NO. BD-2007-0031

IN RE: KATHRYN S. RAGAN

S.J.C. Order of Indefinite Suspension entered by Justice Ireland on April 26, 2007, with an effective date of May 19, 2007.[1]

HEARING REPORT

On August 8, 2005, bar counsel filed a petition for discipline against the respondent, Kathryn S. Ragan. The petition for discipline alleged two counts of misconduct. The respondent, represented by counsel, filed an answer on September 8, 2005.

On October 27, 2005, bar counsel's motion for issue preclusion with respect to certain facts in Count Two was allowed in part and denied in part.[2] On June 26, 2006, the Board Chair, responding to the respondent's motion for reconsideration of the order on issue preclusion, affirmed the prior ruling.

On May 25, 2006, pursuant to Chapter Four of the Rules of the Supreme Judicial Court, 4:01, § 8(3), and the applicable Rules of the Board of Bar Overseers, this proceeding was assigned to me as a Special Hearing Officer.[3]

A hearing was held on the two counts on October 3, 2006. Forty-seven exhibits were admitted into evidence. A stipulation of the parties dated October 3, 2006 was also filed. Two witnesses, respondent Kathryn S. Ragan and Blaize Conte, testified at the hearing. The parties filed their proposed findings of fact, conclusions of law and recommendations for discipline on November 22, 2006.

I. Findings of Fact and Conclusions of Law

1. The respondent, Kathryn S. Ragan was admitted to the Massachusetts bar on December 19, 1989. (Ans. ¶2)
2. At all relevant times, she has been a solo practitioner in Boston. (Ans. ¶2)

Count One - Findings of Fact

3. As a consequence of a motor vehicle accident in which the respondent's client, Blaize Conte, was involved on March 4, 1999, the respondent filed a complaint on his behalf in the Quincy District Court. (Ex. 1) Prior to trial, the claim was settled for $7,250 and on July 30, 2003, a settlement draft in that amount was issued by Safety Insurance Company, payable to the respondent and Mr. Conte. (Ex. 3; Ans. ¶3; Tr. 27-28 respondent, 136 Conte)
4. The respondent admits that, net of her contingent fee and costs, Mr. Conte's share of the settlement was $4,496.10. (Ans. ¶4; Tr. 29 respondent; Ex. 2) Mr. Conte and the respondent agreed that the respondent would hold his share in trust until he requested his funds. (Ans. ¶4; Tr. 29 respondent, 137 Conte)
5. On or about August 5, 2003, the respondent deposited the $7,250 settlement check into her existing interest-bearing account entitled "Kathryn Ragan Trustee Account," No. 1146-340535, at Citizens Bank. (Ans. ¶5; Ex. 4, Ex. 5, p. 25; see Ex. 9)
6. This so-called trustee account had been opened by the respondent in 1998. (Tr. 29-31

respondent; Ex. 42) It was not an IOLTA account (Ans. ¶5; Tr. 30) and was used by the respondent for various purposes, including the deposit of earned fees and settlements, payment of respondent's business expenses, and to cover overdrafts in her Citizens Bank operating/business account, #110210-739-2. (Ex. 5, Ex. 11; Tr. 32, 46-47 respondent) The respondent also maintained an IOLTA account, but did not use it during the 2003 period (Ex. 17) because she claimed she was not clear on how to use her IOLTA account (Tr. 30-31, 34-35, 37 respondent) – an excuse which I do not credit, especially in light of a 1997 admonition to the respondent for commingling client and attorney funds and failing to maintain proper IOLTA records, which resulted in the dishonor of an IOLTA check, and for which she was required to attend a CLE course. (Ex. 47)

7. Before the Conte settlement check was deposited into the trustee account on August 5, 2003, there was an existing balance of $18.22 in the account. (Ans. ¶6; Tr. 37-38 respondent; Ex. 5, p. 26)
8. On August 7, 2003, the respondent withdrew her contingent fee on the Conte case from the trustee account in the amount of $2,417. (Ans. ¶7; Tr. 38, 52 respondent)
9. Evidence that the trustee account was used by the respondent for the deposit of earned fees and settlement funds was clear and convincing. For example, Exhibit 5, p. 17, reflects a deposit on April 11, 2002 of $15,000.00, which the respondent admitted were the settlement proceeds for a client named Kouloris. (Tr. 32-34 respondent; Ex. 6, Ex. 7) Exhibit 5, p. 15 also reflects a deposit into the trustee account on February 12, 2002 of $300.00 and on February 25, 2002 of $850.00, which the respondent admitted were earned fees. (Tr. 31-32 respondent)
10. The exhibits and testimony of the respondent also clearly demonstrate that the funds of her client, Mr. Conte, were withdrawn from the trustee account and used in large part to pay overdrafts in her Citizens Bank operating/business account. (Ex. 5, Ex. 11) For example Exhibit 5, p. 25, a Citizen Bank statement for the Kathryn Ragan Trustee Account for the period July 1, 2003 through September 30, 2003, shows the following scheduled transfers and withdrawals:

9-16-03	$789.69	Scheduled Transfer
9-17-03	$487.07	Scheduled Transfer
9-18-03	$ 46.00	Scheduled Transfer
9-19-03	$ 94.56	Scheduled Transfer
9-26-03	$100.00	Withdrawal
9-29-03	$200.00	Withdrawal

A "scheduled transfer" arose as a consequence of an arrangement made by the respondent and Citizens Bank, pursuant to which the respondent authorized the bank to withdraw available funds from her trustee account to cover overdrafts (checks issued by respondent which would not be honored by Citizens due to insufficient funds) in her operating account. (Tr. 39-40, 46-47 respondent; see Ex. 5 and Ex. 11) The so-called scheduled transfers were made automatically by the bank and were reflected in the statements sent to the respondent. (See Ex. 5 and Ex. 11) "Withdrawals" were amounts taken by the respondent from her trustee account in cash.[4] (Ex. 5, p. 25, Ex. 8; see Tr. 38-39, 52 respondent)

11. After taking out her contingent fee and the costs and expenses, the respondent should have been holding $4,496.10 for Mr. Conte in the trustee account. (Ex. 2; Tr. 29 respondent)
12. 12. Exhibit 5, p. 26, the Citizens Bank statement for the trustee account shows a balance of $3,139.10 for the period ending September 30, 2003. (Tr. 40-41 respondent) Exhibit 5, p. 27, also shows a series of scheduled transfers for the period October 1, 2003 to December 31, 2003. Specifically those scheduled transfers were as follows:

10-7-03	$926.83
10-10-03	$ 15.00
10-31-03	$544.99
11-17-03	$974.58
11-21-03	$469.88

The balance on hand in the trustee account on December 31, 2003 was $203.05. (Tr. 41 respondent; Ex. 5, p. 27)

13. Exhibit 5, p. 28, also reflects several scheduled transfers for the period January 1, 2004 to March 31, 2004. These were:

1-8-04	$49.99
1-12-04	$15.00
3-23-04	$ 9.29

The balance on hand in the trustee account as of March 31, 2004 was $122.86. (Ex. 5, p. 28)

14. During the period July 1, 2003 to March 31, 2004, other than the Conte settlement check of $7,250.00 and small amounts of interest earned on balances in the account, no other deposits were made. (Ex. 5)
15. No payments were made to Mr. Conte prior to April 5, 2004. (Tr. 41-42 respondent)
16. The respondent admitted that she was aware there were overdrafts and returned checks occurring in her business account during the 2003 and 2004 period, but did not ask her accountant, John Horan, how they were being paid. (Tr. 43-45 respondent) Mr. Horan was hired by the respondent to handle her financial matters, pay her bills, and handle her books. (Tr. 42 respondent) The respondent fired Mr. Horan, who did not testify at this disciplinary hearing, in December 2003, at which time he returned her papers to her, including Exhibits 10 (trustee account register), 13 (operating account register), 14 (operating account register), 15 (unpaid bills detail) and 18 (IOLTA register).[5] (Tr. 45, 49-50, 60-61 respondent; Ex. 46, p. 68 respondent) The respondent admitted that she also received the quarterly bank statement for the trustee account, covering the period from October 1, 2003 through December 31, 2003, in January 2004, showing the scheduled transfers out of the trustee account during that time, and the balance as of December 31, 2003 of $203.05. (Ex. 46, pp. 77-78 respondent; see Ex. 5, p. 27) In addition, the respondent admitted that she received the monthly bank statements for the operating account, and that the statement for January 2004 showed scheduled transfers from the trustee account to the operating account. (Tr. 65-66 respondent; Ex. 46, p. 79 respondent)
17. At least during the period July 2003 through December 31, 2003, the respondent was woefully behind in the payment of her personal and professional bills. (Tr. 61, 63 respondent; Ex. 15) Exhibit 15, prepared by Mr. Horan, reflects that the respondent owed over $10,000.00 in unpaid bills for car payments, home mortgage, utilities, credit cards, and other debts. (See Tr. 60-61 respondent) Her homeowners' and lawyer's malpractice insurance had been cancelled for non-payment of premiums. (Tr. 61 respondent)
18. Sometime in November 2003, Mr. Conte contacted the respondent and asked her to prepare a trust called the A.B.T. Trust. (Ex. 19; Tr. 55 respondent) Mr. Conte testified that he and the respondent agreed that a fee of $375.00 would be due to respondent for preparing the trust and was to be taken from the funds the respondent was holding for him. (Tr. 138 Conte) The respondent testified that there was no discussion with Mr. Conte as to the amount of the fee to be paid, but that she understood she was to be paid a reasonable fee from Mr. Conte's money, which she had agreed to hold for him (Tr. 56-58, 79 respondent; Ex. 46, pp. 74-75 respondent), but which had been almost entirely expended by November 2003 to cover her personal overdrafts. (Ex. 5, p. 27)

19. In my view of the facts, it makes no difference as to which fee arrangement is the more credible or truthful. The fact is that Mr. Conte's net settlement proceeds were deposited neither into an IOLTA account nor into a separate interest-bearing account for him as required by the disciplinary rules. (Ex. 5; Tr. 29-30 respondent) Further, whether the fee to be paid the respondent for drafting the trust was to be $375.00 or some other larger amount is irrelevant because most of Mr. Conte's money had already been spent down by that time by the respondent for her business or personal purposes.[6] (Ex. 5, Ex. 11)
20. The A.B.T. Trust was executed by Mr. Conte on December 16, 2003 (Ex. 19), but, as set forth below, the respondent did not prepare or send a bill to Mr. Conte (Ans. ¶¶11, 16) until late April 2004. (Ex. 2)
21. I credit Mr. Conte's testimony that, in late March or early April 2004, he either called or met the respondent in her office and told her he needed all of the money she was holding for him by April 5, 2004, to purchase a residence. (Tr. 139-140, 144 Conte; Ex. 1, Ex. 46, pp. 30-32 Conte; see Ex. 22) I credit Mr. Conte's testimony that the respondent told Mr. Conte that she did not have the money on hand but would "pull in favors" to get it.[7] (Tr. 140 Conte; Ex. 46, p. 32 Conte) I credit Mr. Conte's testimony that they talked later and the respondent said that she could come up with $2,000 by April 5, but he told her he needed all of the money before then. (Ex. 46, p. 32 Conte)
22. The respondent deposited $1,455.84 on April 5, 2004, into the A.B.T. Trust account. (Ex. 20, Ex. 21) Later the same day, she deposited $234.16 into that account for a total of $1,690.00. (Ex. 20, Ex. 21) I credit Mr. Conte's testimony that he called her that afternoon and that the respondent promised him she would deposit the balance of his money into his account by Friday, April 9. (Tr. 143-144 Conte; Ex. 46, p. 34 Conte) On April 9, the respondent deposited a further sum of $310.00 into the account, for a total of $2,000.00 from the three deposits. (Ex. 20; Ans. ¶14) Again, that afternoon Mr. Conte called the respondent to complain that he had not received all of his funds. (Tr. 143 Conte; Ex. 46, p. 35 Conte) The respondent claimed there was some confusion, that she had only agreed to get him $2,000 by Friday, April 9, and that she would get him the rest of the money at some point. (Tr. 143 Conte) Mr. Conte therefore contacted bar counsel and filed a complaint, dated April 10, 2004. (Ans. ¶15; Ex. 1; Tr. 143-144 Conte) On April 20, 2004, bar counsel forwarded Mr. Conte's complaint to the respondent. (Ex. 1)
23. On April 26, 2004, the respondent remitted to Mr. Conte the sum of $1,286.42, which, in her view, was the balance of the money due to him. (Ex. 25; Ans. ¶15) This payment was made after the initial contact by bar counsel with the respondent. (Ex. 1, Ex. 25; see Tr. 77-78 respondent) With the check, the respondent also sent Mr. Conte a letter and a bill for her services in drafting the trust. (Ex. 2) In calculating the amount due to Mr. Conte, the respondent, without Mr. Conte's knowledge or permission, deducted $1,260 as a fee for drafting the A.B.T. Trust, calculated at $150 per hour of service, an amount to which Mr. Conte had never agreed.[8]
24. I am persuaded by the weight of the evidence that the respondent knew that she was spending Mr. Conte's funds, entrusted to her for safekeeping, in order to pay her business and personal obligations, and I do not credit her testimony to the contrary. (See Tr. 42-45, 53, 63 respondent; Ex. 46, pp. 58-63 respondent) Thus, her misuse of Mr. Conte's funds was knowing and intentional. This finding is supported by the following:
    a. The respondent withdrew her contingent fee from the trustee account in August 2003, shortly after the deposit of the Conte settlement funds. (Ex. 5; Tr. 38 respondent) About a month later, she made two withdrawals totaling $300, approximately the amount of the costs and expenses attributable to the Conte matter. (Ex. 2, Ex. 5) It is apparent that the respondent was aware that the Conte funds were in her trustee account and that she knew the amount she should be holding on Mr. Conte's behalf.
    b. The respondent admitted that she knew in 2002 that the bank was automatically transferring funds from the trustee account to her operating account. (Tr. 47 respondent) Indeed, the respondent admitted she set up the account that way in 1998. (Tr. 46 respondent; Ex. 46, pp. 63-64 respondent) I therefore do not credit

her testimony that in 2003 she did not recall that the trustee account was set up in this manner. (See Tr. 42-45, 121-122 respondent)

c. In December 2003, after completing the trust, the respondent did not bill Mr. Conte for her work. (Ans. ¶¶11, 16; Ex. 2; Tr. 58-59 respondent) Indeed, no such bill was sent until late April 2004, after Mr. Conte had requested his funds and she had been unable to pay him. (Ex. 2; Tr. 77-78 respondent) I infer from the fact that she did not bill him in December 2003, at a point when she admittedly needed funds due to serious financial problems (Tr. 60-61 respondent), that she knew that she had spent most of his funds and did not want to raise any issue with him regarding those funds.

d. The respondent admitted that, in late December 2003/early January 2004, she received her bank account records from Mr. Horan, including the records for the trustee account and her operating/business account. (Tr. 45, 49-50, 60-61 respondent; Ex. 46, p. 68 respondent) In addition, the respondent admitted that she received bank statements every month for the operating account, and quarterly statements for the trustee account, starting in January 2004 for the prior quarter. (Tr. 65-66 respondent; Ex. 46, pp. 77-79 respondent; see Ex. 5, Ex. 11) Those statements reflected the scheduled transfers from one account to another. (Ex. 5, Ex. 11) Thus, the respondent must have known at least by early January of these transfers, and the use of the Conte funds to cover her overdrafts, yet she allowed them to continue through the next several months. (See Ex. 5, Ex. 11)

e. In late March/early April 2004, when Mr. Conte requested that the respondent provide him with all the funds she was holding on his behalf for a closing on April 5, the respondent informed him that she did not have the funds and would have to raise some funds to pay him. (Tr. 140 Conte; Ex. 46, p. 32 Conte; see Ex. 41) Thus, the respondent knew at that time that the Conte funds in the trustee account had been spent, and therefore must have known of the scheduled transfers using those funds to cover the overdrafts in her business account.

25. I find that during the period after August 5, 2003, the client, Mr. Conte, was actually deprived of the interest that his funds would have earned. (See Ex. 5) Of course, when Mr. Conte demanded that the respondent return his money to him by April 5, 2004, and the respondent was able to comply only partially by depositing $1,690.00 into his account (with another $310.00 on April 9 and an additional $1,286.42 on April 26),these circumstances also gave rise to Mr. Conte's actual deprivation of his funds. (Tr. 139-140, 143-144 Conte; Ex. 2, Ex. 20, Ex. 21, Ex. 46, pp. 30-32, 34-35 Conte)
26. In September 2004, after discussion with bar counsel, the respondent returned the disputed sum, $885, to escrow pending resolution of the disagreement. (Ans. ¶17; Ex. 27)
27. In February 2006, the respondent remitted $885 to Mr. Conte, the balance of the disputed fee ($1,260 - $375 = $885). (Tr. 80 respondent, 146 Conte; Bar Counsel's Proposed Findings, p. 11 n.4)

Count One - Conclusions of Law

28. The respondent's conduct in commingling trust funds with personal funds, and in depositing and maintaining trust funds in an account that was neither an IOLTA account nor an individual trust account, violated Mass. R. Prof. C. 1.15(a) and (e), as appearing in 426 Mass. 1301, 1363 (1997), effective 1/1/98 through 6/30/04.
29. The respondent's conduct in repeatedly and knowingly misusing Mr. Conte's funds to pay the respondent's personal or business obligations, constituted intentional conversion of trust funds with actual deprivation to the client resulting, in violation of Mass. R. Prof. C. 1.15(a) and (b), as appearing in 426 Mass. 1301, 1363 (1997), effective 1/1/98 through 6/30/04, and Mass. R. Prof. C. 8.4(c) (dishonesty, fraud, deceit or misrepresentation) and (h) (conduct adversely reflecting on fitness to practice).
30. Bar counsel charges that, alternatively, the respondent's conduct in negligently failing to safeguard Mr. Conte's trust funds, resulting in the misapplication and misuse of these trust funds to pay the respondent's personal or business obligations, constituted

negligent conversion of trust funds with actual deprivation to the client resulting, in violation of Mass. R. Prof. C. 1.15(a) and (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). Having found that the respondent's misuse of Mr. Conte's funds was intentional, I must reject this alternative charge.

31. The respondent's conduct in paying herself a legal fee that was disputed by the client violated Mass. R. Prof. C. 1.15(c), as appearing in 426 Mass. 1301, 1363 (1997), effective 1/1/98 through 6/30/04. The evidence shows that the respondent placed the disputed amount in escrow after being advised by bar counsel that Mr. Conte disputed the fee. On these facts, I do not find a violation of the charged disciplinary rules.

Count Two - Findings of Fact

32. In or about 1990, the respondent was appointed to represent Joseph LaVita[9] in a criminal case. (Ans. ¶22; Ex. 46, p. 95 respondent) During the next two years, the respondent represented Mr. LaVita and other members of his family in various matters. (Ans. ¶22) Mr. LaVita also occasionally worked for the respondent, doing maintenance work at her home and office. (Ans. ¶22; Ex. 46, p. 96 respondent)
33. On August 17, 1992, Melrose police officers came to Mr. LaVita's home in Melrose to execute an arrest warrant issued by the Saugus Police Department. (Ans. ¶23; Ex. 33, pp. 10-14)
34. Mr. LaVita attempted to escape arrest. (Ans. ¶24) The police officers pursued him and he was arrested outside his home. (Ans. ¶24) He claimed to have been injured and was taken by the Melrose police to Melrose-Wakefield Hospital. (Ans. ¶24) An x-ray taken at the hospital showed a "significant compression fracture of the L2 lumbar vertebra." (Ex. 33, pp. 28-29, Ex. 40, p. 22, quoting from Mr. LaVita's medical records)
35. I credit the respondent's testimony that she visited Mr. LaVita briefly at the hospital, having been called by a relative of his. (Tr. 90-92 respondent) Mr. LaVita was lying on a board in a small room, with some of his family, Melrose police officers, doctors, and nurses present. (Ex. 46, pp. 100-101 respondent; Tr. 91 respondent) The emergency room doctor showed her the x-ray and said that Mr. LaVita had a compression fracture in his spine. (Tr. 92 respondent; Ex. 46, pp. 101-102 respondent) I credit her testimony that she was there for fifteen to twenty minutes and then left because she assumed Mr. LaVita would be kept in the hospital overnight. (Tr. 92 respondent; Ex. 46, pp. 102-103 respondent)
36. Later that evening, the respondent received another call from a relative of Mr. LaVita, asking her to go to the Saugus police station because Mr. LaVita was being held there. (Tr. 97 respondent; Ex. 46, pp. 106-107 respondent) After arriving there, she spoke to Mr. LaVita through the bars of his cell and asked him what had happened. (Tr. 100 respondent) I credit the respondent's testimony that Mr. LaVita told her that the doctor in the emergency room had recommended that Mr. LaVita have a CAT scan to evaluate his condition more fully, but the police had refused to allow it and took him to the Saugus jail. (Tr. 100-101 respondent; Ex. 46, pp. 102-109 respondent) During this time, Mr. LaVita was lying on the same board as he had been in the hospital. (Tr. 101 respondent) He did not say that he needed medical assistance at that time. (Tr. 101-102 respondent; Ex. 46, p. 109 respondent)[10] I credit the respondent's testimony that she was there for about five minutes. (Tr. 110 respondent)
37. On the morning after Mr. LaVita's arrest, he was transported to Lynn District Court for a hearing. (Ans. ¶27; Tr. 102 respondent) The respondent did not represent him at that hearing. (Ans. ¶27; Tr. 102-103 respondent) After the hearing, Mr. LaVita was incarcerated at the Essex House of Corrections. (Ans. ¶27; Tr. 103-104 respondent) The respondent thereafter represented him in clearing up his default warrants and he was released from the house of corrections in early September 1992. (Ans. ¶27; Tr. 104-106 respondent) Mr. LaVita was then convicted of larceny in January 1993 and incarcerated until the spring of 1993. (Ans. ¶27; Tr. 107 respondent)
38. When he was out of jail, Mr. LaVita continued to work for the respondent on occasion,

doing maintenance work at her office and other odd jobs. (Tr. 108-113, 116 respondent)

39. In late June 1993, the respondent gave a telephone reference for Mr. LaVita to Favorite Nurses, a home health aide agency. (Ex. 35) According to the written notes, the respondent told the agency that Mr. LaVita maintained the building and helped with odd jobs in the office and had been doing so since 1990. (Ex. 35) She also stated that his health was above average. (Ex. 35)
40. In early September 1993, the respondent filled out a reference form for Mr. LaVita for Metropolitan Nursing Services, Inc., also a home health aide agency. (Ex. 36) In the reference, the respondent stated that Mr. LaVita had done office work for her from 1990 to the present, that he was still working for her as needed, and that his health was good. (Ex. 36)
41. I credit the respondent's testimony that during 1993 when Mr. LaVita performed occasional work for her, he appeared normal and that was the basis for her reference letters. (Tr. 116 respondent)
42. On August 15, 1994, the respondent sent presentment letters in accordance with G.L. c. 258 to the Saugus and Melrose clerk's offices. (Ex. 28, Ex. 29) In the letters, the respondent alleged, among others, that the Melrose police used unnecessary and excessive force in arresting Mr. LaVita, causing him serious and permanent injury; that he was transported to the hospital, but before the evaluation could be completed, he was removed by Saugus police, causing exacerbation of his injuries. (Ex. 28, Ex. 29) The respondent further alleged that Mr. LaVita had spent considerable time in an orthopedic brace, had been referred for possible surgery, and had been unable to perform the usual tasks of a home health aide, although he had returned to work with the limitations imposed by his condition. (Ex. 28, Ex. 29)
43. On or about August 15, 1995, the respondent filed a civil suit in federal district court on behalf of Mr. LaVita against members of the Saugus and Melrose police departments, the City of Melrose, and the Town of Saugus, LaVita v. Bloom et al. (Ans. ¶31) The claims against the city and town were later dismissed by agreement. (Ans. ¶31)
44. A second amended complaint was filed which alleged, in pertinent part, that Mr. LaVita had been deprived of his constitutional and civil rights because the Melrose police officers used excessive force in effecting his arrest, and because the Melrose and Saugus police officers were deliberately indifferent to his medical condition and need for treatment. (Ans. ¶32; Ex. 31)
45. This complaint alleged, among other matters, that the Melrose officers injured Mr. LaVita; and that the Saugus officers removed Mr. LaVita from the hospital to the Saugus jail before an MRI could be performed and then denied him prescribed medicine while he was at the Saugus jail. (Ans. ¶33; Ex. 31) The complaint further alleged that Neil Meehan was one of those officers. (Ans. ¶33; Ex. 31)
46. In September 1996, the Saugus defendants filed a motion to compel the respondent's attendance at a deposition and for sanctions. (Ex. 30) The respondent filed an objection and a motion for protective order. (Ex. 30; see Ex. 39) The defendants' motions were denied and the respondent's motion for protective order was granted. (Ex. 30; see Ex. 39) Thereafter, the respondent stipulated that she would not testify for the plaintiff at trial under any circumstances (see Ex. 39), and the defendants advised the court that they would not be calling her as a witness. (Ex. 30) In addition, prior to trial, the magistrate judge ruled that the evidence would be presented in such a way that the respondent would not be made a witness, because otherwise she would have to withdraw and have new counsel represent Mr. LaVita; he therefore excluded evidence concerning the respondent's presence at the hospital and the police station as well as testimony about the work Mr. LaVita performed for the respondent. (Ex. 33, pp. 96-97)
47. Also as part of the civil suit, the respondent pursued a claim on Mr. LaVita's behalf for lost wages. (Ans. ¶35; Ex. 31) In October 1997, with trial scheduled for November 1997, the respondent filed a motion in limine to exclude Mr. LaVita's employment records obtained by the defendants, from the evidence at trial. (Ans. ¶35; Ex. 30) After the motion was denied, the respondent filed a motion to withdraw Mr. LaVita's claim for lost wages, which was allowed on October 23, 1997. (Ans. ¶35; Ex., Ex. 40, p. 6; Tr. 127-128 respondent) I credit the respondent's testimony that this was a strategy decision because

the employment records were damaging in showing that, although Mr. LaVita had held various jobs for relatively short periods as a home health aide and as a stock clerk, he had not quit because of his back problems, but had been fired for other reasons. (Tr. 127-128 respondent; see Ex. 33, pp. 89-96, 136-140, Ex. 34, pp. 36-37, Ex. 40, pp. 17-22)

48. In November 1997, after the close of the evidence, the magistrate judge entered a directed verdict in favor of Saugus Police Officer Meehan on the claim of deliberate indifference to Mr. LaVita's medical needs. (Ans. ¶37; Ex. 30, Ex. 40, p. 6) The jury returned a verdict in favor of the remaining defendants on all other counts. (Ans. ¶37; Ex. 30, Ex. 40, p. 6)

Count Two - Issue Preclusion: Findings of Fact

49. Post-trial, the Saugus defendants sought attorneys fees and costs from Mr. LaVita under 42 U.S.C. § 1988[11] and against the respondent under 28 U.S.C. § 1927,[12] alleging that the claim for lost wages, the claims against the Saugus police officers, and the claim for back injury had been frivolous. (See Ex. 40, pp. 3, 6, 12-26) They also alleged that the respondent should have been disqualified because she ought to have been a witness in the case. (Ex. 40, pp. 27-28) The respondent then moved to withdraw as counsel to Mr. LaVita, which was allowed, but she was ordered to remain in the case to defend the claims against her personally. (Ex. 30, pp. 15-16; see Ex. 37, Ex. 39) Mr. LaVita was given time to obtain new counsel, but he was unable to do so and had to proceed pro se. (Ex. 30, p. 17)
50. In ruling on the Saugus defendants' motion, the judge noted that the applicable standard was objective (Ex. 40, p. 11), not subjective, in contrast to the Massachusetts and disciplinary rule standards. Compare Bobe-Muniz v. Caribbean Restaurants, Inc., 76 F.Supp.2d 171, 174-175 (D.P.R. 1999) with Van Christo Advertising, Inc. v. M/A-COM/LCS, 426 Mass. 410, 416 (1998) and Canon Seven, DR 7-102(A)(1) (lawyer shall not file suit or take other action on behalf of client when he **knows** or it is obvious that such action would serve merely to harass or maliciously injure another) and (2) (lawyer shall not **knowingly** advance a claim or defense that is unwarranted under existing law unless it can be supported by good faith argument for change in existing law), and DR 7-106(C)(7) (in appearing before tribunal, lawyer shall not **intentionally** or habitually violate any established rule of procedure or evidence). Consequently, the magistrate judge was making an objective, not subjective, finding and was not ruling on whether the respondent knew at any point that the claims were frivolous.[13] As a result, any ruling appearing to touch upon the respondent's state of mind was not essential to the judgment and therefore, could not properly be given preclusive effect. Restatement (Second) of Judgments § 27, at 250 (1982).
51. Applying the federal objective standard, the magistrate judge found, in essence, that the claims filed by the respondent on behalf of Mr. LaVita against Officer Meehan and for lost wages were frivolous. (Ex. 40) As a result, based on the issue preclusion order, I find that the respondent filed the claims against Officer Meehan without reasonable inquiry as required by Fed.R.Civ.P. 11 and without preparation or thoroughness adequate in the circumstances. (Order on issue preclusion) Also based on the issue preclusion order, I find that the respondent filed the claim for lost wages without reasonable inquiry as required by Fed.R.Civ.P. 11 and without preparation or thoroughness adequate in the circumstances.[14] (Order on issue preclusion)
52. Bar counsel has the burden of proof by a preponderance of the evidence. On the record before me, there is insufficient evidence to find that the filing and the continued litigation of the claims against Officer Meehan and for lost wages, while frivolous, were knowing and intentional, i.e., a subjective test. Moreover, I credit the respondent's testimony that she, in good faith, believed that the claims against Officer Meehan and for lost wages were meritorious and not frivolous.[15] (Tr. 128-130)
53. The magistrate judge rejected the allegation that Mr. LaVita's back injury claim was frivolous, noting that the x-ray taken on August 17, 1992, the night of the arrest,

showed that Mr. LaVita had suffered a "significant compression fracture of the L2 lumbar vertebra." (Ex. 40, p. 22) He also noted inconsistencies in Mr. LaVita's medical history: (1) the records for Mr. LaVita's visit to a health center on November 23, 1992, stated that he had suffered a collapsed back injury at work several months before, that repeat films were normal and there was no back pain; but (2) the notes from the chiropractic office for Mr. LaVita's visits during 1993 and 1994 showed ongoing treatment for back complaints.[16] (Ex. 40, pp. 22-23) It should be noted that, under this ruling, based on an objective standard, a reasonable person would have pursued the back injury claim. In addition, I credit the respondent's testimony that she believed that Mr. LaVita was injured in the course of his arrest. (Tr. 130)

54. The magistrate judge also rejected the claim that the allegations against the other Saugus police officer were frivolous. (Ex. 40, p, 17) Moreover, he declined to find that the respondent should have been disqualified or that she was a necessary witness, referring that issue, among others, to bar counsel. (See Ex. 40, pp. 27-28)
55. The court ordered Mr. LaVita to pay $500 and the respondent, personally, to pay $7,000. (Ex. 30, p. 17, Ex. 40, pp. 25-26)
56. The respondent filed an appeal (Ex. 30, p. 18), but apparently did not pursue it. (See Ans. ¶ 38)

Count Two - Conclusions of Law

57. Bar counsel charges that the respondent's conduct in filing pleadings and pursuing the claim against Officer Meehan and the claim for lost wages, without a good faith basis for doing so that was not frivolous, or in continuing to pursue these claims after it was apparent that the claims were frivolous, violated Canon Seven, DR 7-102(A)(1) (lawyer shall not file suit or take other action on behalf of client when he knows or it is obvious that such action would serve merely to harass or maliciously injure another) and (2) (lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law unless it can be support by good faith argument for change in existing law). Based on the evidence presented in this hearing and the objective standard underlying the magistrate judge's order, I found that bar counsel failed to prove that the respondent's conduct was knowing. In addition, I find that it was not "obvious" that these claims would serve "merely to harass or maliciously injure another." I therefore conclude that the respondent did not violate the charged disciplinary rules.
58. Bar counsel charges that, in the alternative, or in addition, the respondent's conduct in filing pleadings and pursuing the claim against Officer Meehan and the claim for lost wages without reasonable inquiry as required by Fed.R.Civ.P. 11 and without preparation or thoroughness adequate in the circumstances violated Canon Six, DR 6-101(A)(2) (lawyer shall not handle legal matter without adequate preparation) and (3) (neglect) and Canon Seven, DR 7-106(C)(7) (in appearing before tribunal, lawyer shall not intentionally or habitually violate any established rule of procedure or evidence). I find that the respondent's misconduct constituted a violation of Canon Six, DR 6-101(A)(2) and (3), but I do not find a violation of Canon Seven, DR 7-106(C)(7) because I do not find that the respondent's conduct was either intentional or habitual.
59. Bar counsel charges that the respondent's conduct in filing suit and pursuing a claim on behalf of her client for personal injuries alleged to be ongoing and permitting the client to so testify at deposition and trial, when she knew that the client was in good health and was providing employment references so stating, constituted pursuing a frivolous claim; assisting a witness to testify falsely; dishonesty, fraud, deceit, or misrepresentation; conduct prejudicial to the administration of justice; and conduct adversely reflecting on the respondent's fitness to practice law, in violation of Canon One, DR 1-102(A)(4) (dishonesty, fraud, deceit, or misrepresentation), (5) (conduct prejudicial to the administration of justice) and (6) (conduct adversely reflecting on fitness to practice) and Canon Seven, DR 7-102(A)(1), (2), (3) (lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal), (4) (lawyer shall not knowingly use perjured testimony or false evidence) and (7) (lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent). I

credited the fact that the respondent, in good faith, believed that Mr. LaVita was injured during his arrest. In addition, as set forth above, the magistrate judge rejected the allegation that the claim for back injury was frivolous. After reviewing the c. 258 presentment letters and the second amended complaint, I find that the statements made therein were made in the context of "notice pleadings," i.e., they were general, broad statements, and, interpreted in that light, they did not constitute knowing misrepresentations as to Mr. LaVita's condition. I therefore conclude that the respondent's conduct did not violate the charged disciplinary rules.

60. Bar counsel charges, in the alternative to the above paragraph, that the respondent's conduct in stating to potential employers that the client was in good or above average health when she knew or reasonably believed that he was suffering from ongoing serious, permanent and debilitating injuries constituted dishonesty, deceit, or misrepresentation in violation of Canon One, DR 1-102(A)(4). I note that during 1993, when the references were made, Mr. LaVita was also working for the respondent on occasion. I credited her testimony that during that period Mr. LaVita appeared normal and that was the basis for her reference letters. (Tr. 116 respondent) I note that the presentment letter and lawsuit were not sent until 1994 and 1995, respectively, so that the respondent may not have been aware in 1993 of Mr. LaVita's back problems. In addition, I note that Mr. LaVita himself admitted that his injury did not prevent him from working at times. Specifically, I do not find that the respondent knowingly made false statements in the references. Therefore I conclude that the respondent's conduct did not violate the charged disciplinary rule.

61. Bar counsel charges that the respondent's conduct in undertaking to represent the client in his personal injury claims and lawsuit, when she knew that she ought to be called as a witness as a consequence of having been to see the client at the hospital and at the Saugus police station jail on the date of his arrest and alleged injury, violated Canon Five, DR 5-101(B)[17] and DR 5-102.[18] The respondent only visited Mr. LaVita briefly at the hospital and the jail on the evening of the arrest and, in my view, her testimony at the disciplinary hearing did not conflict with Mr. LaVita's in any significant way, nor did it appear to add anything on his behalf. For example, Mr. LaVita admitted in his deposition that he did not ask the respondent to obtain medical attention for him while she was at the jail. (Ex. 32, p. 78) Moreover, exception (4) appears applicable here, where Mr. LaVita, both before and after the trial, sought, but was unable to obtain, other counsel. (Ex. 30, p.170; Ex. 46, p. 120) Indeed, the magistrate judge handled the trial so as to prevent the respondent from becoming a witness for either side, and to ensure that Mr. LaVita would be represented. (Ex. 30, Ex. 33, pp. 96-07, Ex. 39) In so ruling, I note that "attorney disqualification is a 'drastic remedy,' reserved for cases where the attorney has 'entangled himself to an extraordinary degree' with his client." Fonten Corp. v. Ocean Spray Cranberries, 469 F.3d 18, 23 (1st Cir. 2006) (citations omitted). Furthermore, as the Supreme Judicial Court noted in Borman v. Borman, 378 Mass. 775, 787 (1979), the application of the rule prohibiting a necessary witness from serving as counsel in the same matter "may have harsher consequences for the client than the continued service of the attorney. Most obviously, the rule may deny a litigant of the right to counsel of his choice." Under the circumstances presented here, I conclude that the respondent did not violate the charged disciplinary rules.[19]

II. Factors in Mitigation and Aggravation

62. The respondent has a history of prior related discipline, namely, an admonition, AD-97-36, 13 Mass. Att'y Disc. R. 925 (1997), for inadequate record keeping, in violation of Canon Nine, DR 9-102(B)(3).

III. Recommendation for Discipline

Bar counsel seeks an indefinite suspension, if I find in Count One that the respondent intentionally misappropriated client funds, with actual deprivation resulting. In the

alternative, if I find in Count One that the misappropriation of client funds was negligent, then, based on the alleged misconduct in both counts, bar counsel seeks a two-year suspension.. The respondent seeks a public reprimand.

In Count One, the respondent intentionally misappropriated client funds for her own purposes, with actual deprivation resulting. She has made complete restitution. Under Matter of Schoepfer, 426 Mass. 183, 13 Mass. Att'y Disc. R. 679 (1997), the presumptive sanction for intentional misuse of client funds resulting in actual deprivation is disbarment or indefinite suspension. In choosing between these two sanctions, a significant consideration is whether restitution has been made. Matter of Bryan, 411 Mass. 288, 7 Mass. Att'y Disc. R. 24 (1991). Because of the serious sanction arising out of the intentional misappropriation of client funds in Count One, and the importance of providing an incentive to make restitution, no increase in sanction should be made because of additional misconduct in Count Two.

Based on the foregoing, I recommend that the respondent be indefinitely suspended from the practice of law.

FOOTNOTES:

[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

[2] As a result, issue preclusion was granted as to ¶¶ 34 and 36 of the petition and was denied as to ¶¶ 28-30. See discussion below in Count Two.

[3] This matter was previously heard on January 17, 2006 by a different Special Hearing Officer who recused himself after the hearing. The transcript of that hearing was admitted in evidence and marked as Exhibit 46.

[4] These two withdrawals made by the respondent (Tr. 52 respondent) appear to reflect costs and expenses due from the Conte litigation (see Ex. 3), which was admitted by bar counsel in the first hearing. (Ex. 46, p. 14) Nonetheless, they show that the respondent was aware that the Conte funds were in this trustee account and that she knew the amount that she should be holding in the account on his behalf.

[5] The registers for the trustee account and the operating account show the frequent scheduled transfers from the trustee account containing Mr. Conte's funds to the operating account. (Ex. 10, Ex. 13, Ex. 14)

[6]Even assuming the respondent had been entitled to the $1,260 fee she claimed in April 2004, as set forth below, she had already spent the remainder of the money she should have been holding for Mr. Conte ($4,496.10 minus $1,260 equals $3,236.10). (Ex. 5)

[7]Because of this response, Mr. Conte was concerned that he would not receive the funds in time for the closing and arranged to borrow them. (Tr. 141 Conte)

[8]As set forth above, the respondent admitted that she had no discussions with Mr. Conte about how that fee would be calculated, just that she would take it from the funds she was holding. (Ex. 46, pp. 74-75 respondent; Tr. 57-58, 79 respondent)

[9]The petition for discipline incorrectly states his name as "Richard LaVita."

[10]Mr. LaVita admitted in his deposition testimony that he did not ask for medical assistance while the respondent was at the police station. (Ex. 32, p. 78)

[11]Prevailing defendants are entitled to fee awards from the plaintiff "if they demonstrate that the plaintiff's action was 'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" Ex. 40, p. 8, citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

[12]"Any attorney… who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. The term "vexatious" has been interpreted to mean "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Bobe-Muniz v. Caribbean Restaurants, Inc., 76 F.Supp.2d 171, 174 (D.P.R. 1999) (citations omitted).

[13]During both hearings, bar counsel was advised that the respondent's state of mind regarding the filing and pursuit of the claims against Officer Meehan and for lost wages remained a factual issue, despite the order on issue preclusion. (See Tr. 129; Ex. 46, p. 11-12)

[14]As set forth above, the order granted issue preclusion as to ¶¶ 34 and 36 of the petition, which were each written in the alternative. I have adopted the alternative that is based on an objective standard and rejected the allegations as to the respondent's subjective state of mind. The following is the language of ¶¶ 34 and 36 of the petition:

> 34. The claim filed by the respondent on behalf of LaVita against Officer Meehan was frivolous and the respondent either knew that the claim was frivolous when she filed it or she knew that the claim was frivolous after LaVita was deposed but continued to pursue it. In addition or in the alternative, the respondent filed this claim against Meehan without reasonable inquiry as required by F.R.Civ.P. 11 and without preparation or thoroughness adequate in the circumstances.
> 36. The claim filed by the respondent on behalf of LaVita for lost wages was frivolous and the respondent either knew that the claim was frivolous when she filed it or she knew that it was frivolous after LaVita was deposed but continued to pursue it. In addition or in the alternative, the respondent filed this claim against Officer Meehan without reasonable inquiry as required by F.R.Civ.P. 11 and without preparation or thoroughness adequate in the circumstances.

[15]I credit the respondent's testimony that she believed Mr. LaVita had a basis for suing Officer Meehan because Mr. LaVita believed that Office Meehan was on duty the night he was arrested and was one of the Saugus officers that removed him from the hospital. (Tr. 128-130 respondent; Ex. 46, p. 135 respondent)

[16]Mr. LaVita testified that he wore a brace while sleeping (Ex. 32, p. 100) and while working standing up (Ex. 34, p. 116) and that it helped his condition. (Ex. 34, pp. 135, 150) He also admitted that he worked at various places after the injury, and that he had good times and bad times. (Ex. 32, pp. 91, 94; see Ex. 33, 46, Ex. 34, pp. 149-150)

[17]DR 5-101(B) provides: "A lawyer shall not accept employment in… litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify: … (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

[18] DR 5-102 provides: "(A) If, after undertaking employment in… litigation, a lawyer learns of it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4). (B) If,

after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client."

[19]In any event, even if the respondent's conduct violated the charged disciplinary rules in this count, my recommendation for discipline would not change.