IN RE: ROBERT K. RAINER

NO. BD-2013-099

S.J.C. Order of Term Suspension/Stayed entered by Justice Lenk on October 31, 2013.[1]

SUMMARY[2]

This matter came before the Board of Bar Overseers on the parties' stipulation of facts and rule violations and an agreed recommendation for discipline by a suspension of six months with the suspension stayed for two years on conditions. The stipulation was based on five counts of misconduct as follows.

Count I. As of the spring of 2011, the respondent carried on the practice of law in two firms of which he was the principal, and he employed lawyers and nonlawyers in the practice. The respondent did not make reasonable efforts to ensure that there were procedures in place giving reasonable assurance that all his lawyer employees conformed to the Rules of Professional Conduct and that the conduct of his nonlawyer employees was compatible with his professional obligations.

In August 2011, the respondent assumed retired status and closed the practice effective September 1, 2011. Upon his retirement, the respondent failed to give timely notice of the retirement and closing to all his clients, withdraw all his pending court appearances, and otherwise take reasonably practicable steps to protect the interests of all the clients. The respondent returned to active status in December 2011 and remained on active status thereafter.

By failing to withdraw all his appearances and notify all clients of his retirement, the closing of the practice and the intended termination of his representation, the respondent violated Mass. R. Prof. C. 1.4(a) and (b) and 1.16(c) and (d). By failing to take reasonable measures to ensure that the conduct of his employees conformed to the Rules of Professional Conduct and was compatible with his professional obligations, and by failing adequately to supervise the conduct of his lawyer and nonlawyer employees, the respondent violated Mass. R. Prof. C. 5.1(a) and (b) and 5.3(a) and (b).

Count II. Before closing his practice, the respondent had entered into "affiliation" arrangements with lawyers outside his firms whereby the affiliates agreed to take over cases transferred by the respondent in exchange for sharing any fees realized. The respondent transferred many of his cases to affiliates before closing the practice but failed to inform all those clients of the transfers and obtain their informed consent to his disclosure of confidential information and to the new representation. He also failed to inform each such client that he would be dividing the fees realized with the affiliate and failed to obtain the consent of each such client to the division.

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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.

When he retired and closed his practice, the respondent had shared responsibility for a number of cases with a lawyer whose employment in the practice he had terminated as of August 30, 2011. The respondent instructed the lawyer to retain those cases and notify all the clients of the lawyer's change of address. The respondent failed to take adequate measures to ensure that all those clients were informed of the lawyer's retention of their cases and to obtain the consent of all those clients to the arrangement. The respondent failed to withdraw his appearance in all pending cases handled by the lawyer.

By failing to inform all clients in the transferred cases that he was transferring their cases to affiliates, the respondent violated Mass. R. Prof. C. 1.4(a) and (b) and 1.6(a). By failing to inform all clients in the transferred cases of the existence of the fee divisions and obtaining their written consent, the respondent violated Mass. R. Prof. C. 1.5(e) as then in effect. By failing to inform all clients in cases handled by the lawyer when he was employed by the respondent that the lawyer would be retaining their cases after the respondent's retirement and the closing of his practice, and by failing to take adequate steps to ensure the lawyer's pursuit of the cases, the respondent violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3 and 1.4(a) and (b).

Count III. In the spring of 2010, a client retained the respondent to pursue claims against her property damage insurer arising from severe damage to her house in an ice storm. The case was handled by other lawyers in the practice until late 2010, by which time an action against the insurer had been commenced for the client with the respondent as counsel of record.

In January 2011, the respondent assigned the case to the lawyer. Thereafter the respondent remained counsel of record and retained ongoing responsibility for the case, but he took no action of substance to keep apprised of the case and relied on the lawyer to handle it. The lawyer entered an appearance for the client in February 2011, when he successfully opposed a motion by the insurer for judgment on the pleadings.

In June 2011, the insurer served document requests and interrogatories propounded to the client. The respondent failed to respond or assure that the lawyer responded to those requests even after the insurer served a final request for interrogatory answers under Mass. R. Civ. P. 33(a) in July 2011. The respondent failed to submit or ensure that the lawyer submitted a status report as required by the court in August 2011.

On or about August 15, 2011, the insurer served a motion pursuant to Superior Court Rule 9A to compel the production of documents. The respondent failed to oppose or ensure that the lawyer opposed that motion. The motion was filed and allowed without opposition on August 31, 2011. The respondent never informed the client or ensured that she was informed of the discovery requests, the motion to compel, or the order on the motion.

When he retired and closed his practice, the respondent was still an attorney of record for the client and retained responsibility for her case. The respondent failed to inform the court, the opposing counsel or the client that he had retired, had closed the practice, and was ceasing representation. The respondent failed to withdraw his appearance for the client and failed to inform her of or seek her consent to the lawyer's retention of the case.

In September 2011, a final judgment dismissing the client's claims was entered under Rule 33(a). Notice of the judgment was sent to the address of the respondent's closed office and then forwarded to the respondent and the lawyer at their new addresses. The respondent failed to notify the client or ensure that she was promptly notified of the judgment.

In October 2011, the client learned of the judgment from other sources and asked the lawyer to get the case restored. The lawyer failed to take action until December 2011, when he filed a

motion to vacate the judgment. As grounds, the lawyer cited difficulties arising from the closing of the practice and the termination of his employment in August 2011. The motion was opposed by the insurer and denied by the court without hearing in late December 2011 on the stated basis that the respondent was still an attorney of record and had provided no affidavit or other explanation of the apparent neglect of the case. The respondent received timely notice of the denial of the motion and the basis for the denial, but he did not thereafter submit an affidavit, seek reconsideration, or take other action on the client's behalf.

By failing to notify the client of his retirement, the closing of the practice, his intended termination of his representation and the transfer of her case to the lawyer, and by failing to take adequate steps to protect her interests, the respondent violated Mass. R. Prof. C. 1.4(a) and (b) and 1.16(d). By failing to render diligent and competent services and pursue the client's lawful objectives prior to the dismissal, and by failing thereafter to take action to restore the case, the respondent violated Mass. R. Prof. C. 1.1, 1.2(a) and 1.3.

Count IV. In the spring of 2009, a client retained the respondent to pursue tort claims arising from injuries sustained at a house of correction. Suit was commenced for the client against the Commonwealth and other defendants in 2010 with the respondent as counsel of record. In the spring of 2011, the respondent assigned the lawyer to handle the case. Neither the respondent nor the lawyer informed the client that the lawyer was or would be working on the case. The lawyer did not file an appearance or take action of substance in the case prior to the closing of the practice in 2011.

When he retired and closed his practice, the respondent was still an attorney of record for the client and retained responsibility for the case, but he failed to inform the court, the opposing counsel or the client that he had retired, had closed the practice, and was ceasing representation. The respondent failed to withdraw his appearance and failed to inform the client of or seek the client's consent to the lawyer's retention of the case.

During about the fall of 2012, the defendants' counsel learned of the respondent's retirement, obtained the lawyer's contact information, and served interrogatories at the lawyer's new address. The lawyer failed to provide answers to the interrogatories. In March 2012, the court entered judgment for the defendants under Rule 33(a). The respondent knew of the judgment at least by March 2012 but failed thereafter to notify the client, seek to vacate the judgment, or take other action of substance for the client.

By failing to notify the client of his retirement, the closing of the practice and the intended termination of his representation, and by failing to take adequate steps to protect the client's interests, the respondent violated Mass. R. Prof. C. 1.4(a) and (b) and 1.16(c) and (d). By failing to ensure that the client received timely notice of the judgment and failing to take action to restore the case, the respondent violated Mass. R. Prof. C. 1.2(a), 1.3 and 1.4(a) and (b).

Count V. In the fall of 2007, a client retained the respondent in claims arising from injuries in a car accident. After the accident, the client received medical care paid for by Medicare. The federal government had a statutory right to reimbursement of accident-related Medicare payments from the proceeds of her claims. The recovery of these reimbursements was administered by the Centers for Medicare and Medicaid Services (CMS).

In June 2009, the respondent settled the client's personal injury claim for $5,500 and received a settlement check payable to the client, the respondent and Medicare. The respondent failed to notice that Medicare was a named payee. He did not promptly inform CMS that he had received the proceeds or obtain authorization from CMS to endorse or negotiate the check. The respondent deposited the check to an IOLTA account without any Medicare endorsement and made

disbursements for his fee and expenses, leaving net proceeds of about $2,700 due the client subject to the Medicare recovery. The respondent deposited those net proceeds in a separate, interest-bearing escrow account and retained the funds in that escrow account thereafter.

Between about June 2009 and early 2011, the respondent failed to take action of substance or ensure that his employees took action to satisfy the Medicare recovery. In about February 2011, the respondent obtained from CMS a list of charges claimed to be subject to recovery totaling over $2,800. Only a few listed charges, amounting to about $110, were related to the accident, and those charges should have been paid under the client's Personal Injury Protection (PIP) coverage. Prior to the end of August 2011, the respondent failed to seek or ensure that his employees sought PIP coverage for the related charges and failed to take or ensure further action of substance satisfy the Medicare recovery.

Between 2009 and 2011, the client periodically called the respondent's office to ask about the Medicare reimbursement and her settlement proceeds. The respondent failed to answer or ensure that his employees reasonably answered those inquiries. The respondent failed to inform the client of his retirement or advise her to get other counsel to take custody of the escrowed funds and satisfy the Medicare recovery. In February 2012, after the client complained to bar counsel, the respondent arranged for PIP coverage of the accident-related charges and filed an administrative appeal from any further Medicare recovery. The appeal was denied. The respondent subsequently paid the full recovery demanded by CMS from his personal funds.

By negotiating the settlement check without ascertaining the payees and obtaining endorsement by CMS, the respondent violated Mass. R. Prof. C. 1.3. By failing promptly to notify CMS of his receipt of the funds, the respondent violated Mass. R. Prof. C. 1.15(c). By failing to take timely and adequate steps to satisfy the Medicare recovery, the respondent violated Mass. R. Prof. C. 1.1, 1.2(a) and 1.3. By failing to inform the client of his retirement, the closing of his practice and the intended termination of his representation; failing to arrange for the appropriate transfer of her escrowed funds; and failing maintain adequate communication with the client, the respondent violated Mass. R. Prof. C. 1.4(a) and (b) and 1.16(d). By failing adequately to supervise his nonlawyer employees in handling the case, the respondent violated Mass. R. Prof. C. 5.3(b).

In mitigation, at the time the respondent suffered from severe depression, among other conditions, that worsened during 2011and part of 2012 to the point of substantially impairing his ability to attend to his professional obligations. Recognizing that he was impaired, the respondent decided to close his practice, but he failed to do so properly. He received appropriate treatment with resulting improvement of his conditions. He also had expected that the lawyer would continue to handle the cases described in Counts III and IV after the respondent's retirement.

The board voted on September 23, 2013, to accept the parties' stipulation and recommendation for discipline. On October 31, 2013, the Supreme Judicial Court for Suffolk County entered an order for a six-month suspension with the suspension stayed for two years on condition that the respondent remain under treatment, maintain malpractice insurance, and attend a CLE course on ethics and law office management.