because of confusion as to the date orally set by the court, the case was dismissed on September 19, 1999, when no one appeared for the continuation of the pre-trial conference. Over the next four months until the client filed a complaint with Bar Counsel, the respondent failed to take action to reinstate the case, both because he experienced recurrent medical problems and because he thought, ultimately incorrectly, that the matter would settle imminently.

In the interim between the respondent's receipt of the client's \$3000 from prior counsel in July 1995 and the client's filing a complaint with Bar Counsel in February 2000, and because of the inadequate record keeping described earlier, the respondent failed to maintain the escrow funds intact. After the client filed a complaint with Bar Counsel in February 2000, the respondent remitted \$3000 to the client from personal funds.

The respondent's failure to take action to reinstate the case after its dismissal constitutes neglect of a legal matter and failure to act with diligence and promptness, in violation of Mass. R. Prof. C. 1.3. The respondent's commingling, inadequate record keeping, and negligent misuse of the client's funds, without intent to deprive but with deprivation resulting at least after the lawsuit was dismissed, and his failure to transfer escrow funds held long-term to an individual client account, was conduct in violation of Mass. R. Prof. C. 1.15(a),(d), and (e).

In a fifth matter (Count Five), a client in 1999 retained the respondent to file a personal bankruptcy. She paid the respondent a flat fee of \$1450 for his services. The respondent at this time was experiencing a recurrent and serious medical condition which directly affected his ability to practice law and manage his office. Despite repeated inquiries from the client, he failed to file the petition for bankruptcy. In December 1999, the client retained successor counsel, who telephoned the respondent twice and then sent a letter dated December 15, 1999, requesting the return of the file and a refund of the fees paid. The respondent did not reply. On March 1, 2000, the client filed a complaint with Bar Counsel. Thereafter, the respondent refunded \$1450 to the client from personal funds.

The respondent's failure to file the client's bankruptcy constitutes neglect of a legal matter and failure to act with diligence and promptness, in violation of Mass. R. Prof. C. 1.3. The respondent's failure to decline or terminate the representation when his physical or mental condition materially impaired his ability to represent the client, his failure to refund an unearned fee upon discharge, and his failure to return the client's file promptly upon request is conduct in violation of Mass. R. Prof. C. 1.16(a)(2), (d), and (e).

In aggravation, the respondent continued the commingling and inadequate record keeping in his IOLTA account through 1999, even after the issue was brought to his attention by Bar Counsel as a result of the investigation of Count One. In mitigation, the respondent has had major, ongoing, and debilitating medical problems since at least 1993. At various points during this time frame, the respondent's condition was under control but, in the late 1990's, it steadily worsened. He voluntarily ceased practicing law in 2000. In further mitigation, the respondent believed that the client in Count Three could not prevail and believed that the case in Count Four would settle.

This matter came before the Board on a stipulation of facts and disciplinary violations and a joint recommendation for an eighteen-month suspension. On April 8, 2002, the board voted to accept the stipulation and to recommend the agreed-upon disposition to the Supreme Judicial Court. The Court so ordered on April 25, 2002.

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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