IN RE: BRETT L. MALOFSKY

NO. BD-2015-025

S.J.C. Judgment Accepting Affidavit of Resignation As A Disciplinary Sanction entered by Justice Spina on March 17, 2015.[1]

SUMMARY[2]

The respondent was admitted to the Massachusetts bar on December 17, 1993.

In September of 2013, the respondent was hired to represent a husband and wife in the sale of their home. After a purchase and sale agreement was signed, the buyers tendered to the respondent two personal checks, each in the amount of $2,500, as a deposit. This deposit was in addition to a $1,000 check the buyers had previously given to a settlement agent to hold in escrow as earnest money. On the day that he received the two deposit checks, the respondent cashed one and used the funds for his own personal uses. Four days later, the respondent deposited the second $2,500 check into his personal bank account, and immediately used that money for his own personal uses as well.

The respondent attended the closing on November 20, 2013, and, acting under a limited power of attorney, executed the closing documents on behalf of his clients, who did not attend. At the closing the respondent received a check in the amount of $95,873.85, which represented the net proceeds of the sale due his clients. The respondent deposited these proceeds into his personal checking account and used at least $3,338.14 of the settlement funds for his own personal expenses.

After the closing, the clients repeatedly contacted the respondent requesting a status as to when they would receive their money. In each instance, the respondent either did not respond or gave excuses why they had not yet been paid. Among the excuses he gave was that he was waiting for the check to clear when he knew that the check had in fact cleared days before and that he had already used a portion of that money to pay his own expenses.

On November 27, 2013, the respondent opened an IOLTA account and transferred $89,500 from his personal account into it. He then wrote an IOLTA check to the clients in the amount of $95,873.85. Having deposited no other funds into the account he had just opened, the respondent knew the amount in the account was insufficient by $6,373.85 to cover the check. This check did not include the $5,000 deposit that the respondent had previously collected. The respondent mailed the $95,873.85 check to the clients who received, it on November 30, 2013.

In the interim, on November 29, 2013, the respondent made a demand on the settlement agent to deliver to the respondent the $1,000 in earnest money that she had been holding. The settlement agent immediately sent a $1,000 check to the respondent.

---

[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.

After the clients' $95,873.85 check was returned for insufficient funds, they contacted the settlement agent to tell her that the respondent's check was returned and to request that she send them directly the $1,000 in earnest money that she was holding. The settlement agent promptly put a stop payment on her $1,000 check she sent to the respondent and so notified the respondent on December 2, 2013. The respondent immediately sent an email to the settlement agent falsely claiming that his check was returned for insufficient funds because he had not received her check, which caused his account to be "short by $1,000". In fact, the account was short $6,373.85.

On December 2, 2013, the respondent deposited $11,500 in personal funds into his IOLTA account. The next day, the respondent wired $100,873.85 to the clients, which represented payment of their $5,000 deposit and the $95,873.85 in settlement funds due them.

By failing to deposit and maintain his clients' funds in a trust account prior to November 27, 2013, the respondent violated Mass. R. Prof. C. 1.15(b) and 1.15(e)(5). By not promptly paying to his clients the funds to which they were entitled, the respondent violated Mass. R. Prof. C. 1.15(c). By misusing his clients' funds for his own use, the respondent violated Mass. R. Prof. C. 1.15(b) and 8.4(c). By issuing a check from his trust account that created a negative balance, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(C). By depositing his personal funds into his IOLTA account, the respondent violated Mass. R. Prof. C. 1.15(b)(2). By failing to respond to his clients' reasonable requests for information and by misrepresenting to his clients the reasons why he could not give them their money, the respondent violated Mass. R. Prof. C. 1.4(a) and 8.4(c). By misrepresenting to the settlement agent the reasons why his check to his clients was dishonored, the respondent violated Mass. R. Prof. C. 4.1(a) and 8.4(c).

During the investigation, bar counsel forwarded a copy of the clients' complaint to the respondent at his business address, his home address and his email address. The respondent did not answer any of these communications. By knowingly failing without good cause to respond to bar counsel's requests for information in connection with an investigation, the respondent violated S.J.C. Rule 4:01, §3 (1)(b) and Mass. R. Prof. C. 3.4(c), and 8.1(b) and 8.4(g).

In a separate matter, in April of 2013, a former client died. The respondent had prepared her last will and testament. She left as her only asset one Merrill Lynch investment account, which was to be divided equally among her children. The decedent's daughter and named executor retained the respondent to assist her in settling her mother's affairs. The respondent told the daughter that he would probate her mother's estate in return for his hourly rate of $225, and that he would require a $1,000 retainer from which he would pay the initial filing fee when the petition was filed with the probate court. In May of 2013, the daughter gave the respondent $1,000 in cash. The respondent did not deposit the $1,000 retainer into his IOLTA account.

The respondent took no action with regard to the estate after receiving his $1,000 retainer. Between May of 2013 and February of 2014, the daughter made various attempts to contact the respondent to obtain a status report on the petition for probate. In each instance, the respondent either did not respond, or gave her excuses for why the work was not yet completed. In or around February of 2014, the respondent asked the daughter for an additional $500 fee, which she paid by check on February 27, 2014. The respondent deposited this check into his business account on March 3, 2014, and proceeded to use those funds to pay personal and business expenses unrelated to the daughter or her mother's estate. The respondent still did not complete the estate work.

On May 2, 2014, the respondent was administratively suspended pursuant to S.J.C. Rule 4:02(3) and 4:03(2) for failing to file a registration statement and failing to pay registration fees. On June 1, 2014, thirty days after his administrative suspension, the respondent became subject to the provisions of the administrative suspension order and S.J.C. Rule 4:01, § 17. Among other things, the order and rule required the respondent to file notices of withdrawal in every court where he had an appearance; resign his fiduciary appointments; provide notice of his suspension to all clients, heirs and beneficiaries; return his clients' files; refund any unearned fees; close all client funds accounts and properly disburse or otherwise transfer all client and fiduciary funds in his possession, custody or control; and file an affidavit of compliance with the court and bar counsel. The respondent failed to comply with these requirements in violation of S.J.C. Rule 4:01, § 17.

On June 30, 2014, the respondent contacted the daughter to request an additional $1,000 fee. The daughter did not pay the fee but instead, requested an accounting of the respondent's time. On July 1, 2014, the respondent sent the daughter an email in which he told her that he had thus far billed six hours of time on the estate, "which exhausts the $1,500.00 paid to date at $250.00 per hour." The hourly rate he quoted the daughter at the commencement of the representation was $225 per hour.

By August 8, 2014, the respondent had sent copies of the petition and assents to the daughter and her siblings, who complained that their names and addresses had been listed incorrectly in the documents. The respondent revised the documents and sent them out again. On August 28, 2014, the respondent informed the daughter that the revised petition was completed and could be filed, but he again gave excuses for having failed to do so.

On September 3, 2014, the daughter sent the respondent an email demanding an update and stating that her siblings were growing impatient with the respondent's failure to file the petition with the probate court. The respondent replied that he would file the petition but would require an additional $1,250 fee. He also asked that the daughter meet him at the probate court with a separate check with which to pay the filing fee, even though at the commencement of the representation he had told the daughter that the filing fee would be paid out of his initial $1,000 retainer.

The daughter wrote back on September 4, 2014, agreeing to meet the respondent at the probate court. She also stated, "One of my siblings provided a link to the Mass Bar showing you [are] not in good standing . . . . That's an issue with you practicing in Mass, and will affect the filing?"

The respondent replied that same day saying, "No, it will not affect anything . . . . It's an administrative snafu and is being corrected within a week or 2. I have already been on the phone with them about this and they are trying to figure out what happened. I am apparently not the only one this has happened to. It will NOT affect the filing at all." When the respondent sent this email to the daughter, he had actual knowledge that he was suspended from the practice of law and actual knowledge of his obligations under S.J.C. Rule 4:01, § 17, including his obligation to give notice of his suspension to his clients, to refund all unearned fees and to file notices of withdrawal in every court in which he had entered an appearance.

On September 5, 2014, the daughter paid the respondent the additional $1,250 fee that he requested. On or about September 10, 2014, the respondent filed with the Worcester Probate and Family Court a petition for formal appointment of a personal representative; a military affidavit; a bond without sureties; a death certificate; and the will of the decedent. The respondent signed both the petition and military affidavit as the attorney of record for the daughter.

The respondent's continued representation of the daughter following his administrative suspension in May of 2014 constitutes the unauthorized practice of law in violation of Mass. R. Prof. C. 5.5(a). The respondent's failure to abide by the administrative suspension order and the Court rule constituted a violation of Mass. R Prof. C. 3.4(c) and 8.4(d). The respondent's failure to inform his client that he had been suspended from the practice of law and his misrepresentations as to the reasons why he had been suspended violated Mass. R. Prof. C. 1.2(e), 1.4(a) and (b), and 8.4 (c) and (d).

The respondent's failure to deposit the daughter's retainer in a trust account violated Mass. R. Prof. C. 1.15(b) and 1.15(e)(5). The respondent's misuse of the daughter's funds violated Mass. R. Prof. C. 1.15(b) and 8.4(c). By charging $2,750 to complete and file a petition, a military affidavit, a bond, a death certificate and a will; by charging at a higher rate than agreed upon; and by charging his client twice for a filing fee, the respondent violated Mass. R. Prov. C. 1.5(a) and (b).

By not filing the petition earlier than sixteen months after being retained to probate the estate, the respondent violated Mass. R. Prof. C. 1.1 and 1.3. By failing to respond to his client's reasonable requests for information and by misrepresenting to his client the reasons why he could not file the petition promptly, the respondent violated Mass. R. Prof. C. 1.4(a) and (b), and 8.4(c).

Bar counsel filed a petition for discipline on January 9, 2015. On February 25, 2015, bar counsel filed the respondent's affidavit of resignation and requested that it be accepted as a disciplinary sanction. On March 9, 2015, the board voted unanimously to recommend to the Supreme Judicial Court that the respondent's affidavit of resignation be accepted. On March 17, 2015, the county court (Spina, J.) ordered that the respondent's resignation be accepted effective immediately upon entry of the judgment.