NO. BD-2003-018

IN RE: ISAIAH SHALOM

S.J.C. Order (Indefinite Suspension) entered by Justice Spina on April 4, 2003, effective May 4, 2003. [1]

REPORT OF THE HEARING COMMITTEE

A petition for discipline was filed by Bar Counsel on January 3, 2002, against the Respondent, Isaiah Shalom, alleging four counts of misconduct. Count One alleged that the Respondent engaged in multiple violations of the disciplinary rules in connection with his representation of a client in a civil case against a car dealer. Count Two alleged that the Respondent entered into an agreement to split legal fees with a non-attorney. Count Three charged that the Respondent assisted inmates in various prisons to violate regulations prohibiting inmates from engaging in monetary transactions with each other. Count Four alleged that the Respondent commingled client and personal funds and converted client funds to his own use. The Respondent filed an answer on January 18, 2002.

The hearing was held on May 28, 2002. The Respondent appeared pro se. Prior to the hearing, the parties filed a stipulation of facts and agreed to the admission of Exhibits 1-47. Exhibit 48 was admitted at the hearing. Bar Counsel called as a witness Robert Gaumer. The Respondent called no witnesses. A closing argument was held on August 6, 2002, after submission of the parties' proposed findings.

I. Findings of Fact and Conclusions of Law

1. The Respondent, Isaiah Shalom, was admitted to the Massachusetts bar on December 20, 1989 (Ans. 2; Stip. 1).

2. At all times relevant to the petition for discipline, the Respondent had a law office at 875 Massachusetts Avenue, Cambridge, and he presently has a law office at 30 Central Street, West Brookfield (Ans. 3; Stip. 2).

Count One – Findings of Fact

3. In December 1989, Robert Gaumer purchased a Honda Accord from Salem Imports, Inc., who represented that the Honda was new (Ans. 5; Stip. 3). In 1991, Gaumer was told by a mechanic who worked on the Honda that the car had been in an accident (Ans. 5; Stip. 3). Since the car had not been in an accident while in Gaumer's possession, he concluded that the accident had occurred while it was in Salem Imports' possession (Ans. 5; Stip. 3).

4. Gaumer then contacted American Honda Motor Co. in Connecticut, to make a claim under the new car warranty (Ans. 6; Stip. 4). Al Simon, an employee of American Honda, agreed American Honda would pay for the repairs under the warranty (Ans. 6; Stip. 4). Because the company paid for the repairs, Gaumer did not at that time, in 1991, notify Salem Imports of his discovery that the car had been in an accident prior to its sale to him (Ans. 6; Stip. 4). Gaumer believed, however, that Simon had so notified Salem Imports (Ans. 6; Stip. 4).

5. In 1994, Gaumer had additional mechanical problems with his car, which he believed were caused by the prior accident (Ans. 7; Stip. 5). He decided to seek legal recourse against Salem Imports for selling him a damaged car as a new car (Ans. 7; Stip. 5). In October 1994, Gaumer engaged the Respondent to represent him in a claim against Salem Imports (Ans. 7; Stip. 5).

6. On October 5, 1994, the Respondent and Gaumer executed a "Contract for Legal Services", which was a contingency fee agreement under which the Respondent was entitled to one-third of "the amount awarded to Client in said legal action. In the event Client is awarded nothing, Attorney's fee shall be nothing" (Ans. 8; Stip. 6; Ex. 1). Under the agreement, Gaumer was responsible for all "disbursements in connection with said legal action, including, but not limited to, filing fees, service fees, deposition transcript costs, and costs for all reports" (Ans. 8; Stip. 6; Ex. 1). The contract also provided that if the client terminated the contract, the client would be liable for "all services provided by Attorney on a quantum meruit basis" at the "tentative" rate of $100 per hour with the "[a]ctual amount to be determined by income of client's family and number of dependants [sic]" (Ans. 8; Stip. 6; Ex. 1). The agreement made no reference to obligations of the parties in the event of an appeal (see Ex. 1).

7. That same day, in accordance with the contract, Gaumer gave the Respondent $500, which the contract stated was for "anticipated filing fees and depositions, and if the case is settled before the [money] is spent for those purposes the balance will be refunded to the client" (Ans. 9; Stip. 7; Ex. 1).

8. On December 29, 1994, the Respondent filed suit against Salem Imports on Gaumer's behalf in the Malden District Court (Ans. 10; Stip. 8; Ex. 4A). The complaint, drafted by the Respondent, consisted of two counts, one alleging a violation of G.L. c. 93A, the other breach of contract (Ans. 10; Stip. 8; Ex. 4A; see Ex. 2).

9. G.L. c. 106, § 2-607(3)(a) (UCC) requires that a buyer who has accepted goods "must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy" (Ans. 11; Stip. 9). The Respondent was unaware of this provision of the UCC and did not advise Gaumer of its likely impact on his contract claim (Ans. 11; Stip. 9; Tr. 32-33).

10. On January 31, 1995, Attorney Michael Conley filed an answer on behalf of Salem Imports, which included an affirmative defense stating that "Plaintiff are [sic] not entitled to relief as a result of the failure to provide timely notice of the breach, if any, to the Defendant" (Ans. 12; Stip. 10; Ex. 4B). The Respondent failed to appreciate that this affirmative defense constituted a significant obstacle to Gaumer's prevailing in his claim for damages (Stip. 10; see also Ex. 4D).

11. On July 22, 1996, the case was scheduled for mediation (Tr. 33; Ex. 4C). At the mediation, the mediator asked Gaumer if he had informed Salem Imports in 1991 about the damage to his vehicle and Gaumer replied that he had not (Tr. 34-35). The Respondent did not tell Gaumer at that time that his failure to give notice could be a potential bar to recovery (Tr. 34-35). The matter was not resolved by mediation and a trial date was set for September 27, 1996 (Ans. 15; Stip. 11; Tr. 36).

12. Several days before trial, Salem Imports filed a motion for judgment on the pleadings, arguing that Gaumer had failed to give timely notice as required under the UCC (Ex. 4E; Tr. 36-37). After receipt of this motion, the Respondent, for the first time, discussed with Gaumer the need for evidence that notice had been give to Salem Imports in 1991 (Tr. 32-33, 37). However, the Respondent advised Gaumer not to contact Al Simon or anyone else to see if they had contacted Salem Imports on his behalf, because, in the Respondent's view, the motion was untimely (Tr. 37-38). Had Gaumer understood that notification was a necessary element to prove in his case, he would have contacted Al Simon or Marc Soucy prior to trial to see if they could testify as to such notification (Tr. 35).

13. Salem Imports' motion was denied and the case went to trial. The Respondent failed to introduce evidence that Salem Imports had been timely notified of the damage to the car (Ex. 4G, Ex. 4H; Tr. 39). At the close of Plaintiff's case, Defendant moved, pursuant to Mass. R. Civ. P. 41(b)(2), to dismiss Plaintiff's claims (Ans. 17; Ex. 4G). Judge Merrick allowed the motion, finding:

I act on this motion, not as a ruling only on sufficiency, but as trier of fact, assigning credibility and drawing inferences. To the extent there was a breach of warranty, I am not persuaded that the plaintiffs notified the defendant within "a reasonable time" after discovery. GL c. 106, § 2-105(1). While I am persuaded that the plaintiff's vehicle sustained a severe trauma and repairs before delivery to the plaintiff I am not persuaded that the defendant knew of that fact. (Ans. 17; Stip. 12; Ex. 4, Ex. 4H).

14. Judgment entered for Defendant on September 27, 1996, and the Respondent received a copy of the judgment on October 2, 1996 (Ans. 18; Stip. 13; Ex. 4H).

15. On September 28, October 2, and October 16, 1996, Gaumer and the Respondent had telephone conversations in which Gaumer made it clear that he wanted to consider taking an appeal or seeking relief from judgment (Ans. 19; Stip. 14).

16. By October 2, 1996, Gaumer no longer wanted the Respondent to represent him, but was unsure whether he had some obligation or consequences under the contingency fee agreement if he terminated his representation (Tr. 84). As a result, Gaumer asked the Respondent, during their telephone conversation that day, if the contingency agreement was still binding (Tr. 42-43, 79). The Respondent said yes and that if it was broken, Gaumer would be liable for the Respondent's fees at $100 per hour (Tr. 42-43). The Respondent also told Gaumer that he had not received a copy of the judgment and that he could not decide whether he would be willing to pursue an appeal until he read it (Tr. 43). The Respondent advised Gaumer that an appeal to superior court had to be filed within thirty days of the judgment (Tr. 43). Gaumer asked the Respondent to call him as soon as he received the judgment (Tr. 44). Gaumer also told the Respondent he expected him to withdraw if he did not want to represent Gaumer on appeal, because Gaumer would want to seek other counsel and advice (Tr. 44).

17. On October 20, 1996, Gaumer and the Respondent spoke again on the telephone. At that time, the Respondent told Gaumer he had received the judgment two weeks earlier (Tr. 45). Gaumer told the Respondent he had been waiting to hear whether the Respondent wanted to represent him on appeal. The Respondent replied that he had sent him a letter on October 18, outlining Gaumer's options (Tr. 45). Before receiving that letter, on October 21, 1996, Gaumer wrote to the Respondent requesting that he seek from the court an extension of time to file an appeal (Ex. 6; Stip. 16). The Respondent received this letter on October 23, 1996 (Stip. 16). The Respondent did not seek the requested extension and did not tell Gaumer that he was not taking any further action on his behalf (Stip. 16). In Gaumer's October 21, 1996 letter, he also informed the Respondent that if he did not file for an extension, Gaumer would assume he was entitled to file such motion himself (Ex. 6).

18. Later that same day, or shortly thereafter, Gaumer received the Respondent's letter dated October 18, 1996 (Tr. 45). In the letter, the Respondent stated that he would pursue an appeal for Gaumer only if Gaumer could get a letter from Al Simon indicating Simon's willingness to testify that he had given timely notice to Salem Imports of the discovery of damage to Gaumer's car (Ans. 21; Stip. 15) and if he paid an additional $500 for expenses (Ex. 5). The Respondent also wrote that, if Gaumer could not obtain such a letter, Gaumer could either waive his right to appeal or fire the Respondent as his attorney (Ans. 21; Stip. 15; Ex. 5). If Gaumer fired the Respondent, the balance of Gaumer's account, $285.74, would revert to the Respondent and Gaumer would also owe the Respondent at least an additional $500 (Ans. 21; Stip. 15; Ex. 5). In the letter, the Respondent gave Gaumer until October 23 to notify him which of the three options Gaumer had chosen (Ex. 5).

19. The Respondent's letter was an attempt to coerce Gaumer to either pay him attorney's fees in violation of the contingency fee agreement or forego the possibility of an appeal.

20. During October 1996, Barry Innerfield and Dr. Oscar Orringer, who had testified at trial as expert witnesses on Gaumer's behalf (Ex. 4G), sent invoices to the Respondent for expenses in

connection with their expert testimony in the amounts of $240.50 and $56.51, respectively (Ans. 23; Stip. 17). At the time the Respondent received these invoices he had $285.74 remaining from the original $500 paid by Gaumer (Ans. 23; Stip. 17). In his October 18, 1996 letter to Gaumer, the Respondent stated that he would pay Innerfield's invoice and remit the balance of the account, if Gaumer waived his right to appeal, but if Gaumer sent a letter stating he was firing him, then the balance of the account would revert to the Respondent for legal fees due and an additional amount would also be due which he would settle for $500 (Ex. 5). On November 1, 1996, the Respondent sent letters to both Innerfield and Dr. Orringer stating that he would not pay their invoices because the balance of Gaumer's money was owed to the Respondent for attorney's fees (Ex. 8, Ex. 9). This statement was false. In fact, under the contingency fee agreement, Gaumer was not liable for any attorney's fees (see Ex. 1).

21. On November 1, 1996, the Respondent filed a motion to withdraw from his representation of Gaumer in the civil action (Ex. 4K). In support of the motion to withdraw, the Respondent filed an affidavit disclosing communications between Gaumer and him both by telephone and in writing, which occurred during their professional relationship (Ex. 4K). These communications were potentially adverse to Gaumer's interests in pursuing post-judgment relief from the dismissal of Gaumer's action against Salem Imports, and were likely to be embarrassing to Gaumer (see Ex. 4K). Since Gaumer did not oppose the Respondent's motion to withdraw and had not, at that time, made any charges or allegations against the Respondent, the Respondent had no justification for any such revelation of client confidences or secrets.

22. On November 8, 1996, the Respondent mailed to Gaumer a "final accounting" and demand for $2,714.26 ($3,214.26 less $500 retainer) for the Respondent's hourly fees, at the rate of $100 per hour, in connection with his representation of Gaumer against Salem Imports (Ans. 26; Stip. 18; Ex. 10). The Respondent threatened to take legal action if Gaumer did not pay the full amount by December 13, 1996 (Ans. 26; Stip. 18; Ex. 10). The Respondent did not return to Gaumer the balance of funds advanced by Gaumer to cover expenses, but rather deducted the balance from the claimed fees (Ans. 26; Stip. 18; Ex. 10).

23. On November 18, 1996, Gaumer filed a pro se request, seeking a de novo trial in superior court (Ex. 4L). This request was untimely because the Respondent had received notice of the district court's decision at the latest on October 2, 1996 (see Ex. 4K), and, pursuant to G.L. c. 231, §104, such request must be filed within thirty days of receipt of the decision. On November 20, 1996, Gaumer filed a motion to enlarge the time to file his request for a new trial in superior court, which he supported by attesting that he had obtained new evidence that Salem Imports had received timely notification, namely a letter from the Attorney General's Office to Salem Imports concerning Gaumer's damaged car (Ex. 4L, 4M, 4N). The court dismissed Gaumer's late request (Ex. 4).

24. On December 13, 1996, the Respondent filed an action against Gaumer in small claims court seeking to recover $2,000.00 (Stip. 19; Ex. 11). A trial was held on January 16, 1997 (Tr. 58) and the court found that Gaumer had complied with the contract and that the Respondent was not entitled to recover any fee (Stip. 19; Ex. 11).

25. Gaumer filed a counterclaim for the balance of the $500 he had given the Respondent for expenses, namely $285.74 (Stip. 20; Ex. 11). The court found in favor of Gaumer on the counterclaim (Stip. 20; Ex. 11).

Count One – Conclusions of Law

26. By failing to take adequate steps to ascertain the elements of proof required to prevail on Gaumer's claims, failing to advise Gaumer of potential weaknesses in his case so that he could reasonably assess the settlement offer made by Salem Imports, failing to advise Gaumer in a timely manner when judgment entered, failing to advise Gaumer of available avenues of

appeal and their applicable time limits, and failing to take steps to preserve Gaumer's appeal rights, the Respondent violated Canon 6, DR 6-101(A)(2) (inadequate preparation) and (3) (neglect) and Canon 7, DR 7-101(A)(1) (lawyer shall not intentionally fail to seek the lawful objectives of his client), (2) (lawyer shall not intentionally fail to carry out a contract of employment) and (3) (lawyer shall not prejudice or damage client during professional relationship).

27. By attempting to coerce Gaumer to pay the Respondent $785.74 ($500 plus the balance of his account of $285.74), which Gaumer did not owe to the Respondent, unless Gaumer waived his appeal rights, the Respondent violated Canon One, DR 1-102(A)(6) (conduct adversely reflecting on fitness to practice), Canon Two, DR 2-106(A) and (B) (lawyer shall not enter into agreement for, charge or collect illegal or clearly excessive fee), and Canon Seven DR 7-101(A)(1) (lawyer shall not intentionally fail to seek the lawful objectives of his client), (2) (lawyer shall not intentionally fail to carry out a contract of employment) and (3) (lawyer shall not prejudice or damage client during professional relationship). In so holding, we note that the contingency fee agreement in this matter was "silent" with respect to any appeals. "In the absence of a valid supplementary agreement for extra compensation in the event that an appeal had to be taken or defended, the 331/3 % cap on compensation in the agreement is to be construed as including payment for the rendition of all legal services, both trial and appellate, necessary to bring the claim to a final conclusions." Matter of Kerlinsky, 406 Mass. 67, 73 (1989). In that case the Court reasoned that this rule was necessary because "if the attorney is to be entitled to a contingent fee then it is necessary either to defend a favorable judgment on appeal or to attempt to overturn an unfavorable judgment. In either effort the attorney is doing only that which would be required to achieve a favorable outcome which would assure the right to collect a contingent fee." Id., citing Knight v. DeMarea, 670 S.W.2d 59, 63 (Mo. Cr. App. 1984).

28. By attempting to recover $2714.26 from Gaumer in violation of the contingency fee agreement, the Respondent violated Canon Two, DR 2-106(A) and (B) (lawyer shall not enter into agreement for, charge or collect illegal or clearly excessive fee) and Canon Seven, DR 7-101(A)(1) (lawyer shall not intentionally fail to seek the lawful objectives of his client), (2) (lawyer shall not intentionally fail to carry out a contract of employment) and (3) (lawyer shall not prejudice or damage client during professional relationship).

29. By filing with the Malden District Court an affidavit that contained confidences or secrets of Gaumer, the Respondent violated Canon Four, DR 4-101(A) and (B)(1) (lawyer shall not knowingly reveal confidence or secret of client), (2) (lawyer shall not knowingly use confidence or secret of client to disadvantage of client) and (3) (lawyer shall not knowingly use confidence or secret of client for advantage of himself or of a third person unless client consents), and Canon 7, DR 7-101(A)(3) (lawyer shall not prejudice or damage client during professional relationship).

30. By refusing to pay the invoices of expert witnesses when he was holding funds intended to pay the expenses of the lawsuit, by not promptly returning these funds to Gaumer, and by not refunding the expense money to Gaumer upon withdrawal from representation, the Respondent violated Canon Nine, DR 9-102(B)(4) (lawyer shall promptly pay or deliver to client funds as requested or as due). Because this money was not a "retainer" or payment for legal services, but rather was for expenses, we do not find the Respondent's conduct to be a violation of Canon Two, DR 2-110(A)(3) (lawyer who withdraws from employment shall refund promptly any fee paid in advance that has not been earned).

Count Two – Findings of Fact

31. At all times relevant to the petition for discipline, Leeland Eisenberg was an inmate in the custody of the Massachusetts Department of Corrections and was institutionalized at the DOC facility in Bridgewater (Ans. 35; Stip. 21). Eisenberg is not and was not a lawyer (Stip. 21).

32. On November 23, 1999, Eisenberg notified the Respondent that he was referring a man identified as "Martinez" to the Respondent for legal services (Ans. 36; Stip. 22). Eisenberg demanded that, if the Respondent took the case, he forward $200 to Eisenberg "as a finder or referral fee" (Ans. 36; Stip. 22; Ex. 13).

33. By letter dated December 10, 1999, the Respondent notified Eisenberg that he was responding to Eisenberg's letter and stated, "I will agre [sic] to pay you $100 up front after accepting Martinez' case and $100 additional after a successful conclusion" (Ans. 37; Stip. 23; Ex. 14).

Count Two – Conclusions of Law

34. Bar Counsel charges that by agreeing to pay a referral and/or "finders fee" to Eisenberg and to make further payment to Eisenberg at the "successful" conclusion of the case, the Respondent violated Mass.R.Prof.C. 5.4(a) (lawyer shall not share fees with nonlawyer) and 7.2(c) (lawyer shall not give anything of value to person for recommending the lawyer's services). The Respondent contends that because Bar Counsel did not provide any evidence that he made any of the payments contemplated by the agreement, he did not violate the charged rules. While the Respondent plainly intended to violate Mass.R.Prof.C. 5.4(a) and 7.2(c), the fortuity that the offer and counter-offer did not amount to a completed illegal "deal" appears to preclude a conclusion that such violation occurred here.

Count Three – Findings of Fact

35. At all times relevant to the petition, DOC regulations prohibited inmates from "[g]iving money or any item of value to, or accepting money or any item of value from another inmate, a member of his family or his friend, without authorization." 103 C.M.R. 430.24(25). The Respondent knew that assisting inmates in transferring anything of value among them violated this regulation (Ex. 42, pp. 26, 27, 53, Ex. 43, p. 9). DOC regulations also prohibited inmates from "[c]harging or receiving money or anything of value, either directly or indirectly, from another inmate, a member of his family, or any other person, for rendering legal assistance." 103 C.M.R. 430.24(30). The Respondent knew that inmates could not charge or receive anything of value from other inmates for rendering legal assistance without violating this regulation (Ex. 42, pp. 45-47, Ex. 43, p. 9). Finally, DOC regulations prohibited "[a]ttempting to commit any of the above offenses, making plans to commit any of the above offenses or aiding another person to commit any of the above offenses shall be considered the same as the commission of the offense itself." 103 C.M.R. 430.24(33).

36. On October 1, 1998, the Respondent mailed a copy of a contract to Eisenberg at MCI Concord, which was an agreement between Eisenberg and George Sowyrda, who was also an inmate there (Ex. 15). The contract provided that Sowyrda would transfer $9,000 to Eisenberg, who would "invest said sum or sums annually, in stocks, bonds and other instruments & means common to investments otherwise, for the mutual and equal benefit of both parties to this contract"; after Sowyrda recouped his initial investment, he and Eisenberg would share any net profits equally (Ex. 15).

37. In the fall of 1998, the Respondent received two checks made payable to him, totaling $10,284, which were paid by a third person on Sowyrda's behalf (Ex. 42, pp. 49-50, Ex. 43, pp. 47-49). The Respondent deposited these checks into his IOLTA account (Ex. 42, p. 49).

38. The Respondent disbursed these funds by sending Sowyrda $604, sending $9,000 to a brokerage house, and holding $400 for expenses (Ans. 44; Stip. 24; Ex. 16). The Respondent retained $280 as his fee for handling the transaction (Ans. 44; Stip. 24; Ex. 16).

39. The brokerage house returned the $9,000 to the Respondent because they did not want to handle money from inmates (Ex. 42, p. 50, Ex. 43, p. 52). At Eisenberg's instruction, the Respondent then sent the money to a woman named Melissa, who refused to handle the

money and returned the check to the Respondent (Ex. 42, p. 50).

40. Based on instructions from Eisenberg and Sowyrda, the Respondent sent $9,000 to Eisenberg, who sent $1,000 back to the Respondent, which he then sent to Sowyrda (Ex. 43, p. 56).

41. The Respondent was paid $300 by Eisenberg for handling the funds (Ex. 42, p. 55, Ex. 18). The Respondent understood that Eisenberg and Sowyrda used him to handle transferring the funds because such transfers were prohibited by the DOC regulations (Ex. 42, pp. 26-27, 53; see Ex. 27, Ex. 37, Ex. 43, pp. 10-11).

42. Throughout the time relevant to the petition, James Cook was an inmate of the DOC and the Respondent represented him in several lawsuits (Ex. 42, pp. 10-11, 14-18). The Respondent understood Cook to be a paralegal (Ex. 42, p. 19; see Tr. 98). During this time, Cook referred about ten other inmates to the Respondent for legal representation (Ex. 42, pp. 18-19, 39). The Respondent knew that Cook charged other inmates for legal work which Cook performed (Ex. 42, p. 38, Ex. 28, Ex. 32, Ex. 37, Ex. 38; see Tr. 98). In 1998 and 1999, the Respondent helped Cook obtain payment for his paralegal work by receiving, on Cook's behalf, payments from other inmates for Cook's services, including the following:

(a) In June 1998, the Respondent received, on Cook's behalf, $2,000 from James Pultz, an inmate (Exs. 19-27, 41).

(b) On October 3, 1999, the Respondent received, on Cook's behalf, $100 from James Dowling, an inmate (Ex. 34, Ex. 35).

(c) In October 1999, the Respondent received, on Cook's behalf, $350 from Tomas Carrasquillo, an inmate (Exs. 28-33).

(d) On April 6, 2000, the Respondent received, on Cook's behalf, $200 from Kevin Bolding, an inmate (Exs. 33, 36-39).

43. The Respondent knew that Pultz, Dowling, Carrasquillo and Bolding were DOC inmates; he also knew that the funds sent to him by them were intended as payment to Cook for legal services and that Cook's receipt of payment from other inmates violated DOC regulations (Exs. 19-39).

Count Three – Conclusions of Law

44. The Respondent's conduct in assisting inmates in the violation of DOC regulations violated Mass.R.Prof.C. 1.2(d) and 8.4(d) (conduct prejudicial to the administration of justice) and (h) (conduct that adversely reflects on fitness to practice).

45. The Respondent's conduct in assisting Cook in his performance of legal services violated Mass.R.Prof.C. 5.5 (lawyer shall not assist a person who is not a member of the bar in the unauthorized practice of law).

Count Four – Findings of Fact

46. From at least January through June 1998, the Respondent had one bank account at BayBank (later BankBoston) which held all the funds he received in connection with his law practice (Ex. 43, pp. 13-19, Ex. 40). The Respondent commingled client funds and his own funds in this account (Ex. 43, pp. 13-19, Ex. 40).

47. In June 1998, because he was angry with BankBoston for reporting a dishonored check to the Board of Bar Overseers, the Respondent transferred the funds in that account to a new account at Citizens Bank, which was designated as an IOLTA account (Ex. 43, p. 25, Ex. 41). From June to October 1998, the Respondent continued to commingle client funds with his own

funds in this new account (Ex. 43, pp. 27-44, Ex. 41).

48. As set forth above, in June 1998, the Respondent received $2,000 from Pultz, an inmate, which the Respondent knew was for payment to Cook (Ex. 42, pp. 42-47, Ex. 43, pp. 27-29). On June 22, 1998, the Respondent deposited this money into the Citizens Bank IOLTA account (Ans. 54; Stip. 25; Ex. 41, Ex. 42, p. 44, Ex. 43, pp. 27-28). He thereafter commingled these funds with his own funds in that account (Ex. 43, pp. 27-43, Ex. 41).

49. Subsequently, the Respondent intentionally used some of the $2,000, which he was holding on Cook's behalf in that account, to pay for his own office expenses and expenses for other clients (Ex. 43, pp. 27-46, Ex. 41). In his statement to Bar Counsel, the Respondent admitted he was "borrowing" Cook's money without his permission (Ex. 43, pp. 44-46). Moreover, in his closing argument at the disciplinary hearing, the Respondent tried to explain his misuse of client funds by stating:

If you look at the 4th count, commingling of money, Bar Counsel indicated in her opening statement that I used some money that was supposed to be set aside for other matters. Yes, I did, and in fact my testimony in the interviews said I borrowed the money. I acknowledged that. That was a good business decision. It could have cost me 18 percent interest to accept credit outside, to charge it to a credit. I could have charged it to the credit card but cost me 18 percent interest. Meanwhile money was there which I knew I could reimburse at some future date, and I did reimburse it. (Tr. 95-96) (emphasis supplied).

50. We find that the Respondent intentionally commingled client funds with his own funds in his IOLTA account and that he intentionally misused client funds for his own and other clients' purposes. We find that there was no evidence that the Respondent intended to deprive Cook of his funds, either temporarily or permanently, nor was there any evidence of actual deprivation. However, we do find that the Respondent's intentional misuse of client funds was the result of calculated self-interest, in which he determined it would be cheaper for him to use those funds than to borrow the necessary funds..

Count Four – Conclusions of Law

51. By commingling client or third-party funds and personal funds and by converting client or third-party funds to his own use, the Respondent violated Mass.R.Prof.C. 1.15(a) (property of clients or third persons shall be held separate from lawyer's own funds) and (d) (all funds held in trust shall be held in accounts identified as fiduciary accounts) and 8.4(c) (dishonesty, fraud, deceit or misrepresentation) and (h) (conduct that adversely reflects on his or her fitness to practice).

II. Factors in Mitigation and Aggravation

52. The Respondent's statements under oath to Bar Counsel and his arguments presented before this Hearing Committee demonstrated a fundamental lack of understanding or acknowledgment of the nature of his misconduct and the requirements of the rules of professional conduct. Matter of Clooney, 403 Mass. 654 (1998). ABA Standards for Imposing Lawyer Sanctions § 9.22(g) (as amended, 1990), reprinted in PROFESSIONAL RESPONSIBILITY STANDARDS, RULES AND STATUTES (West, 1995) ("Standards").

53. The Respondent's misconduct was undertaken for selfish motives and personal gain. Matter of Pike, 408 Mass. 740 (1990); Standards § 9.22(b).

54. The Respondent engaged in multiple disciplinary offenses, and a pattern of misconduct in connection with the violations of the DOC regulations. Matter of Saab, 406 Mass. 315 (1990); Standards § 9.22(c) and (d).

III. Recommendation for Discipline

Based on the multiple violations charged, Bar Counsel seeks an indefinite suspension. The Respondent, in contrast, seeks at most, an admonition.

The Respondent engaged in multiple acts of misconduct – most of which would warrant a term suspension. His intentional misuse of client funds (without intent to deprive or without actual deprivation resulting) presumptively requires a term suspension of "appropriate length." Matter of Schoepfer, 426 Mass. 183, 187 (1997). In this case, the Respondent's misuse was callous and calculated – driven purely by his self-interest – to save himself the interest charged by credit cards.

The Respondent's pattern of assisting Cook in the unauthorized practice of law and assisting him and other inmates in violating DOC regulations also warrants a suspension. Matter of Flak, 6 Mass. Att'y Disc. R. 118 (1990) (disbarment for associating with parolee, who was not an attorney and claimed to provide legal services to inmates; attorney accepted referrals from legal services company, then entered into partnership with parolee; attorney also neglected other matters and misappropriated client funds); Matter of DiCicco, 6 Mass. Att'y Disc. R. 83 (1989) (two-year suspension for notarizing a power of attorney when he knew signor was under a legal disability and for failing to monitor an ex-convict's use of a legal association to solicit legal business and for facilitating the ex-convict's unauthorized practice of law). The Hearing Committee in Flak aptly stated, "It strikes this committee as bordering on the incredible that a supposedly experienced practitioner would not know that it was improper to form a partnership with a non-lawyer, let alone a convicted felon; to commingle client funds…." Id. at 123. We find that the same reasoning applies here, except that the Respondent in this matter admits that he was aware of the DOC regulations and nonetheless, violated them repeatedly and assisted inmates in violating them. In our view, such knowing violation of the law is unconscionable.

Finally, we view the Respondent's conduct in his representation Gaumer to be reprehensible. His wrongful effort to extort payment of legal fees to which he was not entitled from Gaumer was exacerbated by his revelation of client secrets, his refusal to pay or refund the expense money, and his refusal to advise his client of his appeal rights. This constituted predatory conduct reflecting a complete lack of understanding of the duties owed to a client.

Based on the multiple, serious violations presented in this matter, as well as the factors in aggravation, we conclude that appropriate sanction would be an indefinite suspension from the practice of law.

For the foregoing reasons, we recommend that the Respondent be indefinitely suspended from the practice of law.

Respectfully submitted,
By the Hearing Committee,

_____
Clarence V. LaBonte, Jr., Chair

_____
Paul G. Levenson

_____
Don Kaplan

Filed: _____

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

Please direct all questions to webmaster@massbbo.org.