

IN RE: HARLAND L. SMITH, JR.

NO. BD-2019-032

S.J.C. Judgment of Disbarment entered by Justice Gaziano on April 5, 2019, with an effective date of May 5, 2019.¹

Following a hearing, the respondent was disbarred for intentionally misusing the funds of clients in two matters, failing to make restitution in the second matter, and engaging in other misconduct. There were multiple aggravating factors, including the respondent's experience in the practice of law, prior discipline, as well as dishonesty and lack of candor before the hearing committee.

SUMMARY²

The case involves two instances where the respondent, who was admitted to the bar in 1988, intentionally misused client funds.

In the first matter, a client retained the respondent in or before 2006 to represent her in her divorce and post-divorce proceedings. On February 28, 2006, the respondent and counsel for the client's husband jointly opened an escrow account at a bank and deposited into it \$227,643.19, consisting of the net proceeds from the sale of the marital home. The escrow arrangement required both counsel to consent in writing to any withdrawals of funds.

The client was aware of the account, and she understood that it was to be held pending the divorce. On October 20, 2010, the probate court entered a judgment of divorce nisi and ordered counsel to disburse \$20,000 to the husband and \$160,000 to the respondent's client from the escrowed funds which, by then, totaled more than \$250,000. Any remaining funds were ordered to be held in escrow to pay future child support payments upon the client's application.

On December 20, 2010, the respondent and opposing counsel jointly withdrew \$184,230 from the escrow account to pay the ex-husband his share (\$20,000), the respondent's client her share (\$160,000) and, by agreement, the legal fees owed to the husband's counsel (\$4,230), all consistent with the court order. The respondent received his client's share, \$160,000, at that time and deposited the funds to his IOLTA account. The balance in the escrow account continued to be held jointly in escrow for unpaid child support. The respondent did not advise his client that he had received her \$160,000. She believed her funds remained in the escrow account.

From 2010 through 2013, the client made numerous requests to the respondent for the \$160,000, and for additional child support funds that were in arrears. The respondent misrepresented to his client that he needed the consent of her ex-husband to release the real estate escrow funds, and that opposing counsel had told him that he could not reach the ex-husband to release the funds due her. From 2010 to April 2018, opposing counsel made periodic attempts to contact the respondent to discuss how to handle the funds remaining in the joint escrow. The respondent did not contact opposing counsel in regards to the unpaid

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.

child support until 2018, when the account was closed. Further, the respondent did not commence any court process to enforce the ex-husband's child support obligations.

By January 1, 2012, the balance in the respondent's IOLTA account had dropped to about \$40,000 without any payment being made to his client. Thereafter, the respondent wrote numerous checks payable to himself totaling \$40,000. Even with unrelated additional deposits in the interim, by August 6, 2013, the balance in the respondent's account fell to \$140.59. The respondent deposited the \$40,000 in check withdrawals to his operating account and used the funds for his own purposes. His client did not authorize these expenditures from her funds. The respondent intentionally misused his client's \$160,000 for purposes unrelated to his client with intent to deprive of her of her funds.

The respondent testified at hearing that that he used the \$160,000 to hire an investigator to locate his client's ex-husband to seek payment of the support arrears. The client denied authorizing this payment at hearing and the respondent offered no documentation to support his claim. The hearing committee found the defense to be neither credible nor plausible.

On April 11, 2014, the respondent disbursed from his IOLTA account a \$160,000 check payable to his client. The check was primarily, if not entirely, made from funds belonging to other clients, as described below. The respondent falsely told his client that her ex-husband and his counsel had finally released the funds from the escrow account.

By misrepresenting to his client that he had not received \$160,000 due to her, and instead stating that opposing counsel and her ex-husband were responsible for the nonpayment of the \$160,000 and the additional child support arrearages, the respondent violated Mass. R. Prof. C. 1.2(a), 1.4, 8.4(c) and 8.4(h). By failing to cooperate with opposing counsel to obtain the child support due to his client from the escrow account in a timely fashion, the respondent violated Mass R. Prof. C. 1.2(a) and 1.3. By failing to account for and intentionally misusing his client's \$160,000, with temporary deprivation resulting, the respondent violated Mass. R. Prof. C. 1.15(c), 1.15(d) 1.15(f)(1)(C), 1.15(f)(1)(F), and 8.4(c) and (h).

In the second matter, in 2012, the respondent began representing a mother and daughter (collectively hereafter, the family) in organizing their financial affairs. The representation included, in March 2014, selling as trustee residential real estate in which the family had a beneficial interest.

On March 28, 2014, the respondent deposited to his IOLTA account \$199,421 of the real estate proceeds and \$1,022.69 in rental income due to the family. From these proceeds, the respondent paid the client in the first matter the \$160,000 that he owed her. The respondent also paid himself two checks in the amounts of \$22,450 and \$4,760, which he used for his own purposes, including payment of his personal taxes. The family did not authorize any of the above disbursements, and the respondent was not entitled to use the real estate proceeds for his own purposes. The respondent knowingly and intentionally misused a total of \$183,865.41 of the real estate proceeds for purposes not related to the family, with resulting and continuing deprivation to the family.

The respondent falsely represented to bar counsel that the real estate proceeds were distributed to two spendthrift trusts, and provided knowingly false testimony to the hearing committee that he used other unrelated funds to pay the family the full amount of the real estate proceeds by making payments by bank checks for deposit to two spendthrift trusts.

The respondent produced no documentation to show that any checks were deposited to any account of any alleged spendthrift trust. The hearing committee did not find his explanation credible and found that the respondent's statements to bar counsel and to the hearing committee were knowingly false.

Between March 19, 2015 and May 15, 2017, the respondent also intentionally misused and converted twenty pension checks totaling \$17,456.36 and a \$9,577.84 insurance check, all payable to the mother. The respondent deposited these checks to his business operating account. By May 16, 2017, all but \$1,533.10 of these funds had been spent from the respondent's business account, without any distributions to the mother or at the mother's direction. The mother, who died prior to the hearing, did not authorize the respondent to take any of the proceeds for legal fees or otherwise. The respondent's use of these funds resulted in immediate and intended deprivation to the mother. The respondent did not account for these funds and deprived the family and the estate of the mother of \$210,899.61 in funds to which they were entitled, consisting of the converted real estate proceeds (\$183,865.41) and the converted checks (\$17,456.36 and \$9,577.84).

By intentionally misusing and failing to account for the sellers' proceeds due the family, and by commingling and intentionally misusing the personal funds of the mother, with deprivation resulting, the respondent violated Mass. R. Prof. C. 1.15(b), 1.15(c), 1.15(d), 8.4(c) and 8.4(h). By misrepresenting to bar counsel the disposition of the sellers' proceeds, the respondent violated Mass. R. Prof. C. 8.4(c), 8.4(g) and 8.4(h).

In aggravation, the respondent, who was admitted to practice in 1988, had a history of prior discipline including, most recently, a stayed suspension. The respondent had substantial experience in the practice law, engaged in multiple discrete acts of misconduct, and took advantage of and victimized multiple vulnerable clients. Also in aggravation, the respondent displayed a lack of candor before the hearing committee and provided testimony that was knowingly false. The respondent also failed to appreciate the wrongfulness of his conduct, instead offering excuses that were not plausible or credible. The respondent displayed indifference to making restitution. He engaged in uncharged professional misconduct by failing to cooperate in bar counsel's investigation and by failing to participate in the disciplinary proceedings by withholding relevant documents. There were no facts found in mitigation.

On March 11, 2019, the Board of Bar Overseers voted to recommend to the Court that the respondent be disbarred. On April 5, 2019, the Court so ordered, effective thirty days from the date of the order.