

IN RE: ROBERT K. GORDON

S.J.C. Order of Term Suspension entered by Justice Greaney on April 6, 2004, with an effective date of May 6, 2004.¹

SUMMARY²

The respondent is a sole practitioner admitted to practice in 1975. He stipulated to the material facts charged in a six-count petition for discipline.

Count One of the petition for discipline arose from the respondent's delegation of responsibility for his IOLTA account to his secretary, who was also his office manager, and his negligent failure to supervise her management of the account. During this time, and unknown to the respondent, the respondent's secretary improperly and without authorization transferred clients' funds from the IOLTA account to the respondent's business account and intentionally converted clients' funds for her own purposes or for the benefit of the respondent's business. The respondent was aware that there were shortages in the IOLTA account, but did not know the cause and did not reconcile the account. He instead caused his personal funds to be deposited to the IOLTA account as needed, thereby commingling personal funds with clients' funds.

In March 1999, the respondent learned that the secretary had embezzled \$107,762 from his accounts for her personal use. The respondent's secretary repaid \$74,000 of this sum in two installments in March and August 1999. After learning of the embezzlement, the respondent failed to take action to reconcile his IOLTA account or to have it audited in order to determine by what amount the account was deficient and which clients had not been paid. The respondent left earned fees in the IOLTA account in order to reimburse the account, but had no way to know when or if restitution was completed without an accounting or audit.

Count Two arose from the respondent's representation of a client in a personal injury matter. In September 1994, the client agreed to settle her claim against the operator of the vehicle that hit the car in which she was a passenger. On September 29, 1994, the respondent received a \$50,000 settlement check on behalf of the client. The respondent endorsed the client's name to the settlement check without her authority and deposited or caused the settlement check to be deposited to his IOLTA account. The respondent did not at that time notify the client that he had received her funds, and he did not promptly disburse the settlement funds to the client or to her medical providers, ultimately resulting in lawsuits and other claims against her. He paid the client only \$11,000 that he denominated as "advances."

On or about October 13, 1995, the respondent received \$21,000 from a second insurer in final settlement of the client's claims. The respondent deposited or caused the settlement check to be deposited to his IOLTA account. As of December 19, 1995, the respondent should have been holding \$33,772.87 in the IOLTA account for the client. Instead, and as a result of the misappropriations by his secretary from the respondent's IOLTA account as described in Count One, the balance in the IOLTA account was reduced to \$9,459.91.

In July 1997, the client and her fiancé met with the respondent in his office. The client demanded her settlement funds, an accounting, and a copy of her file. The respondent refused to provide his client with an accounting or her funds. The respondent agreed to

provide the client with a copy of her file within a week, but he failed to do so. Also in July 1997, the client discharged the respondent and retained successor counsel. By letters to the respondent, successor counsel requested an accounting of the client's settlement proceeds and a copy of her file. The respondent failed to respond to successor counsel's correspondence. As of July 31, 1997, the balance in the respondent's IOLTA account was only \$189.33.

Despite his termination as her counsel and his lack of authority to act on her behalf, the respondent paid one medical provider and settled a lawsuit against the client by another medical provider. He paid the providers with personal funds or with the partial restitution from the secretary.

Count Three arose from the respondent's representation of a married couple in their efforts to prevent foreclosure of their home. On June 24, 1998, the respondent received from the clients a check in the amount of \$101,803.68 ("escrow funds") obtained from the husband's pension fund. The clients instructed the respondent to use the escrow funds to pay off their mortgage. However, as of that date, the amount due, including interest, penalties and attorney's fees, was \$103,010.49.

On June 26, 1998, the respondent deposited the escrow funds to his IOLTA account. By letter to counsel for the mortgagee, the respondent offered to pay \$90,000 in full satisfaction of the mortgage. This offer was not accepted. After July 1998, the respondent failed to transfer the escrow funds to an individual trust account earning interest for the benefit of his clients. The respondent took no further action on behalf of the clients after receiving the mortgagee's refusal to compromise and did not attempt further negotiations to pay off their mortgage.

Between June 26, 1998 and December 1998, and unknown to the respondent, the respondent's secretary made payments to the respondent, herself, and unrelated clients from the escrow funds in the IOLTA account. By December 28, 1998, the balance in the respondent's IOLTA account had been reduced to \$19,395.14 without any disbursements having been made to or for the benefit of these clients.

On or about January 11, 1999, the clients saw a published notice of foreclosure sale of their home and brought the matter to the respondent's attention. Without the clients' knowledge or authorization, the respondent then reinstated the mortgage by paying a total of \$24,587.30 to the mortgagee, representing 15 monthly payments plus late charges, legal fees, costs, and other charges. Over the next year, the respondent made monthly mortgage payments to the mortgagee. On May 24, 1999, the respondent additionally made a lump sum payment of \$65,000 towards the principal. These payments were only made possible by the respondent's use of commingled fees that the respondent had retained in the IOLTA account.

In June and October 1999, the respondent obtained additional funds in the amount of \$5,643.85 from the clients to pay to the mortgagee. By February 2000, the respondent had paid all the funds provided to him by the clients to the mortgagee. In February 2000, and at the respondent's instructions, the clients paid an additional \$10,600.78 to discharge the mortgage.

In Count Four, the respondent was retained to represent a client in a claim for personal injuries arising out of a motor vehicle accident. On or about May 29, 1996, an arbitrator awarded the client \$15,000. The respondent miscalculated the client's share of settlement funds or failed to adequately supervise his secretary's calculations of the client's share.

As a result of the misappropriations and other improper withdrawals by his secretary from the respondent's IOLTA account and the respondent's negligent failure to supervise her as described in Count One, the balance in the IOLTA account by July 1997 was reduced to \$189.33 when the respondent should have been holding \$4,312.24 for the client. After Bar Counsel audited the account and discovered the shortage, the respondent refunded the

amounts due to the client.

In Count Five, the respondent was retained to represent a client's interests in the estate of her mother and to file an equity complaint on behalf of the client. In May 1993, the respondent received \$3,000 for his client from the executor of the mother's estate. The respondent did not disburse these funds, pending final settlement of all claims. In December 1996, the client agreed to settle her claims against the estate for \$15,500.

In January 1997, the respondent deposited or caused his secretary to deposit the \$15,500 settlement to his IOLTA account. Between January and February 1997 and as part of the pattern described in Count One above, the respondent's secretary misappropriated or otherwise improperly expended a portion of funds due the client. On February 26, 1997, the respondent paid the client the funds due her. The payment was made possible only after the deposit of \$8000 of the respondent's personal funds in the IOLTA account on the same date.

In Count Six, the respondent settled a client's personal injury case against the driver of the motor vehicle in which she was a passenger for \$18,500. This sum was deposited to the respondent's IOLTA account, and on December 3, 1996, the respondent's contingent fee of \$5,166.67 was withdrawn and paid to him. The respondent did not at that time pay the client her share of the settlement funds.

By March 1997, and as part of the pattern described in Count One above, the respondent's secretary had misappropriated or otherwise improperly expended \$7,934.30 of IOLTA funds due the client. On March 18, 1997, the respondent paid or caused the client to be paid \$9,813.67, representing the funds due her less expenses. Unknown to the respondent, payment was made possible only by the use of unrelated client funds deposited to the IOLTA account between March 4 and March 7, 1997. The respondent withheld an additional \$2,542.20 to pay the health insurer's lien, but failed to notify the health insurer of his receipt of the settlement funds in March 1997 and failed to remit funds for that purpose.

In November 1998, the respondent filed a civil complaint on behalf of the client against the operator of the other motor vehicle involved in the accident. In August 1999, in response to an inquiry from the health insurer, the respondent indicated that the client's case was "pending." The respondent intentionally withheld information regarding the \$18,500 settlement of the first case in 1997. A later small settlement of the second case ultimately proved uncollectible. The respondent never paid the health insurer's lien with the funds withheld from the client's original settlement. After Bar Counsel audited the account and brought to the respondent's attention the \$2,542.20 held back from the client's settlement, the respondent refunded that amount to the client.

In all of the counts above, the respondent's negligence in failing to maintain and safeguard client funds, resulting in multiple instances of misuse of those funds by the secretary with actual deprivation to clients; his conduct in commingling personal funds and fees with clients' funds; his conduct in delegating control of his IOLTA account to his secretary and failing to supervise her management of the account; his failure to make or cause to be made prompt disbursement of trust funds due clients; his continued use of the IOLTA account in and after 1999, despite knowledge of the misappropriations by his secretary and of the fact that restitution had not been made in full; and his inadequate and improper record keeping violated Canon Nine, DR 9-102 (A) and (B) and Mass. R. Prof. C. 1.15 (a), (b), (d), 5.3(b) and 8.4 (a) and (h).

In addition, in Count Two, the respondent's conduct in endorsing the client's insurance settlement check without her authority, in failing to promptly inform her that he received her settlement funds, in failing and refusing to promptly pay her medical providers resulting in a lawsuit and other claims against her, in failing and refusing to deliver to the client her funds upon request, in failing and refusing to provide the client with an accounting upon request, in failing and refusing to withdraw and to make available to the client, or successor counsel, her

file, an accounting and her settlement funds upon termination violated Canon One, DR 1-102 (A) (6), Canon Two, DR 2-110(A)(2), (3) and (4) and (B) (4), Canon Six, DR 6-101(A) (3), Canon Seven, DR 7-101(A)(1),(2), (3), Canon Nine, DR 9-102 (A) and (B) and Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 1.4(a), 1.15(a),(b), (d)), 1.16(a), (d) and (e) and 8.4 (a) and (h).

In Count Three, by not pursuing further negotiations to pay off the mortgage and thereby failing to act with reasonable diligence or to seek the lawful objectives of his clients; by failing to promptly disburse the escrow funds to pay down the clients' mortgage; by demanding that the clients pay additional sums necessitated by the respondent's misconduct; and by reinstating the mortgage without the clients' authority, the respondent also violated Mass. R. Prof. C. 1.2 (a), 1.3 and 8.4 (h).

In Count Six, the respondent's conduct in failing to pay funds withheld for the health insurance lien and in intentionally withholding information regarding the 1997 settlement and final disposition of the matter from the lien holder also violated Canon One, DR 1-102 (A) (4) and Mass. R. Prof. C. 1.15 (b), 5.3(b) and 8.4 (c).

The matter came before the Board of Bar Overseers on a stipulation of facts, disciplinary violations and a joint recommendation for a two-year suspension from the practice of law. The respondent stipulated to the material facts in the petition for discipline and to the negligent misuse of clients' funds as a result of his failure to supervise his secretary. On March 8, 2004, the Board voted unanimously to accept the stipulation and to recommend the agreed-upon disposition to the Supreme Judicial Court. The Court so ordered on April 6, 2004.

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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