

IN RE: EUGENE W. DOWNING, JR.

S.J.C. Judgment of Resignation As A Disciplinary Sanction entered by Justice Ireland on March 16, 2007.¹

SUMMARY²

Bar Counsel filed a three-count Petition for Discipline against the respondent on July 26, 2006. On January 23, 2007, the respondent submitted to the Board of Bar Overseers an affidavit of resignation from the practice of law pursuant to Supreme Judicial Court Rule 4:01, §15. In his affidavit, the respondent admitted that the following material facts and disciplinary rule violations set forth in the petition can be established by sufficient evidence.

Count One: The client, a leasing company, retained the respondent in 2005 to collect a debt owed to it. In August of 2005, the respondent filed a civil suit on behalf of the client in the Cambridge Division of the District Court Department. On September 22, 2005, the defendant offered, and the client accepted, a settlement in the amount of \$17,500. On or about September 30, 2005, the defendant sent the respondent a settlement check payable to the client. The respondent deposited this check to an account at Citizens Bank entitled Client Trust Acct ("the client account"). After the deposit of the settlement on September 30, 2005, the balance in the client account was \$20,514.58. Net of the respondent's fees and expenses, the client was due \$11,693.72.

Between September 30, 2005 and October 6, 2005, the respondent intentionally expended the client's funds for his own business or personal purposes or those of other clients, with intent to deprive the client of the funds. The client was actually deprived, at least temporarily, of its funds.

By October 7, 2005, the balance in the account was \$15.00, without any payment to or for the benefit of the client.

On October 6, 2005, the client's controller telephoned the respondent to inquire if the settlement check had been received. The respondent advised the controller that the check would be sent the following week. This answer was false and the respondent knew that it was false. The respondent knew that the funds had been received six days earlier and had been expended. Between mid October and early November, 2005, the controller made numerous unsuccessful attempts to contact the respondent.

On November 9, 2005, the controller spoke with the respondent and the respondent stated that he would bring the controller the check for the client's share of the settlement on November 11, 2005. The respondent did not appear on November 11, but on November 15, 2005, the respondent came to the controller's office with a check payable to the client in the amount of \$11,693.72 drawn on the client account.

However, on November 15, 2005, the respondent's client account was in fact in overdraft. The controller called, or had already called, Citizens Bank and was informed that the account did not hold sufficient funds to pay the check. The controller so advised the respondent on November 15, 2005 and the respondent promised to return with a cashier's check. The

respondent did not return, but told the controller when the controller later telephoned him that he would bring the funds the next day. The respondent did not bring the funds on November 16, 2005 or thereafter.

On or about November 21, 2005, the client filed a complaint against the respondent with bar counsel. On or about November 23, 2005, the client retained new counsel and filed a civil suit against the respondent seeking payment of the settlement. In March of 2006, the respondent obtained a bank loan and paid \$11,893.88 in full settlement of the client's claim.

The respondent's misappropriation of the client share of the settlement funds, with actual deprivation resulting, is conduct in violation of Mass. R. Prof. C. 8.4(c) and (h) and Mass. R. Prof. C. 1.15(b), (c) and (d).

The respondent's intentional misrepresentation to the client's controller on October 6, 2005 that the settlement funds had not yet been received, and his attempt to pay the client on November 15, 2005 with a check drawn on his client account that he knew would be dishonored, is conduct in violation of Mass. R. Prof. C. 8.4(c) and (h).

Count Two: Prior to 2004, the respondent was retained to represent an individual in a personal injury claim. On December 22, 2004, the respondent deposited a check in the amount of \$10,000 to his client account, payable to the client and the respondent, in settlement of the client's claim.

Prior to the deposit of the client's settlement on December 22, 2004, the respondent's client account was in overdraft with a negative balance of (\$2,435.56). The account had been in overdraft continuously since December 8, 2004, with a negative balance that varied from a low of (\$904.45) to a high of (\$3,904.43). During this period, a check written by the respondent to a collection agency client, in the amount of \$2,366.64 and bearing the memo "August 2004," was returned on December 17, 2004 on account of insufficient funds.

The bank applied the \$10,000 deposit of the client's settlement funds to the \$2,435.56 overdraft, such that the balance immediately following the deposit was only \$7,564.44. Thereafter, between December 27, 2004 and January 11, 2005, the respondent expended a substantial portion of the client's settlement funds for his own purposes or those of other clients, with actual deprivation to the client resulting. As of January 11, 2005, the balance in the trust account was \$2219.32 without any payment to or for the benefit of the client.

On December 27, 2004, the respondent issued a check in the amount of \$6,667 to the client as the client's share of the settlement. The client submitted this check for payment on or about January 12, 2005. The check was returned by the bank on January 13, 2005 on account of insufficient funds. Payment of the check would have created an overdraft in the amount of \$4,447.58. On January 27, 2005, the respondent purchased a bank check drawn on Belmont Savings Bank in the amount of \$6,700 and remitted this sum to the client.

The respondent's misuse of the client's funds with actual deprivation resulting, is conduct in violation of Mass. R. Prof. C. 8.4(c) and (h) and Mass. R. Prof. C. 1.15(b), (c) and (d).

Count Three: The respondent's Citizens Bank client account was a pooled account into which the respondent deposited trust funds for multiple clients. It was not an IOLTA account as required by Mass. R. Prof. C. 1.15(e)(5) and the respondent did not maintain records for this account in compliance with Mass. R. Prof. C. 1.15(f). The client account was also a commingled account from which the respondent made disbursements both to clients and to or for his own personal or business purposes.

Commencing in or before November 2004 and continuing through December 2005, at least ten checks payable to clients (including the client in the second count) and others drawn by the respondent on the client account were returned by Citizens Bank because of insufficient funds

and either reissued by the respondent or paid after being resubmitted by the payees. In addition, there were at least 15 checks paid by the bank during this time period that created overdrafts in the account.

The returned checks and overdrafts in the client account in and after November 2004 resulted from the respondent's mismanagement of the client account and from his misuse of trust funds, with deprivation to clients resulting at least temporarily.

The respondent's commingling of business and personal funds in the client account in and after November 2004, his failure to maintain pooled trust funds in an IOLTA account, and his failure to maintain required records for his client account, is conduct in violation of Mass. R. Prof. C. 1.15(b), (e)(5) and (f).

The respondent's misuse of trust funds with actual deprivation resulting, is conduct in violation of Mass. R. Prof. C. 8.4(c) and (h) and Mass. R. Prof. C. 1.15(b), (c) and (d).

On February 12, 2007, the Board voted to recommend that the Supreme Judicial Court accept the respondent's affidavit of resignation as a disciplinary sanction. On March 19, 2007, the Supreme Judicial Court for Suffolk County entered a Judgment accepting the respondent's resignation as a disciplinary sanction and striking the respondent's name from the Roll of Attorneys.

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 filed with the Supreme Judicial Court.

Please direct all questions to webmaster@massbbo.org.

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