No. BD-2006-074

IN RE: WILLIAM F. MULLEN

S.J.C. Order of Indefinite Suspension entered by Justice Spina on August 29, 2006, with an effective date of September 28, 2006.[1]

SUMMARY[2]

The respondent was indefinitely suspended for misconduct charged in a four count petition for discipline and arising from three unrelated real estate closings, as well as from commingling and record-keeping violations in his IOLTA account.

Count One

The respondent acted as settlement agent in February 2003 when an individual with whom the respondent had a friendly acquaintance refinanced certain real estate. As part of this refinancing, the respondent was required to obtain a subordination agreement as to an existing mortgage, but negligently failed to do so. As a result, the new lender was not in first position.

The owner never made a monthly mortgage payment after the refinancing. By May 2003, and as a result of the owner's failure to make monthly mortgage payments, the new lender was aware that it was not in first position. The respondent and the owner agreed in May 2003 that the owner needed to sell the property immediately to avoid imminent foreclosure. The respondent's wife owned a mortgage brokerage company and, in May 2003, the respondent contacted a broker or salesperson at this company and was referred to buyer investors known to the respondent and for whom the respondent had acted as settlement agent at a previous closing or closings.

The prospective buyers agreed to purchase the property from the owner, with the understanding that, over and above the amount of a new mortgage, they would not have to provide any funds either for a deposit or at the closing. On or about May 26, 2003, the respondent prepared, and the parties executed, a purchase and sale agreement providing for the buyers to purchase the property for $360,000.

The purchase and sale agreement prepared by the respondent falsely stated that $5000 was paid by the buyers as a deposit. No deposit was in fact paid and the respondent at all times knew that no deposit had been paid. The purchase and sale agreement prepared by the respondent also falsely stated that the purchase price of the property was $360,000. The respondent knew that this was not the true purchase price, that the actual purchase price would be based on the amount that the owner wished to net from the sale, and would in fact be $300,000, more or less.

The buyers applied for a mortgage of $306,000 from a mortgage company. The application indicated that the purchase price of the property was $360,000. The loan was approved.

On or before June 10, 2003, the respondent prepared or caused to be prepared a HUD-1 settlement statement for the sale of the real estate that he knew contained false entries. The settlement statement falsely listed the contract sales price of the property as $360,000, falsely stated that the buyers had paid a deposit of $5000 when they in fact had paid no

deposit, and falsely stated that the buyers brought cash of $58,238.10 to the closing when they in fact brought no funds to the closing.

In order to offset the fact that the buyers brought no cash to the closing, the settlement statement falsely included payoffs to a fictitious payee of two nonexistent debts purportedly owed by the seller totaling $58,238.00, the same amount (less ten cents) that the settlement statement falsely showed the buyers as having brought to the closing.

With the intent to further conceal the fact that the buyers brought no cash to the closing, the respondent on June 10, 2003, prepared or caused to be prepared, and himself signed, two checks drawn on his client fund account totaling $58,238, both payable to the fictitious payee. The respondent deposited the checks to a personal or business account. On or about June 12, 2003, the respondent purchased a treasurer's check in the amount of $58,238 payable to himself with funds from the personal or business account. The respondent deposited or caused the treasurer's check to be deposited to his client account after adding a memo noting that it was for the purchase of the property at issue.

The respondent's conduct in failing to obtain a subordination agreement for an existing mortgage after the February 2003 refinancing was in violation of Mass. R. Prof. C. 1.3. The respondent's conduct in preparing a purchase and sales agreement showing a sales price and deposit that the respondent knew to be false was in violation of Mass. R. Prof. C. 8.4(c) and (h). The respondent's conduct in preparing, and causing to be executed, a HUD-1 settlement statement containing items or information that the respondent knew to be false, was in violation of Mass. R. Prof. C. 8.4(c) and (h).

The respondent's conduct in writing checks drawn on his client account to a fictitious payee with the intent to further conceal the fact that the buyers brought no cash to the closing, and causing these funds to be transferred to a personal or business account and then redeposited to the client account, was in violation of Mass. R. Prof. C. 8.4(c) and (h) and Mass. R. Prof. C. 1.15(a) as appearing in 426 Mass. 1301, 1363 (1997), effective 1/1/98 through 6/30/04.

Count Two

In or about November 6, 2000, the respondent acted as settlement agent and conducted a closing for a purchase by a couple of certain real estate. In connection with the purchase, Real Property Solutions, Inc., was paid a broker's commission by the sellers in the amount of $13,174.94. At the time of the purchase in November 2000, the respondent and an individual named Stuart Rothman were officers of Real Property Solutions, Inc.

In order to finance the purchase of the property, the buyers obtained a first mortgage from an institutional lender. The buyers also executed, and the respondent notarized and caused to be recorded, a second mortgage in the amount of $10,500 to the sellers. The respondent knew that the sellers were not the true mortgagees, that the mortgage was false in so naming them, and that the sum of $10,500 was in fact owed by the buyers not to the sellers but to First Capital Investments, another entity in which Stuart Rothman has or at that time had an interest. The respondent entered the second mortgage on the HUD-1 settlement statement as "2nd mortgage to seller." This entry was false and the respondent knew that it was false.

On and after the November 6, 2000 closing, the respondent failed to obtain discharges for two existing mortgages on the property as to which the sellers were the mortgagors. One of the mortgages had previously been paid off but not discharged. The other mortgage was paid by the respondent after the closing in 2000 but no discharge was obtained.

On November 13, 2002, one of the buyers refinanced the property and the respondent again acted as settlement agent. In connection with this refinancing, the respondent prepared or caused to be prepared a HUD-1 settlement statement that stated the amount of the payoff of the existing first mortgage as $92,854.55. Prior to the closing, the lender had provided the

respondent with a payoff statement showing that $90,354.55 was owed as of the date of the closing. After the closing, the respondent wired or caused to be wired $90,354.55 to the lender in full payment of the mortgage.

The respondent retained in his IOLTA account the additional $2500 (the $92,864.55 shown on the HUD-1 settlement statement less the $90,354.55 actually remitted) in case the mortgage company claimed a prepayment penalty. When no prepayment penalty was thereafter assessed, the respondent negligently failed to remit the funds to the borrower.

By retaining and failing to account to the client for these funds, the respondent negligently misused $2500 of the borrower's proceeds, with actual deprivation resulting. After the borrower filed a complaint with bar counsel in August 2003 concerning other unrelated issues from the 2002 closing, and after bar counsel noticed the discrepancy in the mortgage payoff, the respondent on February 12, 2004, paid $2500 to the borrower from his IOLTA account.

The HUD-1 settlement statement prepared by the respondent for the November 13, 2002 closing also included other entries that the respondent knew were false. The settlement statement falsely listed payments in the amounts of $3056 and $1261 to two creditors; the respondent knew that he did not intend to and did not make these payments and he did not inform the lender that these payments were not made. The settlement statement also included an entry of $20,688.81 as "cash to borrower"; the respondent in fact issued the borrower a check drawn on his client account in the amount of $14,326.67.

The respondent used the difference between the $20,688.81 shown on the settlement statement and the $14,326.67 actually paid to borrower, plus a portion of the funds shown on the settlement statement as paid but in fact not remitted to creditors, to pay $8979.04 owed by the borrower to First Capital Investments. The respondent used the $1700 balance of the differential to enable the borrower to buy out her co-owner's interest in the real estate and to obtain a deed from the co-owner. The respondent intentionally omitted from the settlement statement the disbursements to First Capital Investments and to the co-owner and that the payments to two creditors had not been made.

In connection with the November 2002 refinancing, the respondent still failed to obtain discharges of the two mortgages that he had not discharged when the property was purchased in November 2000. In addition, and despite having made the payoff to First Capital Investments, the respondent also failed to obtain a discharge of the November 2000 mortgage to the sellers that actually reflected the mortgage to First Capital Investments. When the owner attempted to sell the property in 2004, title examination showed the three undischarged mortgages. After being contacted by bar counsel, the respondent obtained or caused to be obtained discharges of the three mortgages.

The respondent's negligent misuse of $2500 of the borrower's proceeds from the November 2002 closing, with actual deprivation resulting, was in violation of Mass. R. Prof. C. 1.15(a), (b) as appearing in 426 Mass. 1301, 1363 (1997), effective 1/1/98 through 6/30/04, and Mass. R. Prof. C. 8.4(h).

The respondent's preparing and causing to be executed a HUD-1 settlement statement for the November 2002 refinancing showing a mortgage payoff amount for the borrower's existing mortgage that differed from the amount actually remitted, showing other debt payoffs that the respondent knew would not be paid, intentionally omitting additional payments that the respondent knew would be made from the new mortgage funds, and falsely stating an amount of "cash to borrower" that the respondent knew the borrower would not receive, was in violation of Mass. R. Prof. C. 8.4(c) and (h).

The respondent's preparing and causing to be executed a second mortgage from the buyers to the sellers for the November 6, 2000 closing, and a HUD 1 settlement statement for this closing also showing a second mortgage to the sellers, both of which documents the

respondent knew to be false because the obligation was owed to the broker, was in violation of Mass. R. Prof. C. 8.4(c) and (h).

The respondent's conduct in failing to obtain discharges of existing mortgages in a timely manner after both the 2000 and 2002 closings was in violation of Mass. R. Prof. C. 1.1, 1.2(a) and 1.3.

Count Three

On February 26, 2003, a prospective buyer signed an offer to purchase certain real estate for $148,900. This offer listed Real Property Solutions, Inc. as "seller's broker" and was accepted by the sellers on March 2, 2003.

On or about March 17, 2003, an appraiser retained by a mortgage broker valued the property at $140,000. In late March 2003, a purchase and sales agreement was signed by the parties showing a purchase price of $140,000. The agreement further stated that the buyer had paid deposits totaling $6900, that the seller agreed to pay $5000 in closing costs on behalf of the buyer and that Real Property Solutions, Inc. would be paid a previously agreed-upon broker's fees by the seller.

In or before May 2003, the respondent was designated as the closing attorney by the lender. On or about May 25, 2003, the respondent received a fax from Stuart Rothman of Real Property Solutions, Inc. concerning this property. The fax indicated, among other information, that the "price for closing" was $140,000, that "outside closing" would be a second mortgage to First Capital Investments for $8900, and that "my commission is the 2nd mort" [sic].

On or about May 30, 2003, the lender provided the respondent with documents entitled "Purchase Debts & Disbursements" and "Escrow/Lender's Instructions" for the mortgage loan. The "Purchase Debts & Disbursements" sheet showed a purchase price of $140,000 and settlement charges of $7559.76, to be paid from a mortgage loan of $119,000 and "borrower credits" of $5000, with the balance of funds needed to close shown as "deposits" of $6900 and $16,256.56 from the borrower. The "Escrow/Lender's Instructions" to the respondent provided that "the total consideration in this transaction except for our loan and approved secondary financing, if any, must pass in the form of cash through your escrow." The respondent signed the escrow/lender's instructions document, acknowledging and agreeing to disburse all loan funds "only as shown on the final HUD..."

On May 31, 2003, the respondent conducted the closing. In connection with this closing, the respondent prepared or caused to be prepared a HUD-1 settlement statement that showed, among other items, a purchase price of $140,000, seller's credits to the buyer of $5000, "cash from buyer" of $16,256.56 and "cash to seller" of $63,940.38. The spaces on the second page of the settlement statement where a broker's commission would be shown were blank.

The respondent prepared, and the buyer executed, a promissory note and second mortgage in the amount of $8900 to First Capital Investments. The respondent witnessed the note and notarized the mortgage. By executing this note and mortgage, the buyer was assuming the sellers' liability for the real estate broker's commission in accordance with the May 25, 2003 fax from Stuart Rothman of Real Property Solutions, thereby increasing the purchase price of the property to the originally agreed upon $148,900.

The respondent knew that, contrary to the entry on the settlement statement, the sellers did not provide the buyer with a credit of $5000. The buyer brought $21,700 to the closing, not $16,256.56 as stated on the HUD settlement statement, and the respondent processed the check from the buyer for $21,700 through his client account. The sellers received net proceeds of $68,940.38 by check drawn on the respondent's client account, not $63,940.38 as stated on the settlement statement. The balance of $443.44 was refunded by the respondent to the buyer.

The settlement statement that the respondent prepared or caused to be prepared, and that he signed, was not a true and accurate account of the transaction and the respondent did not cause the funds to be disbursed in accordance with the statement. The true purchase price was $148,900, not $140,000, and the buyer did not receive credits of $5000 from the sellers. The respondent signed the HUD-1 settlement statement on page 2 as settlement agent, stating that it was a true and accurate account of the transaction and that "I have caused or will cause" the funds to be disbursed in accordance with the statement.

The respondent's conduct in preparing, and causing to be executed, a HUD-1 settlement statement containing items or information that the respondent knew were not true or accurate was in violation of Mass. R. Prof. C. 8.4(h).

Count Four

In or about May, 2002, the respondent opened an IOLTA account entitled Attorney William Mullen IOLTA Account. From 2002 until 2004, the IOLTA account was used by the respondent to conduct real estate closings as settlement agent.

The IOLTA account was a commingled account in which the respondent held, or to which he transferred, personal funds. The respondent also failed to withdraw fees promptly when earned after closings and instead allowed fees to accumulate. Between January 2003 and August 2003, the balance of the respondent's personal funds in the IOLTA account, by his own accounting, was at all times more than $20,000.

The respondent's record keeping for this IOLTA account was generally inadequate. As of October 31, 2004, by the respondent's own accounting, certain client ledgers showed negative balances, other ledgers showed positive balances dating back to 2003, and many transactions, both debits and credits, were unidentified by client matter. The respondent's reconciliation of the account as of that date shows $73,194.47 in uncleared checks and payments between November 2002 and February 2004 and $110,918.18 in uncleared deposits between September 2002 and February 2004.

The respondent's commingling and inadequate and improper record keeping was conduct in violation of Mass. R. Prof. C. 1.1 and 1.3, and of Mass. R. Prof. C. 1.15(a), (b) and (d) as appearing in 426 Mass. 1301, 1363 (1997), effective 1/1/98 through 6/30/04, and of Mass. R. Prof. C. 1.15(b), (c) and (f) of the rule in effect as of 7/1/04.

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 August 14, 2006, the Board voted to accept the stipulation and to recommend the agreed-upon disposition to the Supreme Judicial Court. The Court so ordered on August 29, 2006.

[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.