NO. BD-2010-036

IN RE: JOHN A. NEALON

S.J.C. Order of Term Suspension entered by Justice Ireland on June 28, 2010, with an effective date of July 28, 2010.[1]

SUMMARY[2]

The respondent was admitted to the Massachusetts bar on December 16, 1983. Bar counsel filed a petition for discipline alleging four counts of misconduct. In the first count, the respondent, as counsel for the executor of an estate, Attorney A, a member of his firm, failed to take action to prevent or remedy neglect and delay by the executor. In count two, which concerned the handling of the litigation against a homebuilder, the respondent violated rules involving client communications, fees, candor, and the handling of client funds. In count three, the respondent neglected to either file suit on his client's personal injury claim or timely decline representation of her claim. Last, the respondent, as a partner in the firm and IOLTA account signatory, failed to comply with the rules requiring the maintenance of records of client balances and the completion of three-way reconciliation reports every sixty days.

Count One. The decedent died in the spring 2003. Her will named Attorney A executor. At the time of death, the estate consisted of a house with an assessed value of $268,800 and about $269,479 in liquid assets. Attorney A asked her brother, the respondent, to represent her in seeking appointment as executrix, serving as executrix, and settling the estate. On April 10, 2003, the respondent presented for filing in the Middlesex Probate and Family Court a petition for probate of the will and for appointment of Attorney A as executrix, together with a copy of the will and her death certificate. Under "heirs at law," the petition stated, "None." The assistant registrar declined to accept the documents for filing until he received assurance that a diligent search for possible heirs had been conducted. Attorney A had primary day-to-day responsibility for the search for heirs and other aspects of administration of the estate, while the respondent as the partner and litigator on the file received updates, signed checks, and wrote and filed the necessary pleadings. Unfortunately, Attorney A's search for the heirs was not completed for almost two years; Attorney A acknowledged in a sworn statement to bar counsel that the time she took far exceeded the reasonable time period of six to eight months for a diligent search for heirs in this matter. For his part, the respondent conceded that, despite receiving updates from Attorney A during this period, he never made suggestions or took any steps to speed up the handling of the estate. Because no executor had been appointed from April 2003 to March 2005, the decedent's home remained vacant and uninsured, real estate taxes were not paid, the town recorded a tax title on the property, estate assets were not collected, and the charitable beneficiaries of the estate did not receive their bequests. By March 2005, the search to determine whether there were any heirs had finally been completed. On March 2, 2005, the respondent filed a new petition for probate of the will in Probate Court, the filing was accepted, and Attorney A was appointed executrix. Between August 1, 2005 and September 15, 2005, $247,259.41 was collected from the decedent's bank accounts and deposited in the firm's IOLTA account. They remained in that account for over a year, until they were finally deposited into an interest-bearing estate account, and the respondent knew of this fact since he signed IOLTA account checks to pay estate expenses. No distributions were made to charitable beneficiaries until July 2007. In December 2006, the estate listed the decedent's house for sale and about April 2007, it was sold. Attorney A deposited the net proceeds of $201,078.84 into the estate account. In August 2007, the estate assets having been distributed, the first and final account was filed in

Probate Court, which was allowed. As a result of her delay and neglect of this estate matter and two other estate matters, Attorney A stipulated to and received a public reprimand from the Board of Bar Overseers in March 2009. See Public Reprimand 2009-4 (March 25, 2009).

The hearing committee found that respondent knew of Attorney A's ongoing delay and neglect of the estate between 2003 to 2006, yet failed to take reasonable remedial action. Pursuant to Mass. R. Civ. P. 5.1(c)(2), the respondent's conduct violated Mass. R. Prof. C. 1.1, 1.3 and 1.15(e)(5).

Count Two. In 2001, the respondent was retained to represent a husband and wife in connection with their efforts to purchase property from a builder, who also was to build them a house on the property. The respondent had never previously represented these clients. In January 2002, the builder repudiated the contract to sell the property to the clients. The parties had not yet signed a purchase and sale agreement. The respondent advised the clients to file a civil claim against the builder to seek specific performance of the builder's agreement to sell them the property and the clients authorized him to do so. The respondent did not advise them of his hourly rate or provide them with a proposed written fee agreement. At most, the respondent communicated that his fee would be based on his time and expenses, but did not disclose his hourly rate or provide an estimate or budget.

On January 24, 2002, the respondent filed a civil complaint on behalf of the clients against the builder in Middlesex Superior Court, together with an *ex parte* motion for a *lis pendens*, which was allowed. The respondent timely completed service on the builder, and recorded the *lis pendens* at the Registry of Deeds. The respondent's work effectively prevented the sale of the house during the litigation.

Between February 2002 and October 2005, the respondent assisted the clients in all aspects of their litigation, but never presented them with a bill. About November 2005, the clients authorized the respondent to settle the matter for any amount over the $10,000 previously offered by the defendant. About August 17, 2006, the respondent settled the case for $25,000, but he did not inform the clients that he had settled the case until early September 2006.

About September 14, 2006, the respondent received a check from the defendant for $25,000 payable to the respondent as attorney for the clients. In a cover letter sent with the check to the respondent, the defendant's counsel asked the respondent to hold the $25,000 in escrow pending receipt of a fully executed release. On September 15, 2006, the respondent deposited the settlement funds into his firm's IOLTA account. On September 15, 2006, by a check drawn on the IOLTA account the respondent paid himself $15,000 as a fee for his work on the case. On or before withdrawing $15,000, the respondent failed to send his clients any bill or notice of receipt of the funds.

By letter dated November 3, 2006, the respondent finally notified the clients that he had received the $25,000 settlement check and sent them the release they needed to sign in connection with the settlement of their case against the builder. In his letter, the respondent stated, "I have to hold the settlement check in escrow until I return the fully executed Release." The respondent's November 3rd letter did not inform the clients that the respondent had received the settlement check on September 14, 2006 and that he had paid himself $15,000 as a fee from the settlement funds. The hearing committee found that the respondent knew at the time that his statement regarding holding the settlement check in escrow was false.

On or about November 4, 2006, the clients returned their signed release to the respondent who sent it to defendant's counsel. Between November 9, 2006, and February 2, 2007, the clients telephoned the respondent a number of times, but the respondent did not respond. In January 2007, they sent the respondent a letter complaining about the delay and asking for the status of the settlement funds. The respondent replied on February 2, 2007, sending the

clients a check drawn on his IOLTA account for $7,500 as their share of the settlement proceeds. After payment of this check, the respondent continued to hold $2,500 from the settlement proceeds in his IOLTA account, pending preparation of his bill. In his February 2, 2007 letter, the respondent advised the clients that his legal fee and expenses on their behalf exceeded $17,500, but that his firm would cap the legal fee and expenses at $17,500. The respondent's letter did not inform them that he had previously paid himself $15,000. The respondent also did not include a legal bill with his February 2, 2007 letter, but said that he would send the bill separately. Several days later, the clients told the respondent that they disputed his fee.

The clients filed a complaint with bar counsel in late February 2007, which was sent to the respondent. About March 30, 2007, the respondent informed the clients for the first time that he had received the $25,000 settlement check in September 2006, and had paid himself $15,000 on that day for his "partial" legal fee. The respondent's accounting indicated that he was still holding $2,500 from the settlement funds in his IOLTA account.

The respondent returned the disputed $15,000 fee to escrow. Between March 30, 2007 and August 1, 2007, the respondent held $17,500 in escrow pending resolution of the fee dispute. About August 1, 2007, the respondent and the clients resolved their fee dispute and the respondent paid an additional $7,500 to the clients.

The hearing committee found that, in failing to communicate the basis or rate of his fee to the clients before or within a reasonable time after commencing the representation, when he had not regularly represented the clients, the respondent violated Mass. R. Prof. C. 1.4(b) and 1.5(b); by failing for more than six weeks to notify the clients that he had received the settlement funds and by failing over the same time period to send the clients a release to execute to receive the funds, the respondent violated Mass. R. Prof. C. 1.3 and 1.4(a); by taking $15,000 as a fee without delivering to the clients in writing (a) an itemized bill or other accounting showing the services rendered, (b) written notice of the amount and date of the withdrawal, and (c) a statement of the balance of the clients' funds in the account after the withdrawal, the respondent violated Mass. R. Prof. C. 1.15(d)(2); by sending his clients a letter stating that he had to continue holding the settlement check in escrow pending the signed release, when he had in fact already deposited the settlement check in his IOLTA account and paid himself $15,000 in fees from the IOLTA account, a statement he knew was false and was likely to be relied on, the respondent violated Mass. R. Civ. P. 8.4(c); by failing to promptly respond to communications from the clients requesting information and then an accounting for their settlement funds and his fee, and by failing to promptly pay the clients the funds that they were entitled to receive, the respondent violated Mass. R. Prof. C. 1.4(a), 1.15(c), and 1.15(d)(1).

Count Three. An elderly couple was involved in an automobile accident when the car that the husband was driving was struck from the rear by another car. Neither was seriously hurt or hospitalized. The husband incurred chiropractic bills totaling $4,133.54. Prior to July 2001, they pursued their claims on their own, but were becoming frustrated in their dealings with the insurance adjuster and in getting their medical bills paid.

In early July, 2001, the clients went to the respondent's firm to discuss estate-planning matters. The subject of the auto accident was also raised, and the respondent was retained to evaluate the claims for them. Later that month, the husband died from causes unrelated to the accident. The following March, the wife, who was the sole beneficiary of her husband's estate, was appointed executrix, and the respondent was aware of this appointment.

By no later than March 2002, the respondent determined that neither of the couple's cases had sufficient value to pursue through litigation. However, the respondent did not inform the wife of his opinion of the merits of their personal injury cases or that he did not intend to pursue them. The respondent did not file suit on the clients' behalf within the statute of limitations, and did not inform the wife that he had not done so.

Between 2001 and 2008, the wife made occasional requests to the respondent for information on the status of the claim arising from the automobile accident and the respondent did not respond. At the end of 2007, the client learned from an insurance representative that the statute of limitations may have expired on her claim and she contacted new counsel.

In June 2008, the respondent wrote to the wife's new counsel and extended his written apology to the wife. About December 2008, the respondent and the wife's counsel negotiated a settlement in which the respondent agreed to pay her $15,000.

The hearing committee found that the respondent's conduct, by failing to keep his client reasonably informed about the status of her claim, by failing to respond to her reasonable requests for information, and by failing to explain her rights and options to the extent reasonably necessary to permit her to make informed decisions about her claim, the respondent violated Mass. R. Prof. C. 1.4(a) and (b), and by failing to file suit within the statute of limitations or timely decline the representation, the respondent violated Mass. R. Prof. C. 1.1 and 1.3.

Count Four. Between July 1, 2004 and at least April 2007, the respondent's firm maintained an IOLTA account at Strata Bank. As reflected in the IOLTA records produced to bar counsel by the respondent's firm, the IOLTA records included a register detailing checks and deposits, but did not include records showing balances after each transaction, chronological ledgers with balances for each client, or three-way reconciliation done on a sixty (60) day basis. It was only in response to bar counsel that the respondent's firm began, in March 2007, to keep records with running balances, and client ledgers and performing three-way reconciliations. When this was done, an IOLTA shortfall of $38,041.94 was discovered, necessitating deposits to the firm's IOLTA account. The hearing committee found that as a partner and signatory to the IOLTA account in a five-lawyer firm, the respondent was responsible for taking the steps necessary to assure that the firm's IOLTA account complied with the rules.

The hearing committee concluded that the respondent's failure to maintain adequate trust account fund records between 2004 and 2007 violated Mass. R. Prof. C. 1.15(f), in the following ways: (a) the respondent's failure to prepare and maintain a check register that showed the current balance in the IOLTA account after each deposit or withdrawal violated Mass. R. Prof. C. 1.15(f)(1)(B); (b) the respondent's failure to prepare and maintain a chronological ledger for each client or third person matter for which he received trust funds, documenting the balance held for the client or third person in that matter violated Mass. R. Prof. C. 1.15(f)(1)(C); and (c) the respondent's failure to prepare and maintain reconciliation reports at least every sixty (60) days showing the required reconciliation of the check register, individual ledgers and bank statements for the IOLTA account violated Mass. R. Prof. C. 1.15(f)(1)(E).

In aggravation, the respondent had received an admonition for prior related discipline;[3] the misconduct in count two occurred when the respondent was aware of bar counsel's investigation into the matter in count one; the respondent was an experienced practitioner when the misconduct occurred; and the violations in each count resulted in potential or actual harm including delayed estate distributions, temporary deprivation of funds, and shortfalls in an IOLTA account.

In mitigation, once notified of bar counsel's investigations, the respondent made full restitution to the clients in counts two and three and worked diligently to bring his firm into compliance with IOLTA rules.

The committee recommended as discipline that the respondent receive a six-month suspension of which he be required to serve two months. The committee recommended that the remaining four months of the six-month suspension be stayed, and not imposed, if within one year of the final order in this matter the respondent met the following conditions: (a) obtaining at his expense an inspection, audit, and written assessment of his law practice by

the Law Office Management Assistance Program ("LOMAP"); (b) taking and passing at his own expense the MPRE examination; and (c) taking and completing at his own expense six (6) hours of CLE ethics programs designated by bar counsel.

Neither party appealed and the board, at its meeting on May 9, 2010, adopted the committee's findings of fact, conclusions of law and recommendation. On June 28, 2010, the single justice (Ireland, J.) entered an order adopting the board's recommendation.

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.

[3] See Admonition No. 00-50, 16 Mass. Att'y Disc. R. 526 (2000).