

IN RE: JOHN F. CULLEN

S.J.C. Order of Term Suspension entered by Justice Cordy on August 7, 2008.¹
(S.J.C. Judgment of Reinstatement entered by Justice Cordy on July 16, 2010.)

SUMMARY²

On or about August 16, 2002, a borrower refinanced a mortgage on a residential property in Roxbury, Massachusetts. As part of the refinancing transaction, the borrower was to receive net proceeds in the amount of \$211,633.77 from the lender. Because of a mistake at the office of the closing attorney, the loan funds were wired to the borrower twice, resulting in her receipt of \$423,267.54 instead of only \$211,633.77. Between August and November of 2002, the borrower spent approximately \$252,000.00 of the refinancing funds to purchase a commercial real estate property in Fall River, and approximately \$120,000.00 on other personal matters.

In about late October or early November of 2002, the closing attorney discovered that his law firm had paid the borrower \$423,267.54 from the closing, instead of the \$211,633.77 she was due. The closing attorney demanded that the borrower return the excess funds, and told her that if she did not do so in a timely manner, the law firm would bring a civil suit against her to recover the funds. The closing attorney also contacted the Norfolk County District Attorney's Office, which then began a criminal investigation in the matter.

On November 4, 2002, the borrower retained the respondent to represent her in a number of legal matters, including potential civil and criminal actions arising from her receipt of the excess funds from the refinancing. The respondent agreed to represent the borrower for an hourly fee of \$350.00, and an initial retainer of \$25,000.00.

At the November 4, 2002 meeting, the borrower told the respondent that the lender had threatened to sue for the return of the funds and had filed a complaint with the district attorney. The borrower informed the respondent that she had spent all the funds she had received from the refinancing. The respondent advised the borrower to withdraw funds from her bank accounts in order to avoid having them seized by a trustee process action. The respondent advised the borrower to pay some of the funds to the respondent for his legal fees, and to pay the remainder to a certified public accountant whom the respondent knew and who was then residing in Florida. The respondent said that the accountant would hold the borrower's funds for her and use them as she directed. The accountant was also to provide the borrower with tax advice.

The respondent concealed from the borrower that he was then representing the accountant on criminal charges of insurance fraud and attempted larceny of insurance proceeds. The respondent did not advise the borrower that the accountant might not be the appropriate person to safeguard her funds and that it would be difficult to recover her funds from the accountant because he was living in Florida. The respondent also did not advise the borrower that his own personal interests and his responsibilities to the accountant did or might materially limit his representation, and he did not obtain the borrower's consent after consultation to the conflict of interest.

On November 4, 2002, the borrower paid the respondent a check for \$25,925.00 for his

retainer. She also delivered to the respondent a check for \$49,486.55 made payable to the accountant. On or about November 5, 2002, the respondent deposited the \$25,925.00 retainer check to his law office account before he earned the funds. The respondent thereby commingled the retainer with his personal funds on deposit in the office account.

On or about November 6, 2002, the respondent introduced the accountant to the borrower. During the meeting, the respondent gave the accountant the \$49,786.55 check that the borrower had made payable to the accountant.

On or about November 7, 2002, the closing attorney filed a civil action against the borrower seeking the return of all excess funds transferred to the borrower during the refinancing transaction and sought and obtained an ex parte attachment against the Fall River property. The respondent filed an answer to the civil complaint on behalf of the borrower.

On or about November 13, 2002, the respondent received a check from the accountant returning \$20,000.00 of the borrower's funds to the respondent. The respondent deposited the check to his office account, where he commingled the borrower's funds with his own personal funds on deposit in the account. The respondent distributed some of these funds to the borrower at her request and paid the remainder to himself for legal fees that he earned.

In about June of 2003, the borrower terminated the respondent's representation. Shortly thereafter, the borrower was indicted for larceny over \$250 in connection with the excess funds she had received from the refinancing transaction. Between December 2003 and January 2004, the borrower made complete restitution to the closing attorney. On June 28, 2004, the borrower pled guilty to a charge of larceny over \$250. She was sentenced to one year of probation.

The accountant did not return to the borrower most of the funds that he had received to hold on her behalf. On October 3, 2005, the borrower filed suit in Suffolk Superior Court against the respondent, his former associate, and the accountant, alleging breach of contract, negligence, and other tort claims. The borrower also charged the accountant with conversion of the funds he was holding on her behalf. On or about February 20, 2007, the borrower dismissed her claims against the respondent and his former associate after the respondent paid her \$40,000.00. On June 25, 2007, the Court entered a default judgment against the accountant in the amount of \$35,411.55.

By failing to advise the borrower fully on the consequences of transferring funds to him and to the accountant, including that the transfers could be deemed a fraud on creditors, the respondent violated Mass. R. Prof. C. 1.1 and 1.4(b). By agreeing to represent the borrower when his representation of the borrower was likely to be materially limited by his responsibilities to the accountant and by the respondent's own interests, and without obtaining the borrower's consent after consultation, the respondent violated Mass. R. Prof. C. 1.7(b). By commingling client funds with his personal funds, the respondent violated Mass. R. Prof. C. 1.15(a), as in effect prior to July 1, 2004.

The respondent was admitted to practice on June 7, 1977, and had no record of discipline. In aggravation, the respondent took no action of substance to head off larceny charges and the civil litigation against his client, and he exacerbated the client's circumstances by reducing her assets and ability to make a good-faith effort at restitution. In addition, the respondent's recommendation to his client that she transfer funds to the accountant for safekeeping resulted in actual harm to the client as a result of the accountant's failure to return or account for the funds. The respondent benefited personally from this conflict of interest, because the respondent paid himself fees from a portion of the funds that the accountant had been holding. In further aggravation, the respondent had substantial experience in the practice of law at the time of the misconduct.

The matter came before the Board on a stipulation of facts and disciplinary violations and a

joint recommendation for discipline by suspension of one year, with the condition that the respondent attend a trust account training program identified by bar counsel before seeking reinstatement. On May 12, 2008, the Board voted to recommend that the Court accept the parties' stipulation and joint recommendation for discipline. On August 7, 2008, the Court ordered that the respondent be suspended from the practice of law for one year, effective immediately, and that he attend a course in trust account training for lawyers prior to seeking reinstatement to 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.

¹ 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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