

IN RE: GERALD L. SHYAVITZ

**S.J.C. Order of Indefinite Suspension entered by Justice Greaney on December 17, 2003,
with an effective date of January 17, 2004.¹**

**(S.J.C. Judgment of Reinstatement with Conditions entered by Justice Gants on February 28,
2013)**

SUMMARY²

The respondent was indefinitely suspended for misconduct arising out of repeated mishandling and misuse of trust funds. He admitted to the charges in a five-count petition for discipline filed by Bar Counsel.

The respondent was engaged in the private practice of law as the managing partner of the law firm of Shyavitz & Shyavitz. In this capacity, the respondent was responsible for the deposit, maintenance, and disbursement of trust funds for all attorneys associated with the firm through the firm's IOLTA accounts. The respondent was also responsible for the deposit, maintenance, and disbursement of funds in the firm's several business accounts.

The respondent's own law practice primarily consisted of representing plaintiffs in personal injury matters, although he also did some domestic relations and other types of civil cases. As plaintiffs' counsel in personal injury matters, the respondent received settlement funds on behalf of clients when bodily injury liability claims were resolved, as well as payments from his clients' own insurers such as personal injury protection coverage (PIP) or medical payments coverage (med pay), to be used to reimburse the clients or to pay the clients' medical providers.

Count One of the petition for discipline charged that the respondent failed to keep adequate records of the receipt and disbursement of trust funds in personal injury cases. Individual client ledgers were not maintained; records of out-of-pocket expenses were not maintained; contingent fees and expenses were not withdrawn from the IOLTA account in full as earned, thereby commingling personal or business funds with trust funds; and the account was not properly reconciled.

The respondent's commingling of personal or business funds with trust funds, and his inadequate and improper record keeping, was conduct in violation of Mass. R. Prof. C. 1.15(a),(b).

Count Two of the petition was based on the respondent's representation of a client in a personal injury claim arising out of an automobile accident on January 25, 2001. There was no PIP claim because the client's car was insured in New Hampshire.

The respondent settled the bodily injury claim with the insurer for the other driver for \$7500 in or about April 2001. Because the Commonwealth of Massachusetts Department of Revenue (DOR) had a lien for child support, the insurer remitted to the respondent seven separate checks totaling \$7500: one \$3200 check payable to Shyavitz & Shyavitz for legal fees and six checks totaling \$4300 payable solely to the clients' creditors (specifically, five checks totaling \$3769 payable to the client's medical providers and a final \$531 check payable to DOR for the balance net of fees and medical expenses).

The respondent did not forward any of the six separate checks to the medical providers and DOR or obtain their endorsements on the checks. Instead, and without the knowledge or consent of the payees, the respondent endorsed or caused the six checks to the medical providers and DOR to be endorsed with a "Shyavitz & Shyavitz" stamp and purposely deposited these checks on or about April 30, 2001 to a business account in the name of the law firm. He thereafter intentionally expended these funds for his own personal or business purposes or those of the law firm of Shyavitz & Shyavitz or his law partner John P. Shyavitz.

Also on April 30, 2001, the respondent deposited the \$3200 check payable to Shyavitz & Shyavitz to his IOLTA account. The respondent thereafter paid only two of the creditors for whom the insurer had issued checks. Prior to Bar Counsel's investigation, the respondent did not disburse \$1084 owed to three medical providers and DOR. The respondent finally paid the balance owed to DOR and the three medical providers in March and April 2003, only after Bar Counsel reviewed the respondent's financial records and his accountings and became aware of the nonpayment.

The respondent's purposely depositing the six checks payable to medical providers and DOR to his own business account, without the payees' knowledge or consent and without their endorsement of the checks, is conduct in violation of Mass. R. Prof. C. 8.4(c) and (h). The respondent's commingling of trust funds with his own or his law firm's personal or business funds, and his intentional misappropriation of funds due the client's creditors with intent to deprive the creditors of the funds at least temporarily, and with actual deprivation resulting, is conduct in violation of Mass. R. Prof. C. 1.15(a),(b) and Mass. R. Prof. C. 8.4(c) and (h).

Count Three of the petition charged that, commencing in or before the year 1999 and continuing until January 2002, the respondent, without the knowledge or consent of either his clients or his clients' medical providers, routinely and intentionally deposited to business accounts in the name of Shyavitz & Shyavitz the PIP and med pay funds received from his clients' own insurers in motor vehicle accident cases. The respondent then improperly expended these PIP and med pay funds for his own personal or business purposes or those of the law firm of Shyavitz & Shyavitz or his law partner John P. Shyavitz.

The respondent thereafter failed in certain cases to account for or remit in full to the clients or their medical providers the PIP and med pay funds previously received. Payment in full was remitted only after Bar Counsel audited his trust and business accounts.

The respondent's commingling of trust funds with his own or his law firm's personal or business funds, and his intentional misappropriation of funds due the clients or the client's creditors with intent to deprive the recipients of the funds at least temporarily, and with actual deprivation resulting, is conduct in violation of Mass. R. Prof. C. 1.15(a),(b) and Mass. R. Prof. C. 8.4(c) and (h).

Count Four of the petition was based on the respondent's representation of another client in a personal injury claim arising out of a motor vehicle accident. In November 2000 and January 2001, the respondent received from the client's insurer two PIP checks totaling \$1616 owed to the client's chiropractor. Without the client's or the chiropractor's knowledge or consent, the respondent intentionally deposited these checks to a business account in the name of Shyavitz & Shyavitz. The respondent then intentionally expended these funds for his own personal or business purposes or those of the firm of Shyavitz & Shyavitz or his law partner John P. Shyavitz.

In or about March 2001, the respondent settled the client's bodily injury claim for \$6000 with the insurer for the other driver. On or about March 29, 2001, the respondent deposited the \$6000 settlement check to his IOLTA account. That same day, March 29, 2001, the respondent intentionally, and without the knowledge or consent of the client, transferred the \$6000 settlement in full to a business account in the name of Shyavitz & Shyavitz. The respondent then intentionally expended these funds for his own personal or business purposes or those of

the law firm of Shyavitz & Shyavitz or his law partner John P. Shyavitz.

On or about April 13, 2001, the respondent paid \$1616 to the chiropractor. On or about May 9, 2001, the respondent paid the client \$3400, representing the client's share of the \$6000 bodily injury settlement net of the respondent's fees and expenses. The respondent made these payments to the client and the chiropractor from his IOLTA account, even though no supporting funds from the client's case were on deposit in the IOLTA account. The respondent was enabled to pay the client and the chiropractor only by the use either of other clients' funds or of undisbursed fees retained in the IOLTA account from previous unrelated settlements.

The respondent's commingling of trust funds with personal or business funds, and his intentional misappropriation of the client's PIP and bodily injury settlements, with intent to deprive the recipients of the funds at least temporarily and with actual deprivation resulting, is conduct in violation of Mass. R. Prof. C. 1.15(a),(b) and Mass. R. Prof. C. 8.4(c),(h).

Count Five of the petition was based on the respondent's representation of a client in a divorce case. The client retained the respondent in September 2002 and paid a retainer of \$5000, to be billed at an hourly rate of \$150. The respondent knowingly and improperly deposited this retainer to a business account, rather than to a trust account as required. He then intentionally expended these funds, at least in part, for his own personal or business purposes, or those of the firm of Shyavitz and Shyavitz or his law partner John P. Shyavitz, before the funds were earned in full.

In late September or early October 2002, the client and her husband decided to put the divorce on hold and the client so informed the respondent. In December 2002, the client and her husband decided to reconcile. On December 17, 2002, the client asked the respondent to bill her for his services to date, including any sums owed from a prior support case, and to refund the balance of the retainer. On January 3, 2003, the client again called the respondent to request a refund of the balance of the retainer. The respondent advised the client that he would have his bookkeeper send her a check for \$1000 as partial payment and that he did not have funds available to pay the balance.

On or about January 13, 2003, the respondent sent the client invoices, claiming to be owed \$930 on the divorce case and \$579.20 for the support matter and leaving a credit balance due the client of \$3490.80 by the respondent's own accounting. With the invoices, the respondent sent the client a business account check for \$1000 and a note that the balance would be paid over the next few weeks. On January 17, 2003, the respondent sent the client a \$500 check drawn on a business account. On February 7, 2003, having not received any further refund, the client filed a complaint with Bar Counsel. On March 5, 2003, after Bar Counsel sent the complaint to the respondent, the respondent sent the client a business account check for the \$1990.80 balance due.

The respondent's depositing a retainer check to a business account, rather than a trust account, and expending those funds, at least in part, before they were earned, constitutes commingling trust funds with personal or business funds and intentional misuse of trust funds with actual deprivation resulting, in violation of Mass. R. Prof. C. 1.15(a),(b) and Mass. R. Prof. C. 8.4(c),(h). The respondent's failure to make prompt refund of a fee paid in advance that had not been earned is conduct in violation of Mass. R. Prof. C. 1.16(d).

In mitigation, the respondent has made restitution in full to affected parties. In aggravation, the respondent has a prior public censure for two separate acts of misconduct. In one matter, the respondent accepted a mortgage on a marital home as security for fees in violation of a court order that prohibited encumbering or conveying the property. Upon learning of a pending sale of the property, the respondent then failed to advise a potential buyer, the client's real estate attorney, or any other interested party, of the order. The respondent misrepresented his knowledge of the order to Bar Counsel and also to the court in a

subsequent contempt action brought action brought against the respondent by his client. In the other matter, the respondent induced a client to settle a claim for \$25,000 by threatening to withdraw and file an attorney's lien that would have reduced the client's recovery to \$10,000. Matter of Gerald Shyavitz, 5 Mass. Att'y Disc. R. 349 (1988).

The matter came before the Board of Bar Overseers on a stipulation of facts and disciplinary violations and a joint recommendation for an indefinite suspension. On December 8, 2003, the Board voted to accept the stipulation and to recommend the agreed-upon disposition to the Supreme Judicial Court. The Court so ordered on December 17, 2003.

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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