

IN RE: HARLAND L. SMITH, Jr.

SUMMARY¹

On June 16, 1994 the respondent filed a Chapter 7 petition in bankruptcy on behalf of a married couple. At that time, one of the listed assets of the bankruptcy estate was a meritorious automobile personal injury case being handled by other counsel. On May 8, 1995, the clients discharged the attorney handling the personal injury case and retained the respondent. On August 14, 1995 the respondent filed a civil lawsuit on behalf of the couple in connection with the personal injury claim. The respondent filed the lawsuit without first obtaining the permission of the trustee in bankruptcy. At the time that he filed suit, the respondent knew that he was required to obtain permission of the trustee, but the statute of limitations was about to expire and the respondent was concerned that the trustee would not provide authorization in time.

After the lawsuit was filed the respondent initially neglected to obtain ratification or authority from the trustee but finally, on November 2, 1995, notified the trustee and obtained oral authority. In February 1997, the respondent sent to the trustee a proposed application for employment as the estate's attorney, but the trustee did not take any responsive action to retain the respondent.

On March 10, 1997, the respondent, with the approval of his clients, settled the clients' lawsuit for the approximate amount of the policy limits. At that time, the respondent failed to notify the trustee of the terms of the settlement and failed to obtain the trustee's prior authorization to settle. The respondent knew that he was required, in the circumstances, to obtain the trustee's prior authorization.

Shortly after the settlement, the respondent tendered to his clients the share of the proceeds that the respondent conservatively calculated the clients were entitled to under the federal exemption plus so-called wild card exemptions. The respondent tendered the sum to the clients without the prior knowledge or approval of the trustee. The respondent knew that he was required, in the circumstances, to obtain the trustee's prior authorization.

Shortly after the settlement, the respondent paid to himself and to associate counsel the sums that they were entitled to receive by contract. The respondent's clients consented to the distributions. The respondent paid the sums without prior knowledge or approval of the trustee. The respondent knew that he was required, in the circumstances, to obtain the trustee's prior authorization. After the distributions, the respondent still held approximately \$27,000.00, representing the respondent's calculation of the sum that the bankruptcy estate was entitled to receive after distributions. While holding the sums, the respondent, from time to time, made efforts to settle a claim of a medical provider to a substantial portion of the proceeds. However, the respondent did not notify the trustee that he was holding this sum for the benefit of the estate.

Beginning in June 1997, the respondent's clients began to question the distribution that the respondent made to them as their share of the settlement proceeds. The formula that the respondent used to calculate his clients' share and the law involved was complicated and difficult to explain. On July 16, 1997, not satisfied with the respondent's explanations, the

clients protested in writing to the trustee. On August 27, 1997 the trustee sent a letter to the respondent, inquiring as to the status of the matter and requested an accounting. On September 7, 1997, six months after settlement of the lawsuit and after written request from the trustee, the respondent finally tendered to the trustee the \$27,000.00 that he had held intact, with an accounting of the disbursements made six months earlier.

In subsequent bankruptcy court proceeding there were attempts by the Chapter 7 Trustee and the United States Trustee to recover all of the settlement monies for the benefit of the estate. In ruling on these motions, the court effectively ratified the terms of the settlement of the lawsuit and the amounts of the distributions. No disgorgement of legal fees was ordered. However, on February 2, 1998, in a document entitled "Findings and Conclusions on Trustee's Motion to Compel Debtors to Account for and Surrender Funds", the court held that the respondent's conduct, as described above, was a "clear disregard of the requirements of the Bankruptcy Code".

The respondent's conduct in commencing and settling a personal injury claim constituting an asset of a bankruptcy estate while simultaneously representing the debtors and his distribution of the settlement proceeds including his own fees, all without prior knowledge or approval of the trustee in bankruptcy, was conduct prejudicial to the administration of justice in violation of Canon One, DR 1-102(A)(5).

The respondent's withholding in escrow of a significant portion of the proceeds of the settlement without timely notification and accounting to the trustee was in violation of Canon One, DR 1-102(A)(5), and Canon Nine, DR 9-102(B)(3).

In another unrelated matter, the respondent represented a client in pending divorce litigation from June 25, 1997, until April 15, 1998. On or about April 15, 1998, the client discharged the respondent and thereafter requested several times an accounting of the respondent's time and services and a copy of his file. On May 20, 1998, the client filed a complaint with Bar Counsel and on June 3, 1998, Bar Counsel requested that the respondent provide an accounting of his time and a copy of the client's file to Bar Counsel and to the client. The respondent did not reply and Bar Counsel wrote to the respondent requesting the file and an accounting three more times in September, October, and November 1998. The respondent finally transmitted the file and provided an accounting to Bar Counsel and the client on February 23, 1999.

The respondent's failure to timely return his client's file upon request was in violation of Mass. R. Prof. C. 1.16(e). The respondent's failure to promptly account to his client upon request was in violation of Mass. R. Prof. C. 1.15(a).

In connection with the two complaints investigated by Bar Counsel, the respondent failed to timely respond to requests for information from Bar Counsel. In one case, Bar Counsel was required to subpoena the respondent. The respondent's conduct in this respect was in violation of Disciplinary Rule 1-102(A)(5) (for conduct prior to January 1, 1998), Mass. R. Prof. C. 8.4(g) (for conduct after January 1, 1998) and S.J.C. Rule 4:01 § 3.

In aggravation, the respondent has a prior admonition for failing to communicate adequately with a client.

The matter came before the Board of Bar Overseers 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 on July 20, 1999.

¹ Order (public reprimand) entered by the Board on July 20, 1999.

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