

## IN RE: JAMES J. O'MALLEY, III

S.J.C. Judgment of Disbarment entered by Justice Botsford on July 12, 2010.<sup>1</sup>

Memorandum and Order on Board of Bar Overseers' Information Recommending Disbarment

The Board of Bar Overseers (board) has filed an information recommending that the respondent, James J. O'Malley, III, be disbarred. For the reasons that follow, I accept the board's recommendation.

1. Background. On August 31, 2009, bar counsel filed a petition for discipline of the respondent. The petition contained five counts, which may be briefly summarized as follows. Count I alleges that since at least late 2006, the respondent has failed to comply with rules concerning IOLTA accounts, including provisions requiring reconciliation of his IOLTA accounts with bank balances, maintaining appropriate check and chronological registers; has failed to withdraw promptly all his earned fee and expense disbursements; and has misused client funds in the account, at least temporarily - all in violation of Mass. R. Prof. C. 1.15(f)(l)(B)-(E). Counts II and III allege improper accounting to two specific clients of settlement funds the respondent had received on the clients' behalf, and, more significantly, the conversion or, alternatively, the negligent misuse of those funds. Each count charges the respondent with violating, inter alia, Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 1.15(b), and 8.4(c) (or alternatively rule 8.4(h)), and rules 1.4, 1.5(c), 1.15(d), and U5(f)(l)(B)-(E). Count IV alleges that the respondent represented a client, Marguerite Kelly, and in the course of the misrepresentation, accepted a settlement of her claim without first informing her of the offer or obtaining her consent, and thereafter, following Kelly's refusal to accept the proffered settlement, and the negotiation of an amended fee agreement between the respondent and Kelly, reneging on that amended agreement, taking a larger fee than he had agreed to and failing to pay over promptly certain funds due to Kelly, intentionally misrepresenting Kelly's actions to the bank where the monies had been deposited, initiating a threat of criminal charges against Kelly in order to gain an advantage, and thereafter filing a civil action against Kelly to establish his right to the larger fee, pleading the original fee agreement without informing the court of the amended fee agreement, and disclosing in that action confidential information about his client that was not reasonably necessary to establish his claims or defenses. Count IV charges the respondent with violating a variety of rules, including Mass. R. Prof. C. 1.2(a), 1.6(a), 8.4(a), (c) and (h), and rule 1.15. Finally, Count V charges the respondent with failing to cooperate in bar counsel's investigation, in violation of Mass. R. Prof. C. 3.4(c), 8.1(b), 8.4(g) and (h), and S.J.C. Rule 4:01, §3(1).

As set forth in the board's information, the respondent did not file a timely answer to the petition for discipline, but sought a number of extensions of time to do so, which generally were allowed, even after the respondent had been defaulted for failure to answer. The respondent, however, missed the extended deadlines on a number of occasions. On January 6, 2010, the respondent filed a second proposed answer to the petition for discipline, unaccompanied by a motion or request to vacate the default that again had been entered. When the respondent was notified by counsel for the board that the proposed answer could not be accepted without such a motion or request, he did not respond. On January 22, 2010, bar counsel filed and served a motion to refer the case to the board for disposition, on the basis that the respondent's failure to file a timely and compliant answer meant that the allegations of the petition for discipline were deemed admitted. See Rules of the Board of Bar

Overseers, rule 3.15 (g). The respondent did not oppose or otherwise respond to the motion, and the board allowed it on February 2, 2010, informing the parties that bar counsel had until February 12, 2010, to file a brief on disposition, and the respondent until February 22. Bar counsel filed her brief on February 12; on the same date, the respondent filed a motion to remove the pending default and to accept his proposed answer. The respondent's motion was denied. On March 16, 2010, the respondent filed a brief on disposition accompanied by a motion to file late and for a full hearing on disposition. The board allowed the motion to file late, but denied the motion for full hearing. On April 22, the board voted to file an information recommending disbarment, which was done.

2. Discussion. Because the allegations of the petition for discipline are admitted, this is a case in which there is conversion or negligent misuse of funds belonging to two separate clients, with a failure to make restitution.<sup>2</sup> It is also a case, however, that involves additional types of misconduct, including intentional misrepresentations to a court under oath in the action the respondent filed against his client Marguerite Kelly.

This is an unfortunate case. The respondent has been a member of the bar since 1977, and has no prior disciplinary history. One senses in the record of repeatedly missed deadlines that the respondent, who has represented himself throughout, has never grasped or certainly responded to the seriousness of this matter. As I have previously indicated (see note 1, supra), I have some question whether the respondent's deemed factual admissions should be read to include a specific admission to conversion (as opposed to negligent misuse) of client funds, but the allegations concerning that misuse were serious and included at least temporary deprivation. In any event the cumulative effect of the respondent's several separate violations of disciplinary rules, including most importantly the admitted facts concerning the Kelly matter, need to be taken into account. See, e.g., Matter of Tobin, 417 Mass. 81, 88 (1994). Moreover, the board has voted unanimously to recommend disbarment, and its view of the case is entitled to substantial deference. See id. As stated at the outset, I accept and adopt the board's recommended disposition, and conclude that disbarment is the appropriate discipline in this case.

### Order

For the foregoing reasons, it is ordered that the respondent be disbarred. A judgment of disbarment is to enter.

### FOOTNOTES:

<sup>1</sup> The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

<sup>2</sup> Bar counsel's memorandum on disposition, filed with the board, claims that the case involves actual conversion of client funds, stating that because all the allegations of the complaint are deemed admitted, bar counsel is proceeding on the allegations of conversion rather than alternative allegations of negligent misuse of those funds. I question the fairness of this approach. In the end, however, given the several separate acts of misconduct, I conclude that it does not change my view of the recommended level of discipline.

Please direct all questions to [webmaster@massbbo.org](mailto:webmaster@massbbo.org).