

IN RE: RICHARD ASKENASE

Order (public reprimand) entered by the Board July 19, 2002.

SUMMARY¹

On August 18, 2000, two checks drawn on the respondent's IOLTA account were paid against insufficient funds. The checks in question were in the amounts of \$1200 and \$4200.80 and payment of these checks by the bank, plus overdraft charges, created an overdraft of \$3341.97.

The overdraft occurred for the following reasons. On or about April 27, 2000, the respondent was retained by a client to represent her in a purchase for \$10,000 of vacant land in Lawrence, as well as in the resale of the same property for \$25,000. Both closings were scheduled to occur on August 3, 2000, with the respondent in each instance as closing attorney. Both were cash transactions in which neither the respondent's client nor the ultimate buyer was to mortgage the property to finance the purchase.

The closings scheduled for August 3, 2000 were the seventh double closings in which the respondent represented this client and acted as closing attorney in her purchase and immediate resale of real estate. Like the closings on the Lawrence property scheduled for August 3, 2000, all the earlier closings were cash transactions in which neither the respondent's client nor the ultimate buyers mortgaged the properties to finance the purchases. All but one of the earlier transactions involved vacant land. Unknown to the original sellers, in each instance the client brought no funds to the first closing and in fact funded her purchases of the properties with the proceeds of the resale later the same day.

The client similarly intended to fund her purchase of the Lawrence property with the proceeds of the resale. However, on August 3, 2000, and while the closing in which the client purchased the Lawrence property ("the first closing") was in process, the respondent was notified by the client's husband that the buyer for the resale of the Lawrence property would not have the funds available that day. The husband assured the respondent that the buyer would have the funds the next day. The respondent completed the first closing and gave the seller's attorney a check drawn on his IOLTA account for the net proceeds, \$9944.

Unknown to the seller, this check for \$9944 was not supported by a deposit of the purchase price because the respondent's client intended to pay for her purchase of the Lawrence property with the proceeds of the resale. Since the closing for the resale ("the second closing") had been rescheduled, the respondent asked the seller's counsel at the first closing not to release the proceeds check to his client until the respondent advised him that he could do so. The respondent did not explain the reason for this request. The seller's counsel held the check for several days to allow time to record the deed and he then deposited the check for payment. The respondent did not record the deed for the first closing from the seller to his client because the purchase had not been funded.

The second closing (the expected resale) on the Lawrence property was scheduled and rescheduled several times, but ultimately did not occur. On August 18, 2000, the client notified the respondent that the resale was postponed indefinitely and that the original seller

had agreed to rescind the first closing.

The respondent on August 19, 2000 wrote counsel for the seller in the first closing that the transaction was to be rescinded by mutual agreement of the parties and that the proceeds check was to be returned. The seller's counsel replied by letter dated August 21, 2000 that his client had not agreed to rescind the sale and that the proceeds check had already been negotiated.

The proceeds check for the first closing had in fact been presented to the bank in which the respondent maintained his IOLTA account and paid on August 14, 2000 from other clients' funds in the IOLTA account. As a consequence, there were insufficient funds available to pay two unrelated trust account checks such that payment by the bank of these checks created an overdraft.

On August 24, 2000, and immediately upon becoming aware of the overdraft, the respondent deposited \$10,054 in personal funds to his IOLTA account to cover the sum that his client was to have brought to the first closing on the Lawrence property.

The respondent's closing on his client's purchase of the Lawrence property and tendering his IOLTA check to the seller, knowing that he had not received the funds due from the buyer, and the respondent's also having done so in six previous closings for this client, was a breach of the respondent's fiduciary obligations as closing attorney, in violation of Mass. R. Prof. C. 8.4(c), (h) and Mass. R. Prof. C. 1.15(a), (b).

The respondent's negligent misuse of other clients' funds to pay the seller in the first closing on the Lawrence property, without intent to deprive and with no deprivation resulting, was conduct in violation of Mass. R. Prof. C. 1.15(a).

This matter came before the Board on a stipulation of facts and disciplinary violations and a joint recommendation for discipline by public reprimand. The Board accepted the parties' recommendation and imposed a public reprimand.

¹ Compiled by the Board of Bar Overseers based on the record of proceedings before the Board.

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