

IN RE: MELVIN F. ALBERT

S.J.C. Order of Indefinite Suspension entered by Justice Greaney on November 1, 2005, with an effective date of December 1, 2005.¹

SUMMARY²

The respondent was admitted to the Bar of the Commonwealth in 1976. He was indefinitely suspended from the practice of law on November 1, 2005, as a result of misconduct set forth in a four-count petition for discipline.

In the first matter, the respondent undertook to represent a client in a divorce and agreed to charge the client an hourly rate. On April 20, 2002, the respondent deposited a \$2,000 retainer check into his IOLTA account. Over the course of the next several weeks, the client became increasingly dissatisfied with the respondent's representation of her, and on May 15, 2002, she discharged the respondent and requested her file, a final bill, and the return of the unearned portion of the retainer. The respondent failed to respond.

On May 7, 2003, the client filed a complaint with bar counsel, which the respondent failed to answer, necessitating the issuance of a subpoena in July 2003. On August 5, 2003, the respondent claimed in a letter to bar counsel that, upon discharge on May 15, 2002, he wrote a check from his IOLTA account to purchase a money order in the amount of \$1,000, which represented a refund of the unearned portion of the retainer. He claimed that he had intended to send the money order to the client, but had instead inadvertently put the money order in the file and put the file in storage and had only just discovered it. The respondent further claimed that upon discovering the 2002 money order, he returned it to the bank and purchased a new money order dated July 3, 2003 with the proceeds from the old one. On August 6, 2003, at a meeting with bar counsel, the respondent repeated this story and gave bar counsel a copy of a page of his IOLTA account check register, indicating that on May 22, 2002, the respondent issued an IOLTA check in the amount of \$1,000 payable to the respondent and bearing a notation that it was a "refund" for the client in question.

Bar counsel's subsequent investigation revealed this explanation to be false. The respondent had altered the check register page before giving a copy of it to bar counsel to make it appear as if the IOLTA check was related to the client refund. In fact, the check was from an unrelated matter.

Between May 15, 2002, and March 1, 2003, the respondent intentionally expended the \$1,000 balance of the client retainer for his own personal purposes or those of other clients unrelated to the client. By March 1, 2003, the balance in the respondent's IOLTA account was \$3.82 without any refund having been made to the client. In March and April 2003, the respondent transferred personal funds in excess of \$19,000 to his IOLTA account, thereby commingling personal funds and client funds in his IOLTA account. On July 3, 2003, the respondent used a portion of these personal funds to purchase a \$1,000 money order for the client using an IOLTA check.

The respondent's failure to refund the advance payment of his fee that had not been earned upon termination of the representation and his failure to return the client's file to her within a reasonable time following a request constitute a violation of Mass. R. Prof. C. 1.16 (d) and

(e). The respondent's commingling personal funds with trust funds, his failure to promptly deliver to the client the funds to which she was entitled, and his failure to promptly render an accounting of these funds upon request constitute a violation of Mass. R. Prof. C. 1.15(a) and (b) of the rule in effect prior to July 1, 2004 (now Mass. R. Prof. C. 1.15(b), (c), and (d)). The respondent's intentional conversion of the client's funds to his own use with the intent to deprive the client of these funds at least temporarily and with actual deprivation resulting constitutes a violation of Mass. R. Prof. C. 8.4(c) and (h) and Mass. R. Prof. C. 1.15(a) of the rule in effect prior to July 1, 2004 (now Mass. R. Prof. C. 1.15(b)). The respondent's intentional misrepresentations to bar counsel in his correspondence and in person and the respondent's submission of fabricated evidence in the form of an altered check register page to bar counsel constitute violations of Mass. R. Prof. C. 3.4(b), 8.1(a), and 8.4(c) and (h).

In the second matter, on November 12, 2003, the respondent deposited a check dated September 27, 2003, that he had received from a family member in the amount of \$16,200 into his IOLTA account. This check was payable to the respondent in his capacity as trustee for a trust set up for the family member and was sent to the respondent to be remitted to a life insurance company in payment of the annual premium on a life insurance policy owned by the trust. The respondent did not send the payment of the premium to the life insurance company. Instead, between November 12, 2003, and February 6, 2004, and without authorization or consent, the respondent intentionally expended part of the funds remitted by the family member for the respondent's own purposes or those of other clients unrelated to the trust. By February 6, 2004, the balance in the respondent's IOLTA account was \$9,755.68 without any payment having been made for the benefit of the trust or the family member.

In approximately early February 2004, the family member contacted the respondent concerning the unpaid annual life insurance premium. The respondent admitted that he had not yet paid the premium and that he had spent some of the funds, but agreed to pay the premium immediately. On February 6, 2004, the respondent deposited a check from a second family member in the amount of \$6,860 into his IOLTA account. This deposit was a loan to the respondent and brought the account balance to \$16,615.68. The respondent was enabled by this loan to pay the annual life insurance premium for the trust. The family member was satisfied with this resolution and did not file a complaint with bar counsel. The problem came to bar counsel's attention in reviewing the respondent's IOLTA bank records during the course of investigating the first matter.

The respondent's use of trust funds for his own personal use or the use of other clients unrelated to the trust between November 12, 2003, and February 6, 2004, and his failure to timely deliver those funds to the life insurance company on behalf of the trust constitute a violation of Mass. R. Prof. C. 1.15(a) and (b) of the rule in effect prior to July 1, 2004 (now Mass. R. Prof. C. 1.15(b) and (c)).

In the third count, a client paid the respondent \$2000 in February 2004 to seek a guardianship for her mentally ill daughter pursuant to *Rogers v. Commissioner of Department of Mental Health*, 390 Mass. 489, 458 N.E.2d 308 (1983). On March 16, 2004, the respondent filed the *Rogers* guardianship petition, but then failed to pursue the matter further in the probate court. The last contact that the client had with the respondent was on March 16, 2004. After that date, all of the client's attempts to reach the respondent were unsuccessful. The client eventually contacted new counsel who spoke to the respondent on June 4, 2004. On June 8, 2004, new counsel wrote the respondent and informed him that the client had discharged the respondent as her counsel in this matter. New counsel requested that the respondent send him a notice of withdrawal and that he refund the client's retainer to her. The client did not receive her file. Only after the client had filed her complaint and bar counsel had filed its petition for discipline did the respondent refund the client's \$2,000 fee in full.

The respondent's failure to seek the lawful objectives of his client and to diligently pursue the *Rogers* guardianship once he had undertaken to represent the client in this matter constitute a violation of Mass. R. Prof. C. 1.2(a) and 1.3. The respondent's failure to keep the client

informed about the status of her matter and to promptly comply with her reasonable requests for information constitute a violation of Mass. R. Prof. C. 1.4(a). The respondent's failure to file a notice of withdrawal and his failure to refund the advance payment of his fee that had not been earned or to return the file upon termination of the representation constitute a violation of Mass. R. Prof. C. 1.16(a)(3), (d), and (e).

The respondent also failed to cooperate with bar counsel's investigation of three unrelated complaints, two of which were the subject of counts in the petition, and also failed to comply with the court's subsequent order of administrative suspension. The respondent repeatedly failed to reply to bar counsel's correspondence in the three cases, twice was subpoenaed as a result, and the second time did not appear pursuant to the subpoena.

On December 8, 2004, the Supreme Judicial Court issued an order of administrative suspension, pursuant to Supreme Judicial Court Rule 4:01, § 3, based on the respondent's failure to cooperate with bar counsel's investigation of the three complaints. Because the respondent did not seek reinstatement within thirty days of the date of entry of the court's order, bar counsel sent the respondent the forms necessary to comply with the requirements of Supreme Judicial Court Rule 4:01, § 17. The respondent failed to complete and return these forms or to file an affidavit of compliance certifying that he had fully complied with the provisions of the court's order and with bar disciplinary rules.

The respondent's failure to cooperate with bar counsel's investigations in the three matters and to comply with the court order of administrative suspension is in violation of Supreme Judicial Court Rule 4:01, §§ 3 and 17, and Mass. R. Prof. C. 8.4(d), (g), and (h).

In mitigation as to the neglect and the failure to cooperate, the respondent experienced symptoms of depression intermittently from 1999 to 2005, making it difficult at times for the respondent to function professionally. In 2005, the respondent was diagnosed with depression and began treatment.

This matter came before the Board of Bar Overseers on a stipulation of facts, disciplinary violations and a joint recommendation for an indefinite suspension from the practice of law. On October 20, 2005, the Board voted to accept the stipulation of the parties and to recommend the agreed-upon disposition to the Supreme Judicial Court. On November 1, 2005, the Court entered an order of indefinite suspension.

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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