

IN RE: BERTON D. REED

S.J.C. Judgment of Disbarment entered by Justice Gants on May 13, 2009.¹

SUMMARY²

The respondent was admitted on December 18, 1985, and worked as a sole practitioner based in Melrose specializing in personal injury litigation. He maintained an IOLTA account to handle the receipt and distribution of client funds.

Bar counsel opened a complaint against the respondent on November 27, 2007, due to a dishonored check notice received from Bank of America. The respondent failed without good cause to provide information requested by bar counsel in the course of the investigation of that dishonored check notice as well as a second dishonored check received by bar counsel on January 22, 2008. The respondent also failed without good cause to comply with a subpoena duces tecum issued by the Board of Bar Overseers requiring him to appear at the Office of Bar Counsel with his account records.

Bar counsel petitioned for the respondent's administrative suspension from the practice of law due the respondent's failure to cooperate with her investigation. On June 10, 2008, the Supreme Judicial Court for Suffolk County entered an order immediately administratively suspending the respondent from the practice of law. The respondent violated the terms of the order of administration suspension by failing to close his IOLTA account.

The respondent's conduct in failing without good cause to respond to requests for information requested by bar counsel in the course of her investigation violated Mass. R. Prof. C. 8.1(b) and 8.4(d) and (g). The respondent's conduct in failing to comply with the order of administrative suspension violated S. J. C. Rule 4:01, §3 and 17, and also Mass. R. Prof. C. 3.4(c) and 8.4(d).

In a second matter, the respondent was retained in the spring of 2006 to represent a client in a personal injury case. The respondent and the client orally agreed that the respondent would charge a one-third contingent fee plus expenses, but the respondent failed to have executed a written contingent fee agreement.

In early 2007, the respondent informed the client that the insurance company had offered to settle the case for \$6,000, and he received authority to settle the case for that amount. The respondent settled the case for \$17,500 without informing the client of the increased amount of the settlement.

The settlement was paid in two separate checks. The respondent received the first check in October 2006 made payable to the client. The respondent did not inform the client that he had received this check, signed the client's name to the check without the client's knowledge or permission, and deposited the check to his IOLTA account. Thereafter, he converted the client's share of the funds to his own use.

In April, 2007, the respondent received the second check in the case in the amount of \$12,500 made payable to the respondent and the client. The respondent also signed the client's name without authority to this check and did not promptly notify the client of its receipt. He

converted the client's share of this check as well. Although the matter had concluded, the respondent did not provide to the client a written statement showing the outcome of the matter, the remittance to client, and the method of determination.

On December 14, 2007, the respondent sent the client a check for \$1,500 as his purported share of the settlement but did not provide an accounting of the funds received or any correspondence with the check. For the next several months the client tried numerous times to contact the respondent to ask for an explanation of the amounts recovered on his behalf. The respondent did not respond to these efforts.

In May, 2008, the client filed a request for investigation with the Office of Bar Counsel. Bar counsel twice sent a copy of the complaint to the respondent with a letter asking for an explanation and an accounting. The respondent did not respond to either request.

Five days after bar counsel's second letter, the respondent appeared at the client's home and gave him a check for \$2,500. This sum brought the total amount turned over by the respondent to the client to \$4,000. Consistent with his earlier misrepresentation that the settlement offer was for \$6,000, the respondent explained to the client that the \$2,500 check plus the \$1,500 previously sent to him amounted to his entire two-thirds share of the settlement. The respondent falsely explained the delay in paying the additional \$2,500 by claiming to have been the victim of identity theft, which caused problems in his IOLTA account. The respondent did not tell the client that he had received another \$12,500 on the client's behalf.

On July 28, 2008, bar counsel petitioned the Board of Bar Overseers for approval to take and preserve the client's testimony due to the client's advanced age. Bar counsel served a copy of the motion on the respondent, who then called the client and told him not to testify.

The deposition was approved and scheduled for August 11, 2008. The notice of deposition was mailed to the respondent on August 1, 2008. On August 9, 2008, the respondent called the client and offered to pay him \$4,000 in exchange for not appearing at bar counsel's office for the deposition and for withdrawing his complaint. The client refused the respondent's request and appeared to be deposed. The respondent never made further restitution to the client.

By failing to have a written contingent fee agreement, the respondent violated Mass. R. Prof. C. 1.5(c). By converting client funds, the respondent violated Mass. R. Prof. C. 8.4(c). By failing to keep client funds in a trust account, the respondent violated Mass. R. Prof. C. 1.15(b)(1). By making distributions from his IOLTA account that created a negative balance on behalf of the client, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(C). By misrepresenting to the client the amount of the settlement, the respondent violated Mass. R. Prof. C. 8.4(c) and (h) and 1.4. By failing to respond to the client's requests for information, the respondent violated Mass. R. Prof. C. 1.4. By signing the client's name to the settlement check without authorization, the respondent violated Mass. R. Prof. C. 8.4(c) and (h). By intentionally failing without good cause to respond to bar counsel's requests for information in the course of investigation, the respondent violated Mass. R. Prof. C. 8.1(b) and 8.4(g). By asking the client not to testify and give information to bar counsel, the respondent violated Mass. R. Prof. C. 3.4(f) and 8.4(d) and (h). By offering to pay the client \$4,000 to not appear for his deposition and to drop his complaint with bar counsel, the respondent violated S. J. C. Rule 4:01, § 10, and Mass. R. Prof. C. 3.4(a) and (f) and 8.4(c), (d), and (h). By failing to provide a written statement to the client at the conclusion of the contingent fee case that set forth the outcome, the recovery, and the method of distribution and to account for the proceeds of the settlement, the respondent violated Mass. R. Prof. C. 1.5(c), last sentence, and 1.15(d).

The third matter involved the respondent's representation of the seller in the proposed sale of real estate. On June 21, 2007, the respondent received \$24,000 from the buyer to hold as a deposit in escrow until the date of closing, July 12, 2007. The respondent deposited the

\$24,000 into his IOLTA account. Neither the purchase and sale agreement nor the escrow agreement allowed the seller to use the escrow funds pending the closing. Between June 22, 2007, and July 9, 2007, the respondent violated the terms of the escrow agreement by issuing checks to the seller drawing on the deposit. Between June 22, 2007, and August 23, 2007, the respondent converted the \$9,500 remaining funds held in escrow.

The seller requested an extension of the closing date because he could not convey clear title to the property. The buyer refused to agree to an extension. On July 12, 2007, neither the seller nor the respondent appeared at the closing.

Immediately after the closing date, the buyer sent a written demand for the return of the money the respondent was supposed to be holding in escrow and made numerous additional demands. The respondent did not respond to any of these requests.

On October 16, 2007, the buyer filed suit in Middlesex Superior Court against the seller for the return of his deposit. The seller was *pro se* in this action. On June 26, 2008, the buyer filed a motion for summary judgment on his claim for the return of the deposit, which was unopposed. On September 3, 2008, the court granted the motion for summary judgment and entered an order that the seller return the full deposit, plus interest and attorney's fees.

On September 8, 2008, the buyer forwarded a letter to the respondent, along with a copy of the court order, requesting the return of the deposit. This letter was followed by several telephone calls to the respondent demanding the funds. The respondent never returned any of the funds. By converting the escrow funds, the respondent violated Mass. R. Prof. C. 8.4(c). By failing to keep the funds in a trust account, the respondent violated Mass. R. Prof. C. 1.15(b)(1). By violating the terms of the escrow agreement, the respondent violated Mass. R. Prof. C. 8.4(c).

On December 9, 2008, bar counsel filed a petition for discipline. The respondent failed to answer and was therefore defaulted. On March 9, 2009, the Board of Bar Overseers voted to recommend that the respondent be disbarred.

On March 18, 2009, the Board of Bar Overseers filed an information with the Supreme Judicial Court. On April 1, 2009, an order of notice was issued directing bar counsel and the respondent to appear in front of a Single Justice on May 12, 2009. The respondent failed to appear. On May 13, 2009, the Court entered a judgment of disbarment effective on the date of entry.

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 filed with the Supreme Judicial Court.

Please direct all questions to webmaster@massbbo.org.

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