

IN RE: C. DAVID GRAYER

S.J.C. Order of Term Suspension entered by Justice Cowin on October 31, 2007, with an effective date of November 30, 2007.¹

(S.J.C. Judgment of Reinstatement with Conditions entered by Justice Lenk on August 3, 2012.)

SUMMARY²

The respondent, C. David Grayer, is an attorney duly admitted to the Bar of the Commonwealth on April 25, 1973. During the relevant time period, the respondent was a partner in the law firm of Grayer & Dilday. The respondent engaged in misconduct concerning three separate matters.

In the first matter, the client, a citizen and resident of Trinidad, retained the law firm of Grayer & Dilday ("the firm") to represent her in a claim against the estate of a Massachusetts resident, who died on October 21, 1999. The client sought to establish that the Massachusetts resident was the father of her two children, in order to establish their entitlement to support from the estate. The respondent and the client entered into a fee agreement under which the client agreed to pay for legal services on an hourly basis. The agreement provided that the firm would bill partner time at \$225 per hour, associate time at \$200 per hour, and law clerk time at \$75.00 per hour.

During 2002 and 2003, an associate of Grayer & Dilday represented the client in proving paternity. On November 25, 2003, the Massachusetts resident was adjudicated to be the father of the clients' two children. In December 2003, the associate left the employ of Grayer & Dilday and withdrew her appearance for the client. During January or February 2004, the respondent delegated the matter to Harrison A. Fitch, an attorney who was renting an office from Grayer & Dilday. The client assumed that Fitch was employed by the firm. The respondent did not inform the client that Fitch was not a partner or associate of Grayer & Dilday.

During February and March 2004, Fitch completed settlement negotiations with the estate. The parties executed a Final Settlement Agreement on March 31, 2004, and filed it in court that day. Pursuant to the settlement agreement and stipulation, the client, individually and on behalf of her children, was to receive from the trust \$60,000 in cash and title to certain real estate in Trinidad. The client was also to receive an additional \$20,012 from a special administration in Massachusetts. Pursuant to the terms of the settlement agreement, the client was to grant to the executors, and to record, rights of first refusal to the Trinidad real estate.

In late April 2004, Fitch wrote to the client, enclosing a bill covering the period of February 16 through April 5, 2004. Fitch billed his time at \$350 per hour and the total amount of the bill was \$26,495. Fitch informed the client that \$20,000 of his fee would come from the special administrator's fund, and that the client owed him an additional \$6495. In May, 2004, Fitch received \$20,012 from the special administrator, and deposited the funds into a client funds account. The respondent and Fitch agreed to divide the fees in half after adjusting for costs expended. Pursuant to that agreement, on May 24, 2005, Fitch gave the respondent a check for \$9750. Neither the respondent nor Fitch informed the client that they had agreed to

divide, or had divided, her legal fees.

In May 2004, Fitch and the estate's attorney negotiated a "stipulation" to the Final Settlement Agreement, which was executed and filed on May 25, 2004. Under the stipulation, the estate would immediately pay \$20,000 of the cash to the client, and the remaining \$40,000 when the deeds incorporating the rights of first refusal were recorded by the parties' respective attorneys in Trinidad.

On July 29, 2004, the estate's attorney sent Fitch a bank check for \$20,000, made out to Fitch, as the first installment of the \$60,000. Fitch deposited the check into his client funds account. Fitch did not promptly inform the client that he had received the \$20,000, and made no payments to or on behalf of the client until December 2004. Between July 30, 2004 and August 24, 2004, Fitch, without the client's authority, drew on the client's funds by writing checks, withdrawing cash, and making on-line transfers to another checking account in his name. On December 21, 2004, Fitch deposited the proceeds of a personal loan to him of \$20,000 into his client funds account. By letter of December 24, 2004, Fitch sent the client a check for \$20,000 and informed her that the \$20,000 was the first portion of the \$60,000 cash settlement that she was to receive from the estate.

In January 2005, the client wrote a letter to the respondent expressing dissatisfaction with Fitch and requesting an accounting of the funds that had been distributed by the estate. The respondent forwarded or showed the letter to Fitch. By letter to the client dated February 4, 2005, Fitch, with the respondent's knowledge, informed the client that he was resigning as her attorney in the estate matter and that he would deliver her files to the respondent that day. The respondent did not inform the estate's attorney that he had resumed the representation of the client in the estate matter and did not take reasonable steps to obtain the client's file from Fitch or obtain information about the status of the settlement. Instead, during the spring of 2005, Fitch continued to hold himself out as the client's attorney in communications concerning the payment by the estate of the remaining \$40,000 to the client.

In March 2005, Fitch and the estate's attorney agreed that the estate would promptly distribute an additional \$10,000 to the client, and would make the final \$30,000 payment when the right of first refusal was recorded. Fitch did not inform the client that he had entered into the agreement. On April 5, 2005, the estate's attorney e-mailed Fitch, confirming that the estate would send him another \$10,000 partial payment, with final payment [of \$30,000] to be made at the time the right of first refusal was recorded in Trinidad. Fitch did not inform the client that the estate had agreed to make a \$10,000 partial payment.

The client continued to believe that the respondent had received all of her files from Fitch, and that Fitch was no longer involved in her case. In April 2005, the client asked the respondent about the status of the payments due under the settlement agreement. He did not respond. On or about June 27, 2005, the estate's attorney sent Fitch a check from the estate for \$10,000, made out to Fitch. The client had no knowledge of the receipt of the funds. Fitch converted these funds to his own use.

During the summer of 2005, the respondent informed the client that he could not effectively represent her because Fitch had given him only a portion on her file. By letter dated September 29, 2005, the client again directed Fitch to turn over her entire file to the respondent. By another letter dated September 29, 2005, the client informed the respondent that she had directed Fitch to turn over the entire file. In that letter, the client requested that the respondent inform her if Fitch did not comply. The respondent did not respond to the client's letter. Between September 2005 and February 2006, neither the respondent nor Fitch communicated with the client about the status of the settlement.

On February 23, 2006, the client went to the respondent's office and demanded that the respondent inform her about the status of the distribution of her settlement funds. The

respondent falsely told the client that the estate's lawyer was stalling and "playing hardball" about the money. In fact, the respondent had failed to take any steps to determine the status of the settlement funds. Following the meeting with the client, the respondent advised the estate's attorney to direct all further communication concerning the settlement to him.

On March 14, 2006, the estate's attorney informed the respondent that the rights of first refusal had been recorded in Trinidad and that the estate was ready to make the final distribution of \$30,000 to the client. The estate's attorney requested that the respondent provide her with a document from the client authorizing the respondent to receive the settlement check on her behalf. The respondent failed for several weeks to relay the request to the client. On April 5, 2006, the estate's attorney wrote to the respondent, reiterating her request for an authorization by the client to release the funds to him. On April 24, 2006, the client sent the respondent a letter authorizing him to receive the settlement check on her behalf. The respondent failed to forward the authorization to the estate's attorney until June 1, 2006.

By delegating the client's matter to an attorney with whom he had no formal affiliation and who was not acting under his control or direction, and failing to advise the client that Fitch was not affiliated with his firm, the respondent violated Mass. R. Prof. C. 1.1, 1.3, and 1.4(b). After the client told him that she no longer wanted Fitch to represent her, the respondent's failure to take reasonable steps to obtain the client's file, to inform the estate's attorney that he had resumed the representation of the client, to determine the status of the client's entitlement to funds under the settlement agreement, to obtain outstanding funds due to the client under the settlement agreement, and to respond to the client's letters and telephone calls to him seeking information about the settlement, violated Mass. R. Prof. C. 1.1 and 1.3, 1.4(a) and 1.4(b).

By sharing in Fitch's collection of fees from the client at the rate of \$350 per hour, when the maximum fee provided by his firm's fee agreement with the client was \$225 per hour, the respondent collected a clearly excessive fee, in violation of Mass. R. Prof. C. 1.5(a). By dividing the fees paid to him by the client with Fitch, without informing the client of the arrangement, and without obtaining her consent thereto, the respondent violated Mass. R. Prof. C. 1.5(e).

In the second matter, a couple engaged the respondent to represent them in an ongoing land court action. The case involved a pipe that had been installed on the clients' property, without permission, by a developer building a subdivision. The defendants in the case were the developer and the residents of the subdivision. The clients entered into a fee agreement with the respondent under which partner time would be billed at \$275 per hour, associate time at \$200 per hour and junior associate time at \$200 per hour. Fees were to be deducted from the clients' retainer as they were earned.

On May 30, 2003, the clients gave the respondent a certified check for \$10,000.

The respondent and Fitch agreed that Fitch would do the legal work for the clients and that the respondent and Fitch would split equally the legal fees paid by the clients. The respondent did not inform the client that he and Fitch had agreed to split the legal fees paid by the. On May 30, 2003, the respondent wrote a check to Fitch for \$6250, of which \$5000 was Fitch's share of the clients' \$10,000 retainer.

Shortly after their initial meeting, the respondent introduced the clients to Fitch. The clients assumed that Fitch was an associate or partner of the respondent. The respondent did not inform the clients that Fitch was not affiliated with Grayer & Dilday. On June 11, 2003, Fitch entered an appearance for the clients in the land court action and proceeded to work on the case. On or about August 25, 2003, Fitch sent the clients a bill for \$10,482.50. Fitch billed his time at \$350 per hour. Neither the respondent nor Fitch provided any other invoices to the clients.

On December 4, 2003, the clients paid another \$10,000, by certified check made out to the respondent. Mistakenly believing that Fitch had been billing the clients and that the funds had been earned, the respondent deposited the check into a personal bank account. On December 5, 2003, the respondent wrote a check to Fitch for \$5480, representing Fitch's fifty percent share of the clients' payment, plus some expenses paid by Fitch.

On June 15, 2004, the clients gave Fitch a certified check for \$10,000. That check was made out both to Fitch and to the respondent. The respondent endorsed the check. On June 18, 2004, Fitch deposited the check into his client funds account. On June 18, 2004, Fitch wrote a check to the respondent on his client funds account for \$5000, representing the respondent's fifty percent share of the clients' payment. The \$10,000 had not been earned, but mistakenly believing that Fitch had been billing the clients and that the funds were earned, the respondent deposited the funds into a personal checking account. The respondent failed to maintain complete records of the receipt, maintenance, and disposition of the funds paid to him and Fitch by the clients.

The land court case was settled in October 2004, by an agreement under which the developer was to pay \$5000 to the clients, the homeowners were to pay \$15,000, and the clients were to grant the developers an easement for the pipe, and obtain a subordination agreement from any senior lien-holder. The parties reported the case settled, and the court issued an order of dismissal dated November 17, 2004. The homeowners' attorney collected the settlement funds in the amount of \$15,000 from his clients and deposited them into his own IOLTA account, pending final signing of all settlement documents, and procurement of the subordination agreement.

The clients attempted to contact Fitch repeatedly between December 2004 and April 2005 to ascertain the status of the subordination agreement. Fitch did not respond to their telephone calls. Sometime in the spring of 2005, Fitch's office telephone was disconnected. During the spring of 2005, the clients on several occasions contacted the respondent. The respondent informed the clients that there was nothing he could do because Fitch had stopped coming to the office, and he could not obtain the file from Fitch's office because Fitch was not a member of his firm.

In mid-May 2005, the clients contacted the Attorney and Consumer Assistance Program ("ACAP") of the Office of Bar Counsel. An ACAP attorney contacted the respondent, who agreed to meet with the clients. The respondent met with the clients on May 17, 2005. Fitch unexpectedly appeared at the office and participated in the meeting. During the meeting, Fitch and the respondent jointly promised the clients they would get the subordination agreement executed so that the clients could collect the settlement funds from escrow. The clients requested an accounting of the \$30,000 they had paid in legal fees. The respondent and Fitch promised to review the clients' bill, provide an accounting and refund any unearned portion of the \$30,000.

Neither the respondent nor Fitch took the steps necessary for the clients to collect the settlement funds held in escrow. Neither the respondent nor Fitch at any time provided the clients with an accounting of the \$30,000 they had paid. The clients finally circumvented the need for a subordination agreement by refinancing their mortgage in December 2005. The clients did not receive all of the settlement funds until January 2006. The respondent made restitution to the clients in the amount of \$20,000 in August, 2007.

By delegating the matter to an attorney with whom he had no formal affiliation and over whom he had no control, and failing to advise the clients that Fitch was not affiliated with his firm, the respondent violated Mass. R. Prof. C. 1.1, 1.3, 1.4(b) and 1.6(a). By collecting, in conjunction with Fitch, \$30,000 from the clients and by collecting fees from the clients at the rate of \$350 per hour, when the maximum fee provided by the fee agreement was \$275 per hour, the respondent collected a clearly excessive fee, in violation of Mass. R. Prof. C. 1.5(a).

By dividing the fees paid to him by the clients with Fitch, without informing the clients of the arrangement, and without obtaining their consent thereto, the respondent violated Mass. R. Prof. C. 1.5(e). By failing to keep complete records of the receipt, maintenance, and disposition of the money paid by the clients, and by failing to comply with the clients' request for an accounting of the funds they had paid to him, the respondent violated Mass. R. Prof. C. 1.15(a) and 1.15(b). By failing, after the termination of the representation, to return any unearned portion of the clients' fees, the respondent violated Mass. R. Prof. C. 1.16(d). By depositing, in June 2003, the clients' \$10,000 retainer into an account in which he was holding personal funds, before the funds were earned as fees, the respondent violated Mass. R. Prof. C. 1.15(a) and 1.15(d).

In the third matter, a client retained the respondent in April of 2004 to handle a civil rights suit that the clients had previously filed pro se against a local police department. On May 17, 2004, the client's sister, on behalf of the client, and the respondent signed a fee agreement. Under that agreement, the respondent was to bill the client on an hourly basis, and deduct the fees earned from the retainer paid by the client. The client was to pay a retainer of \$10,000.

Between April 23 and May 31, the client gave the respondent a total of \$10,000 in four separate checks. Before the respondent had earned the \$10,000 as fees, he deposited the checks into two different accounts, neither of which was an IOLTA or client funds account. The respondent held personal funds in both of those accounts, with which he commingled the client's funds.

In May 2004, the respondent and Fitch agreed that Fitch would do the legal work on the client's case, and that the respondent and Fitch would split equally the fees paid by the client. In May 2004, the respondent paid Fitch at least \$3500 of the funds he received from the client. The respondent failed to maintain complete records of the receipt, maintenance, and disposition of the funds paid to him by the client. In June 2004, the respondent informed the client that Fitch would be handling his case. The client assumed that Fitch was an associate of Grayer & Dilday. Neither the respondent nor Fitch informed the client that Fitch was not affiliated with Grayer & Dilday, or that the respondent and Fitch had agreed to split the attorney's fees he paid to them.

During the fall of 2004, the defendants sent interrogatories to Fitch for response by the client. Fitch did not serve timely responses on the defendants. In November 2004, the defendants filed an application for a default judgment against the client, based on the failure to serve interrogatory responses. When no interrogatory answers were served, the court entered a default judgment, dismissing the case, on November 29, 2004.

In January 2005, the client terminated Fitch and the respondent as his counsel. In January 2005, the respondent billed the client for \$1,287.00. The client received no other bill. On May 23, 2005, the client requested from the respondent an accounting of the \$10,000 he had paid and a refund of the unearned amount of the retainer. The respondent did not provide an accounting, and did not refund any of the client's legal fees until 2007.

By delegating the matter to an attorney with whom he had no formal affiliation, and failing to advise the client that Fitch was not affiliated with his firm, the respondent violated of Mass. R. Prof. C. 1.1, 1.3, 1.4(b) and 1.6(a). By dividing with Fitch the fees paid to him by the client, without informing the client of the arrangement, and without obtaining his consent thereto, the respondent violated Mass. R. Prof. C. 1.5(e). By failing to keep complete records of the receipt, maintenance, and disposition of the money paid to him by the client, and by failing to comply with the clients' request for an accounting of the funds he had paid to him, the respondent violated Mass. R. Prof. C. 1.15(a) and 1.15(b).

By depositing the \$10,000 retainer funds, before those funds were earned, into an account which was not a trust account, and in which he was holding personal funds, the respondent

violated Mass. R. Prof. C. 1.15(a) and 1.15(d). By failing to refund the unearned portion of the client's retainer promptly after the termination of the representation, Grayer violated Mass. R. Prof. C. 1.16(d).

The matter came before the Board of Bar Overseers on a stipulation of facts and disciplinary violations and a joint recommendation for a one-year suspension from the practice of law. On September 10, 2007, the Board voted unanimously to accept the stipulation and to recommend the agreed-upon disposition to the Supreme Judicial Court. The court so ordered on October 31, 2007.

FOOTNOTES:

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 Supreme Judicial Court.

Please direct all questions to webmaster@massbbo.org.
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