IN RE: FRANK FOSS RUSSELL

NO. BD-2012-117

S.J.C. Judgment of Disbarment entered by Justice Spina on October 7, 2013.[1]

SUMMARY[2]

This matter came before the Court on an affidavit of resignation submitted by the respondent to the Board of Bar Overseers under S.J.C. Rule 4:01, § 15. The respondent sought to resign after bar counsel had started formal disciplinary proceedings against him on a five-count petition for discipline. The respondent acknowledged in his resignation affidavit that there was a pending inquiry into allegations of misconduct on his part, that the material facts on which the petition for discipline was based could be proved by a preponderance of the evidence, and that the allegations were established as fact for the purposes of bar discipline, admission, and reinstatement proceedings. The allegations were as follows.

The respondent represented a client as a defendant in an action that was settled in the spring of 2012 on the client's agreement to pay the plaintiff $54,000 in installments. In April 2012, the client gave the respondent $10,000 as the first installment. Instead of remitting those funds to the plaintiff, the respondent intentionally converted the funds to his own use. The respondent made intentional misrepresentations to the plaintiff's counsel about the status of the payment. After the plaintiff's counsel informed the respondent that she would bring the matter to the attention of the Board of Bar Overseers, the respondent remitted $10,000 in July 2012. That same month, the client gave the respondent $5,500 as the second installment payment, and the respondent intentionally converted those funds to his own use. The client then hired a new lawyer, who demanded the funds and the file. The respondent delayed in returning the file and gave the plaintiff's lawyer a check that was dishonored for insufficient funds. He finally made restitution from his personal funds in November 2012.

In order to pay the $10,000 in July 2012, the respondent converted a down payment of $10,000 that he had received as the attorney for a court-appointed receiver of distressed property in another case. In August 2012, the respondent restored only about $3500 of the down payment, claiming the rest for fees and case expenses. His fee was clearly excessive.

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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.

In a third case, the respondent represented a plaintiff whose claims were settled for $165,000 in the fall of 2011. The respondent was then owed no more than about $14,900 in fees in that case, leaving at least $150,100 due the client as the net settlement proceeds. The respondent failed promptly to notify the client of his receipt of the funds. Between November 2011 and March 2012, the respondent intentionally converted at least $50,000 of the client's proceeds to his own use. When the client inquired about the settlement, the respondent intentionally misrepresented that he had to calculate his fees and costs before remitting the proceeds.

In March 2012, the respondent sent $100,000 to the client as a partial payment. Using personal funds, the respondent remitted about $45,200 to the client in May 2012. Despite demands by the client, the respondent failed thereafter to restore the balance due the client.

As to each of the clients, the respondent failed to disclose his misuse and disposition of the funds. He also failed to account adequately for the funds.

The respondent's conversion of trust funds violated Mass. R. Prof. C. 1.15(b)(1) and (2) and 8.4(c) and (h). His intentional misrepresentations violated Mass. R. Prof. C. 4.1(a) and 8.4(c). The respondent's failure promptly to remit the funds when due violated Mass. R. Prof. C. 1.2(a), 1.15(c) and 8.4(h). His failure to disclose his misuse and dissipation of the funds violated Mass. R. Prof. C. 1.4(a) and (b).

The respondent's failure to account adequately for the funds and to respond promptly to the clients' demands for the funds violated Mass. R. Prof. C. 1.4(a) and (b) and 1.15(d)(1). His failure promptly to turn over the client's files violated Mass. R. Prof. C. 1.16(e). Charging and collecting clearly excessive fees violated Mass. R. Prof. C. 1.5(a), and the respondent's failure to give the client timely notice of fee withdrawals violated Mass. R. Prof. C. 1.15(d)(2).

At least from December 2011 through November 2012, the respondent failed to account fully for all funds in his IOLTA account and failed to keep required IOLTA records including chronological check registers, individual ledgers, and reconciliation reports. The respondent's failure to make account in full and maintain the required records violated Mass. R. Prof. C. 1.15(d) and (f)(1)(B)-(E). In violation of Mass. R. Prof. C. 1.15(e)(3), the respondent on occasion issued IOLTA checks payable to cash He also deposited and retained earned fees and other personal or business funds in the IOLTA account, in violation of Mass. R. Prof. C. 1.15(b)(2).

The respondent was administratively suspended from practice in the Commonwealth on December 7, 2012, pursuant to S.J.C. Rule 4:01, § 3(2), for knowing failure without good cause to reply in full to requests for information and comply with a subpoena *duces tecum* issued during bar counsel's investigation. By this misconduct, the respondent violated Mass. R. Prof. C. 3.4(c), 8.1(b), and 8.4(d) and (g) and S.J.C. Rule 4:01, § 3(1)(a) and (b).

The respondent's affidavit of resignation was submitted to the board on September 13, 2013. Bar counsel recommended that the affidavit be accepted and that a judgment of disbarment enter. The board voted on September 23, 2013 to recommend that the

respondent's affidavit of resignation be accepted and that the respondent be disbarred retroactive to May 1, 2013, the date on which he effected compliance with the administrative suspension order. By a judgment entered on October 7, 2013, the Supreme Judicial Court for Suffolk County accepted the resignation and disbarred the respondent effective May 1, 2013.