

**BBO File No. C1-03-(9)312****IN RE: Attorneys Smith and Jones****Vote affirming recommendation of dismissal entered by Board of Bar Overseers on April 12, 2010.****SUMMARY**¹

Respondents Smith and Jones² were admitted to the Massachusetts bar in 2002 and 1989, respectively. Jones was also admitted to the bar in Rhode Island. Bar counsel filed a five-count petition for discipline against the respondents. The matter was heard by a special hearing officer, who generally found the respondents to be credible and recommended dismissal. The former clients involved in the matter were unavailable and did not testify at the hearing.

Background. The former clients consisted of a mother, and her son and daughter. The mother and her siblings had been involved in various business enterprises, and her children had been employees of these businesses. The mother and her siblings had a falling-out and had been involved in a number of lawsuits in Massachusetts and Rhode Island. The mother had retained and discharged a number of attorneys in the course of these lawsuits. She had also been awarded substantial sums of money, but these awards were subject to creditor claims including claims by her former lawyers. Some of these funds were subject to two interpleader actions, one in state court and the other in federal court.

In 1992, the daughter lived in a house which was being foreclosed upon. The mother's attorney advanced money for its purchase and took back a mortgage. The daughter continued to live in the house and, after about two years, stopped making mortgage payments. In about 1999, the mother discharged this attorney.

That same year, the family formed a corporation, each with a one-third interest, and assigned to the corporation their claims for money damages against anyone.

The following year the federal government instituted garnishment proceedings in federal district court to collect a judgment against a limited partnership in which the mother

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

² Pseudonyms.

had been a general partner. The daughter knew of these proceedings.

In 2001, the daughter's house was conveyed to the mortgagee by deed in lieu of foreclosure, but the daughter remained in the house. The mother and son moved in with the daughter and they lived together there until 2005, when the son died. No payments were made after 1994 toward the costs of the property.

In 2001, the mother executed an assignment and voluntary judgment assigning to the family corporation \$1.5 million from her funds in the interpleader actions in federal and state court and any proceeds from cases pending in those courts. No steps were taken at that time to obtain a judgment against the mother based on the assignment.

In August 2002, the IRS filed a notice of tax lien claiming the mother owed taxes of almost \$1.7 million for the years 1991-1997. These tax claims arose from her partnerships with her siblings.

As of the fall of 2002, the mother had about \$2.6 million in the federal court interpleader action, which were subject to contested claims equal to or exceeding that amount by three of her former counsel. In addition, she had about \$270,000 in the state interpleader action in which the sole claimant was one of the three former counsel.

The special hearing officer found that the mother and her children were sophisticated in business matters and in employing lawyers and challenging their fees. The special hearing officer also found that, throughout the relevant period, the family acted in concert, their interests were intertwined, and notice to one was notice to all.

Fee Agreement. In October 2002, the family engaged Smith to represent them in all of their pending matters, including the two interpleader actions and ten other pending lawsuits, and to initiate new litigation to recover damages from the mother's siblings. The special hearing officer found that the family did not disclose either the federal garnishment proceeding or the tax lien to Smith before he agreed to represent them, and that these matters alone threatened any recovery from the interpleader actions.

The family had no financial resources to fund the pending and new litigation. Both interpleader funds were listed in the fee agreement among the possible sources of funds. As the interpleader funds became available, half of the proceeds were to be placed in trust and half given to the clients until \$250,000 was held in trust as a fund to pay the legal fees.

During the course of the representation, Smith would be allowed to withdraw from the trust fund fees calculated at the rate of \$150 per hour for representation in all matters, except some personal injury claims. Smith's final fees were to be calculated on a contingent basis: upon settlement or judgment of any matter (other than the excluded personal injury claims), Smith was to receive 33% less fees previously paid. The agreement had a fee arbitration clause. The clients acknowledged that Smith was to engage Jones to render services in Rhode Island. The fee obligations, however, ran only to Smith. The fee agreement was signed by each of the family members and by the daughter on behalf of the family corporation.

The special hearing officer found that the \$150 hourly fee represented a reduced hourly rate. He further found that the likelihood of recovery of substantial funds free from creditors' claims was sufficiently doubtful that the contingent fee and reduced rate hourly fee represented a substantial financial risk for respondents and was a highly favorable arrangement for the clients.

After Smith was retained, he and Jones agreed that Jones would submit invoices for Jones's hourly billings, and Smith would pay the invoices from the trust funds. They also agreed that Jones would receive a portion of the contingent fees earned on matters in which she was involved.

State Court Interpleader. In late November 2002, Jones filed a motion on the mother's behalf to withdraw funds from the state interpleader. The motion was unopposed and was allowed. In December 2002, the mother endorsed the check for the proceeds of about \$270,000 and gave it to Smith, who deposited the funds into a trust account he had opened in Rhode Island with his clients' knowledge and consent. Under the fee agreement, half these funds were then due the clients; however, they consented to take only \$125,000 and leave the remainder to pay for legal fees. In December 2002, at his clients' request, Smith transferred the \$125,000 to an account established for the family corporation.

Between December 2002 and September 2003, Smith paid about \$41,500 to Smith and about \$30,500 to Jones from the funds for their interim hourly fees, and the special hearing officer credited Smith's testimony that he sent bills for each payment by email to the family. In addition, Smith made a series of withdrawals totaling \$65,000 as advances on the contingent fee due from the recovery from the state interpleader. The special hearing officer

credited Smith's testimony that notices of these withdrawals were mailed to the clients contemporaneously with the withdrawals, each stating that the withdrawal was "Drawn on Contingent Fee Per Agreement." The special hearing officer found that the clients received the notices, knew they referred to contingent fees due from the state interpleader, and made no objection, thus acknowledging these fees were proper under the fee agreement. The special hearing officer rejected bar counsel's argument based on the printing on the letterhead that these notices of contingent fee advances were fabricated.

Federal Interpleader. In January 2003, the respondents filed an action in federal court in Massachusetts to litigate the property dispute concerning the family's home. The clients' former attorney and the mortgagee sought possession of the property and payment for the fair value of the family's use and occupancy for the prior eight years. The mortgagee offered to settle a portion of the dispute for about \$325,000 but this was rejected by the family. In August 2003, the federal court action was dismissed without prejudice. Meanwhile, in March 2003, the mortgagee brought suit in Rhode Island for possession and for damages, including payment for use and occupancy.

Concerned about protecting any recovery from the federal interpleader from the IRS, the family at that point told Smith for the first time of the federal tax lien against the mother. Smith referred them to a tax attorney with whom they met in early September 2003. As a result of further discussions between Smith and the family, it was decided to file a "friendly" lawsuit between the family corporation and the mother by which, based on the earlier assignment, the corporation could obtain a judgment and execution against the mother. At this point, Smith recognized the existence of a conflict between the interests of the corporation and the mother. He therefore advised the children that they and the corporation should obtain separate counsel, and referred them to Attorney Doe, who thereafter represented them in all matters relating to the corporation's claim against the mother. Respondents Smith and Jones continued to represent the mother with respect to her interests. In July 2003, Attorney Doe³ filed suit on the corporation's behalf against the mother and Jones appeared for her. In accordance with the mother's wishes, Jones executed a consent to

³ A pseudonym.

judgment for the corporation against the mother for \$1.5 million. Smith advised the family that once federal interpleader funds were released to the mother, they could be paid to the corporation based on the judgment and levy of an execution. However, no execution was ever obtained on the judgment.

During the summer of 2003, disputes arose between the clients and the respondents, and the clients began criticizing the respondents' efforts on their behalf. In July 2003, Smith notified the clients that following completion of the federal interpleader action, the respondents would withdraw from further representation.

In late July or early August 2003, the respondents negotiated settlements of two of the three federal interpleader claims for a total of \$643,000, resulting in a net recovery of \$132,000 for the clients over the previous claims. The negotiation of the remaining claim was complicated and difficult. The special hearing officer credited Smith's testimony that the clients were fully advised regarding the progress of the negotiations and fully agreed to the terms of the final settlement.

This final settlement was global in that it involved all the claims of a former law firm and all the claims regarding the family home. It was very favorable to the clients because, absent settlement, the claims in the federal interpleader exceeded the amount held by the court. The firm agreed to accept \$1.2 million in satisfaction of its claims against the mother, subject to execution of releases by the clients; the family home would be conveyed to the mother's designee free of encumbrances; and the parties were to mutually release each other from all claims. The law firm gave up about \$400,000 of interest and the clients received the family home free and clear, meaning that all claims for the fair market value of the property, valued at \$400,000, and for prior use and occupancy, valued at \$110,000, were released.

The court approved the settlement in early August 2003. Shortly thereafter, the court ordered the release of funds to the claimants and the balance of approximately \$751,000 to Smith as trustee for the mother. The latter disbursement was done at the respondent's direction because he could not disburse funds to the clients or transfer the property until the releases had been executed.

Assuming that the clients complied with the terms of the global settlement and received the funds from the federal interpleader, Smith and Jones, at the end of August 2003,

had obtained financial recoveries for the clients totaling about \$1.532 million: approximately \$270,000 from the state interpleader; \$751,000 from the federal interpleader; title to the family home; and release of claims for use and occupancy for almost ten years.

During September 2003, the clients disputed aspects of the respondents' representation, and as time approached for the respondents to be paid their contingent fee for the federal interpleader, the clients ceased cooperating with Smith and tried to prevent his concluding the global settlement: they refused to execute the releases and refused to permit a qualified appraiser to determine the fair market value of the property necessary to the calculation of the contingent fee.

None of these disputes concerned Smith's entitlement to a contingent fee based on the value of the recovered property. The special hearing officer found that the clients knew and accepted that, under the fee agreement, the fair value of the family home and the fair value of the clients' use and occupancy would be used in calculating the contingent fee.

Through September 2003, the relationship between the respondents and the clients continued to deteriorate. At the end of September 2003, the daughter, as managing partner of the corporation, discharged Attorney Doe. Smith was advised of this and he urged them to obtain new counsel.

The special hearing officer found that the clients set out on a deliberate course of conduct both to frustrate Smith's conclusion of the global settlement and to prevent him from obtaining the contingent fee to which he was entitled. They neither disputed his entitlement to contingent fees nor invoked the fee arbitration clause. Instead, they demanded that he turn over all of the funds held in the trust account, without reference to his rights or obligations.

About mid-September 2003, Smith received the check for about \$751,000 from the federal interpleader funds. He deposited the funds in the trust account, which after that deposit, held a total of about \$759,000 of the mother's funds. Smith advised the clients of the deposit and informed them that he was trying to calculate the contingent fee but had been delayed due to the controversy over the appraisal.

The special hearing officer found that until the releases were executed Smith could not deliver the deed or disburse funds. The special hearing officer also found that the respondents had a lien upon the funds for payment of their fees, and that by October 1, 2003,

the respondents had earned their contingent fee – only its amount was at issue.

On October 9, 2003, knowing that he had earned his contingent fee and frustrated by the clients' efforts to thwart conclusion of the global settlement and calculation of the fee, Smith withdrew about \$149,000 from the funds he held as trustee and used them to purchase a house. The special hearing officer found that Smith acted in good faith in accordance with his understanding of his rights under Rhode Island's attorney's lien statute and that he knew the contingent fee due him would substantially exceed this amount.

Garnishment Proceeding and Subsequent Actions. On October 7, 2003, the federal government obtained a writ of garnishment issued to Smith, as trustee for the mother, against the property of the limited partnership and the mother (discussed above) in Smith's possession up to about \$610,000, the amount then owed on the federal government's judgment. Smith was served with the writ, but was not asked to represent the mother in the garnishment proceeding, nor did he undertake to do so. Smith had not known of this issue and it was not part of the fee agreement. At that point, Smith held about \$600,000 of the mother's funds and he knew her interest was nonexempt.

Smith had a good faith belief that the mother had valid grounds for contesting the garnishment and quashing the writ. In addition, it was Smith's position that the trust funds were not subject to garnishment because the mother was not entitled to them: they were subject to the attorneys' liens of the respondents and Attorney Doe, and the family corporation, if it obtained an execution on the judgment, was also entitled to be paid from those funds.

About October 30, 2003, Smith filed a garnishee's answer and served it on the government and the mother. In the answer he represented that all of the mother's funds in his possession were "subject to lien and/or execution" and that no funds were due the mother. Jones notarized Smith's signature on the answer. The government never filed any written objections to Smith's answer. The special hearing officer found that at the time it was the respondent's good faith understanding that attorneys' liens and executions levied upon a pre-existing judgment would have priority in a garnishment proceeding.

Although it was not Smith's responsibility, he argued to the Assistant U.S. Attorney that the mother had not been a general partner of the limited partnership at times relevant to

the underlying action and therefore was not liable for the judgment.

In the meantime, in October 2003, the family had engaged successor counsel, Attorney Roe⁴, to represent them and the family corporation in obtaining the interpleader funds and an accounting from Smith. In early November 2003, Attorney Roe sent a letter to Smith demanding that he turn over the federal interpleader funds, account for them, and provide an itemization of all fees. He also threatened to file a disciplinary complaint against Smith. Smith replied by fax and declined to send any information regarding the mother, since Attorney Roe did not represent her. He advised Attorney Roe that the balance of the money following satisfaction of attorneys' liens and resolution of the garnishment action would be forwarded to the family's corporation and further stated that he was still awaiting receipt of the signed releases so that the deed to the family home could be delivered. Around November 21, 2003, the family executed the releases. The two attorneys continued to exchange letters during November containing similar demands and responses. About November 13, 2003, all the former clients including the mother notified Smith that the respondents had been discharged and they had retained Attorney Roe, and demanded a full accounting, while threatening criminal prosecution if the demands were not met.

About November 21, 2003, by certified mail, return receipt requested, restricted delivery, Smith sent an accounting to the mother, whose funds he held in trust. The special hearing officer found that this accounting accurately described the funds received, the valuation of the family home and of its use and occupancy for ten years, as well as the fees taken from the trust account to pay the respondents. He further found that it accorded with the fee agreement. In the accounting, Smith also accurately described the garnishment action, and the measures that the mother could take in that matter. This accounting was refused and was returned to Smith.

In January 2004, when Smith was informed by the U.S. Attorney's Office that the government was not convinced the mother had not been a partner at the relevant time, he immediately informed Attorney Roe that the government intended to pursue the garnishment action and suggested that he take immediate action on behalf of the mother to block the

⁴ A pseudonym.

government's efforts.

However, Attorney Roe never entered an appearance in the garnishment action for the mother or for the family corporation. On July 14, 2004, Smith sent a fax to Attorney Roe suggesting that he obtain an execution on the family corporation's judgment against the mother, serve it on Smith, and Smith would disburse the funds, assuming the government did not interfere. However, Attorney Roe took no action to obtain an execution.

Between February 2004 and the spring of 2006, there was virtually no activity in the garnishment proceeding. During that time, Smith kept the mother's remaining funds in the trust account, except that he withdrew fees for services as trustee and garnishee and for legal services. The special hearing officer found that, when and as the fee payments were withdrawn, Smith prepared bills for the family, addressed them to Attorney Roe, who, he understood, still represented the family, and faxed them to Attorney Roe, who received them. The special hearing officer rejected bar counsel's claims that these faxes were fabricated by the respondent.

By the spring of 2006, two and a half years after service of the garnishment writ, having paid his and others' liens, Smith held about \$290,000 in trust under garnishment. Around that time the government made demands on Smith to turn over the garnished funds. In May 2006, Smith, as trustee, paid the government the remaining funds, advising the government in his transmittal letter, that all perfected attorneys' liens and other claims had been satisfied. The special hearing officer found that throughout this process the Assistant U.S. Attorney knew that Smith intended to first satisfy the attorneys' liens and the approximate amount of those liens, and that these payments were acceptable to the government.

Thereafter, Smith advised Attorney Roe (with a copy to bar counsel) that essentially there were no funds left in the trust account and asked Attorney Roe whether he should communicate with Attorney Roe or the mother. On July 10, 2006, Attorney Roe advised Smith for the first time that he no longer represented the family. About a week later, Smith sent a detailed accounting to the mother, reviewing the prior accountings and bills, and including accountings for fees as trustee and garnishee, and sent a copy to bar counsel. This accounting was refused and returned to him. The special hearing officer found that Smith

fulfilled any obligation to render an accounting by sending this and the prior accounting, and that the accountings were accurate.

About September 26, 2006, Smith filed and served upon the mother and the government an amended garnishee's answer which reflected his payment to the government of the remaining funds he had held as trustee.

In January 2007, Smith filed and served upon the mother and the government a motion in the garnishment proceeding for an order approving, nunc pro tunc, his conduct as garnishee concerning his payment to the government in May 2006, with a memorandum in support of the motion, accurately setting out his conduct as garnishee and the fact that his former client had received the original answer and had taken no action to contest the garnishment. With the government's assent, the court allowed the motion.

The special hearing officer found that Smith's actions as garnishee were proper, made in good faith and consistent with his ethical obligations. The special hearing officer rejected bar counsel's allegation that Smith had made knowingly false statements in his first or second answers in the garnishment action.

In December 2003, the clients filed a complaint with the board as to both respondents. The thrust of the allegations was that all of the funds in Smith's possession, which had been subject to the garnishment proceedings, should have been turned over to the family corporation.

Smith received about \$270,000 from the state interpleader, of which \$125,000 was paid to the family corporation. He withdrew about \$41,500 in hourly fees and \$65,000 in advances on contingency fees before receiving federal interpleader funds in the appropriate amount of \$750,000. Smith paid Jones \$33,000 in interim fee bills between January 2003 and January 2004. After receiving the federal interpleader funds, Smith withdrew about \$19,930 in hourly fees and \$445,440 in contingency fees, of which \$200,000 was paid to Jones. Ultimately, Jones was paid about \$233,000, and Smith received about \$372,000, from recoveries and releases of claims totaling about \$1,532,000.

The special hearing officer concluded that the respondents did not charge or collect excessive fees, first finding that the contingent fee aspect of the fee agreement as it applied to any recoveries from the interpleaders and the recovery of the family home, was not only fair,

but was favorable to the clients both on the face of what was disclosed to the respondents at the time of the fee agreement and based on what the clients knowingly did not disclose. The potential ability to secure a recovery to which a contingent fee would apply was unique and risky; in addition, the clients had a history of disputing their attorneys' fees. The special hearing officer found that Smith's contingent fee agreement was fair and that the charges and withdrawals for fees were made in accordance with the agreement.

Conclusions of Law. The special hearing officer recommended dismissal of the numerous charges against the respondents, summarized here: Smith's alleged conversion of client funds and fees due Jones in violation of Mass. R. Prof. C. 8.4(c) and (h); Smith's alleged failure to notify the clients of receipt of funds and withdrawal of funds in violation of Mass. R. Prof. C. 1.4(a) and (b) and 1.15(a), as in effect through June 30, 2004; Smith's alleged failure to remit funds to the clients in violation of Mass. R. Prof. C. 1.2, 1.3, and 1.15(b), as in effect through June 30, 2004; Smith's alleged failure to deposit and hold the interpleader funds in trust in violation of Mass. R. Prof. C. 1.15(d) and (e), as in effect through June 30, 2004; Smith's alleged commingling of client funds with his own funds in violation of Mass. R. Prof. C. 1.15(a), as in effect through June 30, 2004; Smith's alleged failure to place client funds in a financial institution with an agreement to report the dishonor of funds to the board in violation of Mass. R. Prof. C. 1.15(f)(1), as in effect through June 30, 2004, and 1.15(h)(1), as in effect from and after July 1, 2004, because of the clients' knowledge and consent; Respondents Smith and Jones's alleged representation of clients with adverse interests without obtaining the clients' informed consent after consultation in violation of Mass. R. Prof. C. 1.4(a) and (b) and 1.7(a) and (b) and the same rules of professional conduct of Rhode Island; Smith's payments to himself and Jones from garnished funds without permission from or notice to the court, government or clients, allegedly violated Mass. R. Prof. C. 3.4(c) and 8.4(c) and (d) and Rhode Island's analogous rules of professional conduct; Respondents Smith and Jones's allegedly intentionally false representations under oath to the federal court, government and mother, in violation of Mass. R. Prof. C. 3.3(a)(1) and 8.4(c) and (d) and Rhode Island's analogous rules; Smith's allegedly intentionally false representations to Attorney Roe and the clients about the status of the funds in violation of Mass. R. Prof. C. 1.4(a) and (b) and 8.4(c) and Rhode Island's

analogous rules; Smith's alleged failure to inform the mother adequately concerning her rights in the garnishment proceeding and failing to protect his clients' interests in violation of Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 1.4(a) and (b) and Rhode Island's analogous rules; Smith's alleged failure to account adequately to the clients for the funds in violation of Mass. R. Prof. C. 1.4(a) and (b) and 1.15(b), as in effect through June 30, 2004; Respondents Smith and Jones's alleged failure to withdraw promptly from representing their clients when their continued representation constituted a violation of the Rules of Professional Conduct in violation of Mass. R. Prof. C. 1.16(a)(1) and Rhode Island's analogous rules; respondents Smith & Jones's alleged abandonment of clients' interests without adequate notice and without taking reasonable steps to protect their interests in violation of Mass. R. Prof. C. 1.16(d) and (e) and Rhode Island's analogous rules; Smith's alleged disclosure of information about the representation to his clients' disadvantage in his amended garnishment answer and motion in violation of Mass. R. Prof. C. 1.9(c) and Rhode Island's analogous rule; Smith's alleged voluntary surrender of the remaining funds under garnishment to the government without a prior disposition order or other authorization in violation of Mass. R. Prof. C. 8.4(c) and (d) and Rhode Island's analogous rules; Smith's alleged submission of false evidence and fabricated documents to bar counsel in violation of Mass. R. Prof. C. 8.1(a) and 8.4(c) and (d); Respondents Smith and Jones's allegedly making knowingly false claims to contingent fees on the interpleader funds in violation of Mass. R. Prof. C. 8.1 and 8.4(c) and Rhode Island's analogous rules; Smith and Jones's allegedly charging and collecting excessive fees in violation of Mass. R. Prof. C. 1.5(a) and Rhode Island's analogous rule; Respondents Smith and Jones's allegedly charging and collecting contingent fees without a written fee agreement authorizing those fees in violation of Mass. R. Prof. C. 1.5(c) and Rhode Island's analogous rule; Respondents Smith and Jones's alleged failure to place the disputed fees in a trust account in violation of Mass. R. Prof. C. 1.15(d)(2); as in effect through June 30, 2004, and 1.15(b)(2)(ii), from and after July 1, 2004; and Smith's alleged failure to give the clients written statements of the method of determination of contingent fees and written itemizations of fees, and to get the clients' approval of fees in violation of Mass. R. Prof. C. 1.4(a) and (b), 1.5(c), 1.15(d)(2), as in effect from and after July 1, 2004, and Rhode Island's analogous rules.

The special hearing officer also found that Smith inadvertently overcharged the clients by collecting a one-third contingent fee instead of 33% as provided by the fee agreement. The amount of the overcharge was about \$5,000.

The special hearing officer recommended that the petition be dismissed and that Smith pay \$9,000 (the excess amount charged because Smith calculated the contingent fee as 1/3 when the fee agreement provided for 33%, plus interest) to the Massachusetts Bar Foundation. The special hearing officer alternatively recommended that, if any violations were found, there be no discipline.

Bar counsel did not appeal, but filed objections to certain statements in the hearing report to the effect that bar counsel had prosecuted the matter in bad faith. The board chair, treating the objections as a motion to strike, denied it without adopting the hearing officer's determination that bar counsel had proceeded in bad faith. Bar counsel appealed the denial. Smith filed an objection to the recommendation of repayment. The Board of Bar Overseers adopted the special hearing officer's subsidiary findings of fact, conclusions of law and proposed disposition, and voted to dismiss the matter. The board treated as advisory the recommendation that the respondent disgorge the fee. The board also found that the board chair had properly denied bar counsel's motion because there had not been any appeal from the findings of fact, conclusions of law, and recommendation of the special hearing officer.