

## IN RE: DAVID A. KIERNAN

S.J.C. Order of Indefinite Suspension entered by Justice Ireland on January 21, 2003, with an effective date of February 20, 2003.<sup>1</sup>

SUMMARY<sup>2</sup>

On November 29, 2002, bar counsel filed a petition for discipline and an answer and stipulation of the parties in which the respondent agreed that the facts stated in the petition for discipline would be established by a preponderance of the evidence at a hearing. These facts are as follows:

On or about September 3, 1999, the client hired the respondent to represent him in a divorce action. As part of the representation in the divorce, the respondent represented the client in the sale of the marital home.

The sale of the marital home was completed on January 13, 2000 and netted \$52,515.20 in proceeds ("house proceeds"). The client and his wife directed the respondent to deposit the \$52,515.20 proceeds into an interest-bearing escrow account in their names until they resolved the issue of dividing the marital assets. On January 14, 2000, the respondent opened an interest-bearing account under the name of "Law Office of David A. Kiernan, Client Account" ("client account") at Family Bank in Chelmsford, Massachusetts. The respondent deposited the house proceeds into the client account and did not open an interest-bearing account designating the client and his wife as persons with an interest in the account.

Between February and July 2000, the respondent disbursed a total of \$20,786.08 from the house proceeds to pay certain outstanding marital debts and to pay the wife her share of the proceeds from the sale of the marital home. The client and the wife authorized the respondent to make these disbursements. The remaining \$31,729.12 in the client account belonged to the client. Between May and September 2000, the respondent also received additional funds totaling approximately \$13,500.00 from the client to hold on his behalf. By September 2000, the respondent was accountable to the client for at least \$42,729.12.

Between May 15, 2000 and August 29, 2001, the respondent deposited funds belonging to other clients in the client account and disbursed funds from the client account to himself and to pay expenses unrelated to the client. The respondent did not maintain complete records of the receipt, maintenance, and disposition of the funds in the client account.

Between April 2000 and September 2000, the respondent converted at least \$42,729.12 of the client's funds to his own use or to pay unrelated expenses. The respondent used these funds with the intention of depriving the client temporarily of the use of the funds.

The client's divorce became final on July 28, 2000. Between August 2000 and May 14, 2001, the client made numerous demands to the respondent for the return of his funds. The respondent did not turn over the funds to the client but, rather, intentionally misrepresented to the client that he had invested the client's share of the house proceeds into an eighteen-month certificate of deposit. On May 14, 2001, the client demanded that the respondent provide confirmation of the certificate of deposit. On or about May 29, 2001, the respondent provided the client with copies of documents from his wife's pension plan and intentionally misrepresented to the client that the documents were evidence of the certificate of deposit the respondent claimed to have purchased with the client's share of the house proceeds.

On May 14, 2001, the client sent the respondent a certified letter stating that he would report the respondent to the Office of Bar Counsel unless the respondent paid him \$41,950.00, which was the amount that the client calculated was owed to him by the respondent. The respondent was unable to calculate what he owed the client due to his inadequate record keeping. On May 29, 2001, the respondent paid the client \$47,329.00. Together with the \$11,250.00 that the client had received from the respondent prior to May 29, 2001, the respondent repaid the client a total of \$58,579.00.

By failing to deposit the client's funds in a properly identified and maintained individual trust account, the respondent violated Mass. R. Prof. C. 1.2(a) and Mass. R. Prof. C. 1.15(e). By failing to maintain complete and accurate records of his receipt, maintenance, and disposition of client funds, the respondent violated Mass. R. Prof. C. Rule 1.15(a). By failing to promptly deliver the funds which the client was entitled to receive and by failing to render a full accounting for funds held on behalf of the client, the respondent violated Mass. R. Prof. C. Rule 1.15(b). By making intentional misrepresentations to the client about the disposition of his funds, the respondent violated Mass. R. Prof. C. 1.4(a) and (b) and Mass. R. Prof. C. 8.4(c) and (h). By converting the client's funds to his own use and to pay unrelated expenses, the respondent violated Mass. R. Prof. Rules C. 1.15(a) and Mass. R. Prof. C. 8.4(c) and (h).

On December 9, 2002, the Board of Bar Overseers voted to accept the parties' stipulation and their recommendation that the respondent be indefinitely suspended. On December 19, 2002, the Board of Bar Overseers filed an information with the county court recommending that the respondent be indefinitely suspended. On January 21, 2003, the Supreme Judicial Court for Suffolk County (Ireland, J.) entered an order indefinitely suspending the respondent, effective thirty days from the date of the order.

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

<sup>2</sup> Compiled by the Board of Bar Overseers based on the record before the Court.

Please direct all questions to [webmaster@massbbo.org](mailto:webmaster@massbbo.org).

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