

IN RE: RICHARD G. BIRCHALL

S.J.C. Judgment of Disbarment entered by Justice Cowin on July 18, 2006, with an effective date of August 17, 2006.¹

SUMMARY²

The respondent was admitted to the Bar of the Commonwealth on December 20, 1990. In January 1992, the respondent received a public censure for misconduct that had occurred in New Jersey, where he was also admitted to practice law.

In February 1994, a client retained the respondent to advise and assist her in protecting her assets from the claims of potential creditors. The respondent persuaded the client to place all of her assets in a corporation over which she would have no control. The respondent did not advise the client that such transfers might be deemed fraudulent. This conduct violated Canon Seven, DR 7-101(A)(1) (lawyer shall not intentionally fail to seek lawful objectives of client), and (3) (lawyer shall not prejudice client during course of professional relationship), and DR 7-102(A)(7) (lawyer shall not counsel or assist client in conduct lawyer knows to be fraudulent).

The respondent then created a corporation to hold the client's assets and named himself president, vice-president, and chairman of the board of directors. The respondent did not advise the client that his obligations to the corporation and his own financial interests might differ from hers. The respondent failed to give the client advice that a lawyer independent of the transaction might have given or advise the client to seek the advice of independent counsel. This conduct violated Canon Five, DR 5-101(A) (lawyer shall not accept employment if lawyer's professional judgment on behalf of client reasonably may be affected by lawyer's own financial interests), and 5-105(A) and (C) (lawyer shall decline proffered employment if lawyer's independent professional judgment is likely to be adversely affected and lawyer can only represent clients with differing interests if it is obvious he can adequately represent the interests of each and if each client consents after full disclosure).

The respondent also established a corporation in the Bahamas in which he and the client were stockholders, officers, and directors, thus entering into a business transaction with his client in violation of Canon Five, DR 5-104(A) (lawyer shall not enter into business transaction with client if they have differing interests unless client has consented after full disclosure). The respondent opened a bank account in the Bahamas under the name of the Bahamian corporation and named himself as the sole signatory on this account without advising the client that his role as sole signatory on this account did or might interfere with his professional judgment on her behalf. This conduct violated Canon Five, DR 5-101(A).

Several months later, without the client's knowledge or consent, the respondent transferred all of the client's interest in the Bahamian corporation to the U.S. corporation in which she had no interest. Over the next year, the respondent deposited approximately \$2,000,000 that the client had entrusted to him into the Bahamian corporation's bank account.

In July 1997, the respondent deposited \$75,000 of the client's funds into a new bank account he opened on Cape Cod. Over the next three years the respondent deposited personal funds and more than \$550,000 of the client's funds from the Bahamian bank account into the Cape

Cod account. During that same period, the respondent intentionally converted more than \$235,000 of the client's funds to his own personal or business use with the intent to deprive the client of her funds. The respondent's conduct prior to January 1, 1998, violated Canon One, DR 10102(A)(4) and (6) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, or other conduct adversely reflecting on fitness to practice law), and Canon Nine, DR 9-102(A) and (B) (prohibition against lawyer commingling client funds with personal funds and requirement that lawyer maintain complete records of handling, maintenance, and disposition of client funds, render accounts to client regarding such funds, and promptly pay to client as requested funds to which client is entitled). The respondent's conduct after January 1, 1998, violated Mass. R. Prof. C. 1.15(a), (b), and (d) (prohibition against commingling, and requirement that lawyer keep client funds in trust account, account for handling of client funds, and pay client funds to which client entitled), and 8.4(c) and (h) (prohibition against dishonest conduct and conduct adversely reflecting on fitness to practice law).

On at least two occasions in 1998 and 1999, the client demanded that the respondent provide her with an accounting of the property she had transferred to him. The respondent failed to provide an accounting in response to these demands, thereby violating Mass. R. Prof. C. 1.4(a) and (b) (lawyer shall comply with client's request for information and explain matter so client can make informed decisions about representation), and 1.15(a), (b), and (d), as in effect prior to July 1, 2004.

In 2000, the client filed suit against the respondent alleging that he had converted her property, made misrepresentations to her, and breached his fiduciary duty to her by misusing and misappropriating her funds. Shortly thereafter, the respondent established a new corporation, opened a new bank account in the name of the new corporation, and transferred funds from the Cape Cod account and the Bahamian account to the new bank account in order to conceal from the client what remained of the funds she had entrusted to him. This conduct violated Mass. R. Prof. C. 3.4(a) (lawyer shall not unlawfully obstruct another party's access to evidence). The respondent commingled his own personal funds with the client's funds in the new account and intentionally converted the client's funds to his own use, all in violation of Mass. R. Prof. C. 1.15(a), (b), and (d), and 8.4(c) and (h).

On February 18, 2004, a judge in the client's civil action against the respondent ordered the respondent to execute a waiver of privilege and authorization so that the client could obtain information about the Bahamian account in which he deposited the funds she had entrusted to him. The respondent intentionally failed without good cause to comply with this order. On June 15, 2004, the court ordered the respondent to produce documents relating to his handling of funds he had received in the name of the various corporations he created. The respondent intentionally failed without good cause to comply with this order as well. On October 5, 2004, the court ordered the respondent to provide the client "with every piece of paper and supporting document identifying each and every account, trust, corporation, offshore entity, or other asset in the [respondent's] possession, control or known to [him]" The respondent intentionally failed without good cause to comply with this order. On January 11, 2005, the court ordered the respondent to "disclose and turn over to the Clerk's Office every document of every nature and any kind that may be related to this Court's Order dated October 5, 2004, regarding any financial aspect of the affairs between the parties" The respondent intentionally failed without good cause to comply with this order. The respondent's intentional failure to comply with these court orders violated Mass. R. Prof. C. 3.4(a) (lawyer shall not unlawfully obstruct another party's access to evidence), (c) (lawyer shall not knowingly disobey obligation under rules of a tribunal), and (d) (lawyer shall not fail to make diligent effort to comply with legally proper discovery request), and 8.4(d) (lawyer shall not engage in conduct prejudicial to the administration of justice).

On February 28, 2005, the court entered a default judgment against the respondent. On March 18, 2005, the court entered judgment for the client on liability only. The court also entered a judgment of contempt against the respondent for his failure to comply with the court's orders

requiring him to turn over discovery materials. On June 14, 2005, the court entered an order assessing damages against the respondent in the amount of \$2,752,934.54.

In another matter, a second client retained the respondent in 1997 to assist in protecting the client's assets. The respondent referred this client to a Bahamian law firm to set up a Bahamian corporation for him. The respondent also advised the second client to set up an account for his corporation at the same Bahamian bank in which the respondent had deposited the first client's funds.

In May 1998, the respondent informed the second client that he had set up an account at the Bahamian bank for the exclusive use of the client's corporation. This representation to the client was false, and the respondent knew it was false. In fact, the account into which the respondent directed the client to deposit his funds belonged to a business operated by the respondent and at least one other person. Both the respondent and the other person involved in the business with the respondent had signatory authority over the account. By advising the client to deposit his funds into an account in the name of the respondent's business and over which the respondent had signatory authority, and by misrepresenting to the client that the account was in the name of the client's corporation and belonged exclusively to the corporation, the respondent violated Mass. R. Prof. C. 1.4(a) and (b), and 8.4(c) and (h).

In May 1998, the client sent \$145,000 to the Bahamian bank with instructions to deposit the funds into the account he believed belonged to his corporation. After May 1998, either the respondent or his business partner intentionally and without authority used the client's funds for purposes unrelated to the client or the client's corporation. By inducing the client to deposit his funds into an account over which the respondent had signatory authority and which was used by the respondent and his business associate to conduct their own business without obtaining the client's consent after consultation, the respondent violated Mass. R. Prof. C. 1.4(a) and (b), 1.7(b) (lawyer shall not represent client if representation may be materially limited by lawyer's responsibilities to third person or by lawyer's own interests, unless client consents after consultation), and 8.4(c) and (h). By causing the client's funds to be deposited into an account containing the respondent's business or personal funds, and by converting or permitting the client's funds to be converted to his own personal or business use, the respondent violated Mass. R. Prof. C. 1.15(a), (b), and (d), and 8.4(c) and (h).

The client confronted the respondent after he discovered that his money was gone and that there was no account in his name or the name of his corporation. Between February and July 1999, the respondent paid \$145,000 to the client to reimburse him for his loss.

In the course of investigating the second client's complaint, bar counsel sent three written requests to the respondent for information about the account in the Bahamas in which the client's funds had been deposited. Along with these requests, bar counsel presented the respondent with an authorization and waiver of confidentiality for his signature so that bar counsel could obtain information about the account directly from the Bahamian bank. The respondent intentionally failed to respond to these requests for information.

Bar counsel filed a petition for administrative suspension against the respondent on December 18, 2000, for his failure to cooperate in bar counsel's investigation. On December 26, 2000, a Single Justice entered an order of administrative suspension against the respondent based on bar counsel's petition.

On January 31, 2001, the respondent signed the waiver of confidentiality and authorization that bar counsel had sent to him in 2000. On February 12, 2001, the respondent filed with the Supreme Judicial Court and the Office of Bar Counsel an affidavit of compliance with the order of suspension. In the affidavit, the respondent stated that he had no clients and held no fiduciary positions. This affidavit was intentionally false, as the respondent knew that he was holding funds belonging to the first client at that time. The respondent's false representations in his affidavit of compliance violated Mass. R. Prof. C. 3.4(c), and 8.4(c), (d) and (h). Based

on the respondent's false affidavit of compliance, the Court reinstated the respondent from his administrative suspension, effective February 13, 2001.

Bar counsel continued to investigate the second client's complaint after February 13, 2001. Because the Bahamian bank would not release account information except on the specific request of an account signatory, bar counsel sent letters to the respondent on June 26 and July 11, 2001, asking him to write to the bank to specifically authorize the release of information about the account. The respondent refused to comply with this request.

On August 16, 2001, bar counsel provided the respondent with a specific, irrevocable "Waiver of Privilege and Authorization", and asked the respondent to sign the document, have his signature notarized, and return the executed waiver to bar counsel for transmission to the Bahamian bank. The respondent intentionally failed without good cause to sign the waiver or otherwise to respond to bar counsel's request.

In a letter dated October 11, 2001, bar counsel notified the respondent that his failure to provide the executed waiver and other information would subject him to another petition for administrative suspension. The respondent received this letter, but he intentionally failed without good cause to reply to bar counsel or provide the requested information. On November 1, 2001, bar counsel petitioned the Supreme Judicial Court pursuant to S.J.C. Rule 4:01, § 3(2), to administratively suspend the respondent from the practice of law for his failure to cooperate in bar counsel's investigation of the complaints made by the respondent's two clients. On November 7, 2001, the Court entered an order of administrative suspension against the respondent.

On December 12, 2001, in connection with the order of administrative suspension, the respondent filed an affidavit of compliance pursuant to S.J.C. Rule 4:01, § 17(5), in which he claimed to have notified the U.S. corporation he had created for the first client, his "only client", that he had been administratively suspended from the practice of law. The respondent attached to the affidavit schedules falsely stating that he held no fiduciary funds and had no fiduciary accounts as of the date of the affidavit.

On September 3, 2003, bar counsel sent a written request to the respondent for an accounting of all the funds he had received from the first client. Although the respondent received this letter, he intentionally failed to provide any accounting of the first client's funds to bar counsel. The respondent also intentionally failed to provide other information to bar counsel about his receipt and handling of funds he deposited into his Cape Cod account between July 31, 1997, and April 30, 2000.

The respondent's intentional failure without good cause to cooperate with bar counsel's investigation and respond to requests for information violated Mass. R. Prof. C. 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority), and 8.4(g) (lawyer shall not fail without good cause to cooperate with bar counsel's investigation of complaint) and (h).

On August 1, 2005, bar counsel filed and served a petition for discipline alleging three counts of misconduct by the respondent. On August 22, 2005, the respondent requested an extension of time to answer the petition. On August 25, 2005, the Board granted the respondent an extension until September 26, 2005, to file his answer to the petition for discipline. On September 28, 2005, the respondent requested a further extension of time in which to answer the petition for discipline. On the same date, over the objection of bar counsel, the board allowed the respondent's motion without specifying the date by which his answer would be due. The respondent failed to answer or otherwise respond to the petition for discipline.

On November 15, 2005, bar counsel moved to have the allegations in the petition for discipline against the respondent deemed admitted pursuant to Section 3.15(e) of the Board of Bar Overseers Rules. The respondent received notice of bar counsel's motion, but failed to

respond. On November 29, 2005, the board notified the respondent that the allegations in the petition for discipline had been deemed admitted and that he had waived his right to present evidence in mitigation pursuant to Section 3.15(e) and (f) of the Board of Bar Overseers Rules. The notice from the board also informed the respondent that he could move for relief from default by filing a motion, supporting affidavit(s), and a proposed answer within twenty days, and that his failure to do so would foreclose him from denying the allegations in the petition or presenting evidence in mitigation. The respondent did not move for relief within twenty days or otherwise respond to this notice.

On March 20, 2006, upon the respondent's default, the board voted to file an Information with the Supreme Judicial Court recommending that the respondent be disbarred. On April 3, 1996, the Board of Bar Overseers filed an Information recommending that the respondent be disbarred effective on the entry date of judgment.

The matter came before the Supreme Judicial Court for Suffolk County on April 21, 2006. The respondent did not appear for the hearing, but left a telephone message with the Court advising that he was unable to appear because of a medical condition. The county court ordered that, absent a letter from a physician describing the respondent's medical condition and why it prevented him from attending the hearing on or before May 12, 2006, it would accept the recommendation of the board and impose an order of disbarment. The respondent failed to submit a letter from a physician by May 12, 2006. On July 18, 2006, the county court, Cowin, J., entered a judgment of disbarment.

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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