

IN RE: ROBERT BABCHUCK

S.J.C. Judgement Accepting Affidavit of Resignation As A Disciplinary Sanction entered by Justice Spina on August 24, 2010.¹

SUMMARY²

This matter came before the Board of Bar Overseers and the Court on the respondent's affidavit of resignation pursuant to Supreme Judicial Court Rule 4:01, § 15. In the affidavit, the respondent acknowledged that sufficient evidence existed to warrant findings that the material facts summarized below could be proved by a preponderance of the evidence.

At all times relevant to the statement of disciplinary charges, the respondent was a sole practitioner in the Brockton area, specializing in residential real estate closings. The respondent also served as an agent for several title insurance companies. Between 1996 and 2008, the respondent handled approximately 200 closings per year, and there was always a substantial balance in the IOLTA account that he used to hold closing funds.

In about 2000, the respondent hired an administrative assistant. After about 2004, the assistant was the respondent's only employee. The respondent delegated to the assistant the tasks of depositing funds to his IOLTA and business accounts, preparing checks for his signature, on occasion signing his name to checks, and keeping records for the IOLTA account. The assistant was also responsible for following up on mortgage discharges that needed to be filed.

From 2004 through March of 2008, the respondent did not adequately supervise the assistant. He did not instruct her to maintain appropriate trust account records or on the requirement that his fees be removed promptly from the IOLTA account. The respondent also did not compare records generated by his computer program for the bank account to the bank statements, and he did not properly reconcile the account with the bank statements. The respondent also did not confirm that all closing funds had been received and disbursed in accordance with the settlement statements and that the assistant was maintaining an accurate list of outstanding checks, nor did he confirm that all discharges had been received and filed. The assistant did not keep accurate trust account records, and she failed to obtain discharges for each mortgage that had been paid.

Between 2004 and 2008, the assistant misappropriated approximately \$18,000 from the IOLTA account by drawing checks payable to herself. The primary sources of the misappropriated funds were closing proceeds owed to title insurance companies for premiums, recording fees owed to registries of deeds, and the respondent's earned legal fees on deposit in the IOLTA account. Had the respondent compared the check register with the checks issued or reviewed the cancelled checks or properly reconciled the account, he would have been able to identify the misappropriations.

Title insurance companies audited the respondent's closing files on an annual basis between 2004 and 2008. In February of 2008, a title insurer discovered payments totaling approximately \$14,360 to the assistant from the IOLTA account. The title insurer notified the respondent of the payment, and the respondent promptly terminated the assistant's employment and notified his malpractice insurer.

The respondent did not then close the compromised IOLTA account. The respondent opened a new IOLTA account in March 2008 to handle all new closings, but he maintained the other IOLTA account to process checks that had been issued from that account. He did not take any action to audit the old IOLTA account to confirm that all real estate closing payments had been made and that no client funds were missing but simply assumed that the thefts were covered by his earned fees in the account. He also took no action to record mortgage discharges.

By May 1, 2008, the balance in the IOLTA account was about \$62,800. On May 7, 2008, the respondent generated an outstanding check list for the IOLTA account that showed \$52,945.91 in outstanding checks. The respondent believed this outstanding check list to be inaccurate due to his firm's failure to keep proper trust account records, but he did not take any steps of substance to determine who was entitled to the funds in the account. By October 1, 2008, the balance in the old IOLTA account had been reduced to about \$45,000 as outstanding checks were paid from the account. On October 2, 2008, the respondent withdrew about \$40,000 from the IOLTA account and deposited the funds to a new bank account that he opened in his own name. In fact, the respondent owed at least \$7,000 of the funds he transferred to the personal account for payments of title insurance premiums and recording fees to registries of deeds.

After October 2008, the respondent used the funds that he had transferred to his personal account to pay for personal expenses. By at least July 2009, the respondent knew that he was not likely entitled to all of the funds he had deposited to his personal account, and that at least some of these funds were due and payable to clients or third parties. The respondent made no efforts of substance to determine who was entitled to the funds until June 2010, when he began the process of reviewing his old closing files to identify unpaid title policies and unrecorded mortgage discharges and to account for the remaining outstanding checks. After June 2010, the respondent made payments of approximately \$7,000 from personal funds to reimburse title insurance companies for unpaid policies and to record mortgage discharges.

The respondent's conduct in failing to maintain required records for his IOLTA account and to properly reconcile the account violated Mass. R. Prof. C. 1.15(f). The respondent's failure to have in place measures giving reasonable assurance that his employee's conduct was compatible with his professional obligations and failure to make reasonable efforts to ensure that her conduct was compatible violated Mass. R. Prof. C. 5.3(a) and (b). By failing to promptly remove his earned fees from the IOLTA account, the respondent violated Mass. R. Prof. C. 1.15(b)(2).

By failing to safeguard trust funds and hold trust funds in a trust account and separate from the respondent's own property, and by failing to promptly pay trust funds due to third persons, the respondent violated Mass. R. Prof. C. 1.15(b)(1) and (2), 1.15(c), and 1.15(e)(5). By failing to promptly identify and record mortgage discharges, the respondent violated Mass. R. Prof. C. 1.1 and 1.3. By failing to promptly conduct a full and complete audit of his IOLTA account after learning that his office manager had misappropriated approximately \$18,000 from the account, the respondent violated Mass. R. Prof. C. 1.1, 1.3, 1.15(d) and (f), and 8.4(h). The respondent's appropriation of trust funds for his own use when he knew that at least some of the funds were likely due to third parties violated Mass. R. Prof. C. 1.15(c), and 8.4(c).

The respondent was admitted to practice in the Commonwealth of Massachusetts on June 10, 1974. On August 9, 2010, the respondent filed an affidavit of resignation. On August 16, 2010, the Board of Bar Overseers voted to recommend that the affidavit be accepted as a disciplinary sanction. On August 24, 2010, the Supreme Judicial Court entered a judgment accepting the affidavit of resignation as a disciplinary sanction, effective immediately upon the entry of the judgment.

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.