

IN RE: MILES DANIEL HERMAN

S.J.C. Order of Term Suspension entered by Justice Ireland on September 18, 2008, with an effective date of October 20, 2008.¹

SUMMARY²

On September 18, 2008, the Supreme Judicial Court for Suffolk County ordered that the respondent Miles Herman be suspended from the practice of law for one year and one day, effective in thirty days. The sanction arose from the respondent's conduct in representing a client in a discrimination claim and a claim against an estate.

The client filed a claim on December 4, 2000, with the Massachusetts Commission Against Discrimination against a restaurant, claiming that the restaurant discriminated against her by prohibiting her to be accompanied by her dog, a specially trained seizure dog. The client hired the respondent on January 3, 2001, to represent her on this claim.

The client had a legal guardian to assist her. The guardian died on December 12, 2001. The client moved to Pennsylvania, where she lived with a woman who helped her with her daily needs. The discrimination claim was still pending before the MCAD, and the woman's father, who was an attorney in Pennsylvania, agreed to assist the client in corresponding with the respondent when she did not hear from him for a period of time.

On December 15, 2003, the Pennsylvania lawyer wrote to the respondent to inquire whether he intended to continue his representation on the MCAD complaint. The attorney advised the respondent that the client was interested in having her legal fees paid and a written apology from the defendant. He also wrote that the client was on government assistance and could not have more than \$2,000 to maintain eligibility.

Shortly after this letter, the respondent settled the claim against the restaurant for \$6,000. The client would receive \$2,000 plus a letter of apology from the owner of the restaurant. Payment would be made by the owner in \$1,000 increments, with the client to receive her share by the end of February 2004. The respondent notified the lawyer in Pennsylvania of the terms of the settlement and how payment would be made to the client. The respondent did not have the client sign the release to the defendant, however. Instead, he had the client's name signed to the release by a member of his staff and forwarded the release to the defendant.

The respondent received the first disbursement of \$1,000 and the letter of apology from the defendant a few days after his letter to the lawyer in Pennsylvania. The respondent did not notify the client or the lawyer of his receipt of these funds. The respondent deposited the check into his IOLTA account on December 30, 2003. During the following week, the respondent's wife, who maintained the respondent's books, transferred the funds into the respondent's personal checking account, and they were used to pay personal expenses.

On February 2, 2004, the respondent received the second \$1,000 and promptly sent a check in this amount to the client with the letter of apology.

Between March 16, 2004, and June 2, 2004, the respondent's law office received the

remaining payments. The respondent did not notify the client of his receipt of these funds, or that he had taken disbursements for his own use. The respondent failed to insure that his IOLTA account records were maintained according to the requirements of Mass. R. Prof. C. 1.15. In addition, the respondent's bookkeeper commingled personal and client funds in the IOLTA account and respondent's business account. During that period, the respondent failed to turn over the remaining \$1,000 owed to the client and negligently spent it on his own personal needs.

By November 30, 2004, the respondent realized that he had not paid the client the remaining \$1,000 owed to her. Between November 30, 2004, and April 4, 2005, the respondent made four payments of \$250 each to the client. One of these payments was returned for insufficient funds.

The second matter involved the client's request that the respondent investigate whether she had a claim against the estate of her former guardian. On February 3, 2005, the respondent agreed to take the case, and the client forwarded \$2,000 to the respondent as a retainer for his services.

From December 13, 2005, to January 18, 2006, the respondent paid himself \$1,650 in fees from the client's retainer for various services. The respondent did not notify the client in writing of the fee payments or provide her with an itemized bill justifying the fees and showing the amount of retainer still held in the account, thereby violating the requirements of Mass. R. Prof. C. 1.15 (d)(1) and (2).

In March 2006, the client informed the respondent that she had hired a new attorney and wanted the unearned portion of her retainer returned. The respondent did not refund the unearned portion of the retainer for more than two years.

By failing to make reasonable efforts to have in effect measures giving reasonable assurance that his assistant's conduct was compatible with his professional obligations and by failing adequately to supervise her, the respondent violated Mass. R. Prof. C. 5.3(a) and (b).

By signing or causing the client's name to be signed to the release and forwarding the release to defense counsel when he was not authorized to sign her name and when he did not inform defense counsel that he had signed the release without the client's knowledge and permission, the respondent violated Mass. R. Prof. C. 8.4(c). By failing to notify his client promptly of his receipt of funds on her behalf, the respondent violated Mass. R. Prof. C. 1.4(a) and (b) and Mass. R. Prof. C. 1.15(b) as in effect prior to July 1, 2004.

By issuing a check from his IOLTA account that created a negative balance for a client, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(C), as in effect on and after July 1, 2004.

By failing to provide an accounting of his fee, and by failing to provide the client with written notice or an itemized bill on or before the dates he withdrew his fees, the respondent violated Mass. R. Prof. C. 1.15(d)(1) and (2) as in effect on and after July 1, 2004. By failing promptly to return the unearned portion of his fee upon his discharge from the case, the respondent violated Mass. R. Prof. C. 1.16(d).

The respondent was admitted to practice on June 12, 1986, and had no record of discipline. In aggravation, the respondent had substantial experience in the practice of law at the time of the misconduct. In addition, the respondent deprived his client of her funds for a period of ten months. In mitigation, the respondent was severely physically disabled as a result of a car accident and relied substantially on his wife to assist him in daily activities as well as routine business and financial matters.

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 and one day. On September 8,

2008, the board voted to recommend that the Court accept the parties' stipulation and joint recommendation for discipline.

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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