NO. BD-2011-066

S.J.C. Order of Indefinite Suspension entered by Justice Gants on July 20, 2011, with an effective date of August 19, 2011.[1]

SUMMARY[2]

On May 11, 2011, this matter came before the Board of Bar Overseers on a stipulation of facts and disciplinary violations and a joint recommendation that the respondent be indefinitely suspended from the practice of law. The respondent, Daniel Peter Gibson, was admitted to the Bar of the Commonwealth on December 17, 1982. In the stipulation, the respondent acknowledged that the following facts can be established by a preponderance of the evidence.

In May of 1999, a man was killed in a motor vehicle accident. There were both primary and excess insurers of the vehicle operated by the other driver, who was operating under the influence. In 2001, the decedent's widow settled with the operator, the primary insurer and excess insurer (insurer) for a total of several million dollars. In conjunction with the settlement, the insurer and the widow entered into an agreement whereby additional claims would be made, and the insurer and the widow would split the proceeds equally.

In July of 2001, the respondent agreed to represent both the insurer and the decedent's estate in dram shop claims against establishments where the other driver had been drinking prior to the accident. The respondent wrote a letter, confirming a fee agreement in writing to the insurer, and entered into a separate contingency fee agreement with the widow. Each agreement provided that the respondent would receive a fee of one-third of any settlement reached after the filing of litigation.

In December of 2004, after filing suit against two restaurants that had allegedly served alcohol to the driver who caused the decedent's death, the respondent settled the widow's claim against one of the restaurants for $2,000,000, which was finalized in February of 2005. Of that, $600,000 was used to purchase a structured settlement and $1,400,000 was to be paid in cash.

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[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.

Thereafter, personal counsel for the widow wrote to the respondent's firm concerning the attorney's fees to be paid from the settlement. He asserted that the widow was entitled to $1,000,000 from the settlement and that the respondent's fees and expenses should come from the insurer's share of the settlement proceeds. Counsel for the insurer then wrote to the respondent's law firm asserting that the insurer was not responsible for payment of the respondent's entire legal fee. The respondent's firm, with his knowledge and assent, responded to the insurer's counsel stating, in part, that the insurer had relinquished any claim to the proceeds.

In February of 2005, a check for the settlement proceeds of $1,400,000 was deposited into the respondent's firm's IOLTA account. Three weeks later, the respondent withdrew $333,333 from the IOLTA account as a legal fee on the dram shop matter.

More than two weeks after withdrawing its own fee, the respondent's firm forwarded to the insurer a check for $323,898.50. Included with the check was a letter from the respondent's law firm, with his knowledge and consent, stating that the case had settled for $2,000,000; that the widow would get $1,000,000 ($600,000 structured and $400,000 cash); that the respondent's firm would receive a legal fee of $666,666.66 and litigation costs and expenses of $9,434.84; and that the insurer would receive $323,898.50. The letter also stated that these payments were consistent with the firm's fee agreement with the widow and with the settlement agreement between the insurer and the widow, although it questioned the validity of the agreement between the insurer and the widow.

The insurer then returned the check for $323,898.50, stating that the insurer was entitled to $666,666.00, or two-thirds of half of the total settlement. The insurer requested a replacement check of $666,666 and, "without waiving any rights," "suggest[ed] the parties resolve this dispute by fee arbitration."

After receiving this letter, the respondent's law firm sent a letter to the widow, enclosing a check for $400,000, and explaining that $600,000 was used to buy an annuity. After the disbursement to the widow of $400,000, the respondent was holding in his IOLTA account the remaining $655,666.53 of the settlement proceeds. The respondent understood that the insurer claimed the full $655,666.53 as its share of the settlement. The respondent's position was that the insurer might not be entitled to any of the settlement proceeds and was entitled to at most $323,898.50.

Beginning in April of 2005 and through December of 2005, the respondent intentionally used the remaining $655,667 in settlement proceeds, as follows:

a) On April 14, 2005, the respondent withdrew $333,333.67 from the firm's IOLTA account, as a "further fee" on the dram shop matter.

b) On July 8, 2005, the respondent withdrew $114,000 from the firm's IOLTA account, and deposited it into the firm's operating account. The same day, the respondent wrote a check for $114,000 from the firm's operating account to a builder for an addition to the respondent's house.

c) On August 9, 2005, the respondent withdrew another $147,000 from the firm's IOLTA account, and deposited it into the firm's operating account.

d) On December 31, 2005, the respondent withdrew another $61,333.33 from the firm's IOLTA account, and deposited it into the firm's operating account.

The respondent gave no notice to the insurer or its counsel of any of these withdrawals from the remaining settlement proceeds. In withdrawing the $655,667 from the remaining settlement proceeds, the respondent failed to hold in escrow funds, his entitlement to which was disputed by the insurer, and he intentionally converted at least $323,898.50 of funds due to either the insurer or the widow.

In December of 2005, counsel for the insurer wrote to the respondent's firm, offering to settle for the $323,898.50 originally forwarded by the respondent, and requested that the check be issued by the end of the calendar year. The respondent did not respond in writing to this letter until November of 2006, when he wrote to counsel for the insurer, pointing out that the insurer had returned the previous check for $323,898.50, indicating it was "void." On December 1, 2006, counsel for the insurer again offered to settle for $323,898.50, referencing the check that was previously returned and asking for it to be reissued.

Between December 2006 and July of 2008, the respondent repeatedly rebuffed the efforts of the insurer and its counsel to obtain payment of the $323,898.50 it was willing to accept as a settlement of its claim for $666,666.67.

On July 1, 2008, the insurer wrote to the Office of the Bar Counsel concerning the failure of the respondent's firm to pay the insurer any money from the dram shop settlement. After bar counsel notified the respondent and requested a response, the respondent requested

and was granted an extension to respond. The respondent then deposited $350,000 of his personal funds into the firm's office account, and then sent a firm check for $346,166.53 to counsel for the insurer, as payment of the $323,898.50 plus interest from December 5, 2005, in exchange for a release from the insurer.

In the stipulation, the respondent acknowledged that the following violations of the Massachusetts Rules of Professional Conduct could be established by a preponderance of the evidence.

The respondent's conduct in intentionally misusing approximately $323,898.50 of the dram shop settlement funds due to either the insurer or the widow was in violation of Mass. R. Prof. C. 1.15(b) and (c) and 8.4(c) and (h). The respondent's conduct in failing to hold in escrow approximately $657,232.50 of the dram shop settlement funds, his entitlement to which was disputed by the insurer, was in violation of Mass. R. Prof. C. 1.15(b)(2)(ii) and 8.4(h).

In aggravation, the respondent has substantial experience in the practice of law. In mitigation, the respondent paid the insurer the funds due to it in September of 2008.

On June 13, 2011, the board voted to recommend that the Supreme Judicial Court accept the parties' stipulation and joint recommendation that the respondent be indefinitely suspended from the practice of law for the above misconduct. The Court (Gants, J.) so ordered on July 20, 2011.