

**IN RE: KEVIN G. BARRY**

**NO. BD-2012-022**

**S.J.C. Order of Term Suspension entered by Justice Duffly on April 18, 2012, with an effective date of May 17, 2012.<sup>1</sup>**

**SUMMARY<sup>2</sup>**

In December 2008, a client retained the respondent to assist him in administering his late uncle's estate. The respondent was hired to probate the estate and to pursue the administrator's claim that his uncle had a prescriptive easement over the driveway on an abutter's property. The client told the respondent that the abutter had given his uncle permission to use the driveway and that the uncle had used the driveway for fifty years.

The respondent did not know the requirements of a prescriptive easement and was unaware that permission to use the driveway defeated the claim to a prescriptive easement. He therefore failed to advise the client of this fact. The respondent charged the client \$1,500 to handle the probate of the estate and to attempt to resolve the driveway dispute, advising the client that there would be an additional fee if the driveway dispute had to be litigated.

The respondent performed no services of substance to aid in the administration of the estate, and he was unsuccessful in resolving the driveway dispute. In March 2009, the client told the respondent that he wanted to sue the neighbor to enforce the easement over the driveway. The respondent again failed to tell the client that permissive use of the driveway precluded an easement. He agreed to file suit and requested that the client send him \$300 to pay the filing fee, which the client did later that month.

Shortly after receiving the \$300, the respondent told the client that he required a retainer of \$2,500 to pursue the driveway case and that he would bill at the rate of \$150 an hour, capping the fee at \$2,500. The client promptly sent the \$2,500 to the respondent.

The respondent did not file the lawsuit. Rather than depositing the funds he received from the client to an IOLTA account or other trust account, the respondent deposited the funds into a conveyancing account used by the respondent for that bank's loan transactions. The respondent negligently spent the funds entrusted to him by the client on unrelated matters. The client received no notice that the respondent had used any of the retainer.

During April and May 2009, the client repeatedly asked the respondent for information on the respondent's preparation and filing of the complaint. In their e-mail

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<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> Compiled by the Board of Bar Overseers based on the record filed with the Supreme Judicial Court.

exchanges, the respondent intentionally misrepresented to the client that he had drafted a complaint, had filed it in court, and was awaiting an answer.

On April 27, 2009, the respondent was administratively suspended from the practice of law for failure to pay his registration fees. By no later than May 4, 2009, the respondent had notice of his suspension. The respondent did not inform the client of his suspension and that he could not take any action on behalf of the complainant until he was reinstated.

On May 18, 2009, the respondent's affidavit requesting reinstatement was filed with the Supreme Judicial Court for Suffolk County. In the affidavit, the respondent represented that he had not engaged in the practice of law during his administrative suspension. The respondent knew that this representation was deceptive, false, and misleading. On May 21, 2009, the respondent was reinstated.

On May 20, 2009, after calling the clerk's office and learning that the respondent had not filed a complaint, the client discharged the respondent and demanded that the respondent return the unearned portion of the fee. The respondent did not comply with the client's request.

On June 4, 2009, the client asked bar counsel to investigate the respondent's conduct, and bar counsel sent a letter to the respondent asking for an explanation of his conduct. On June 29, 2009, the respondent refunded \$300 to the client, but he did not refund any portion of the retainer. On August 10, 2009, the respondent sent bar counsel an invoice purporting to justify his fee, but the invoice failed to credit the initial \$1,500 paid to the respondent and intentionally misrepresented the services provided and the time spent on the matters.

The respondent's failure to research the requirements of an easement and his resulting failure to explain to the client that the permissive use of the driveway would defeat the claim violated Mass. R. Prof. C. 1.1 and 1.4(b). The respondent's failure to prepare and to file the complaint with the court on behalf of the estate violated Mass. R. Prof. C. 1.1, 1.2(a), and 1.3. The respondent's intentional misrepresentations to the client that he had drafted and would file the complaint, his falsely stating or implying that a complaint had been filed with the court, his failure to inform the client of his administrative suspension, and his claim that he was waiting for an answer to the complaint supposedly filed with the court violated Mass. R. Prof. C. 1.4(a) and (b) and 8.4(c) and (h).

The respondent's negligent misuse of the funds advanced for expenses and fees violated Mass. R. Prof. C. 8.4 (h). His conduct in depositing into the conveyancing account fees and funds other than funds provided by the bank for its loan transactions violated Mass. R. Prof. C. 1.15(b) and (e)(5). The respondent's failure to deposit the retainer into an IOLTA account violated Mass. R. Prof. C. 1.15(b)(1). The respondent's withdrawal of funds from the conveyancing account without sending the complainant in advance of or on the date of the withdrawal an itemized bill, written notice of the amount and date of the withdrawal, and a statement showing the balance of the complainant's funds being held by the respondent violated Mass. R. Prof. C. 1.15(d)(2).

The respondent's failure to provide the complainant with an accounting of his use of the estate's funds and his failure to return the unearned fees upon discharge violated Mass. R. Prof. C. 1.15(d)(1) and 1.16(d). The respondent's conduct in providing a purported bill to bar counsel in which he intentionally misrepresented his services on behalf of the complainant violated Mass. R. Prof. C. 8.1(a) and 8.4(c). The respondent's conduct in collecting an excessive fee for his services violated Mass. R. Prof. C. 1.5(a). The respondent's conduct in holding himself out as a lawyer and engaging in the practice of law during his administrative suspension violated Mass. R. Prof. C. 5.5(a).

The respondent's conduct in falsely representing to the court that he had not engaged in the practice of law while he was administratively suspended from the practice of law violated Mass. R. Prof. C. 3.3(a)(1) and 8.4(c) and (d).

In a second matter, the respondent acted as the closing agent in a refinancing. After the lender wire-transferred the proceeds from the refinancing to the respondent's conveyancing account, the respondent negligently misused the funds that were to pay the property's real estate taxes to pay personal expenses unrelated to the closing.

The respondent subsequently issued a check drawn on his IOLTA account to pay the real estate taxes. The respondent knew that there were inadequate funds in the IOLTA account to cover the check. When the bank notified the respondent that the check had been dishonored due to insufficient funds, the respondent deposited personal funds into the IOLTA account, which he used to pay the real estate taxes.

The respondent's failure promptly to pay the real estate taxes violated Mass. R. Prof. C. 1.1, 1.3, and 1.5(c). His negligent misuse of the tax funds violated Mass. R. Prof. C. 1.15(b). The issuance of a check from the IOLTA account when he knew that the check would be dishonored violated Mass. R. Prof. C. 8.4(c) and (h).

From January 1, 2009 through December 1, 2009, the respondent did not keep records of the receipt and maintenance of funds in his IOLTA account and his conveyancing account. The respondent failed to maintain a chronological check register with client identifiers and a running balance; failed to keep individual client ledgers listing every deposit and expenditure and a running balance; failed to perform a three-way reconciliation of the account at least every 60 days, and failed to keep a ledger of his personal funds and bank fees in either account. The respondent's failure to keep adequate records for his conveyancing account and IOLTA account violated Mass. R. Prof. C. 1.15(f)(1)(B), (C), (D), and (E).

In mitigation, the respondent had undiagnosed attention deficit hyperactivity disorder at the time of his misconduct. The problem was diagnosed and the respondent entered into treatment. In aggravation, the respondent did not make restitution to the client in the first matter for the unearned portion of the fee.

On February 24, 2012, the parties submitted a stipulation to the Board of Bar Overseers recommending that the respondent be suspended from the practice of law for eighteen months. As a condition precedent to applying for reinstatement, the respondent was required to make full restitution to the client or the Client Security Board for any payments made to the respondent's clients.

On March 12, 2012, the Board of Bar Overseers voted to accept the stipulation of the parties and their proposed sanction. The board filed in Information with the court on March 22, 2012.

On April 19, 2012, the Supreme Judicial Court for Suffolk County ordered that the respondent be suspended from the practice of law for eighteen months effective May 19, 2012, with the respondent's reinstatement conditioned upon his showing that he has made full restitution to the client and/or the Client Security Board for any payments made to the respondent's clients.