

**IN RE: IRVING MARMER****NO. BD-2014-043****S.J.C. Order of Term Suspension entered by Justice Hines on April 23, 2015.¹****SUMMARY²**

The respondent received a term suspension for the conduct described below.

A second cousin of the respondent, June, died testate on November 11, 2006, survived by her three children and her father, Henry. On December 21, 2006, the respondent filed a petition for administration of the will of June on behalf of Richard, one of June's three surviving children. On December 21, 2006, Richard was appointed administrator of the estate with the will annexed. While attorney for Richard as administrator, the respondent assisted in marshalling assets, helped Richard gain access to certain bank accounts, met with family members and discussed various issues involving the estate.

June had a brother named Paul. Paul claimed that June held title to certain properties wrongfully transferred to her by their father, Henry. Paul argued that Henry intended that June was to hold title to the properties in trust for his benefit, and prior to June's death, he brought suit against his father and sister to have these same properties, or the value thereof, transferred to him. The complaint was dismissed by the superior court and the dismissal was upheld on appeal, with the Appeals Court finding that Henry owned the property and was free to deal with it as he pleased. The court added that, "The plaintiff has been unable to point to any documents to show his vested entitlement to any of the property."

After June's death, Paul renewed his claims and the respondent participated, as Richard's lawyer, in one or more discussions among the family members of Paul's claims. On August 8, 2007, the respondent filed a notice of withdrawal of his appearance for Richard in the estate.

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.

Despite his prior representation of Richard, on November 9, 2007, the respondent filed a civil complaint in the superior court on behalf of Paul against Richard in Richard's capacity as administrator of the estate. The complaint alleged a breach of contract based upon Paul's claim that had Richard failed to perform an agreement to reimburse Paul a sum certain from June's estate. This complaint was the same or substantially related to matters in which the respondent had previously represented Richard.

At no time did Richard consent to the respondent's representation of Paul in commencing the litigation against him in his capacity as administrator of the estate. In fact, Richard and his brother and sister, through counsel, protested in writing to the respondent his advancing any of Paul's claims for reimbursement by any "intervention" in the estate matters.

Richard defended the claims in court. Through counsel, he asserted in a motion for summary judgment that any oral promise by him or other family members to repay Paul was a gratuitous promise, not an enforceable promise supported by legal consideration or bargaining between the parties. In 2009, the superior court ruled in favor of Richard and found that, as a matter of law, there was no consideration or bargained for exchange for any oral promise of Richard and other family members to repay Paul. Richard's motion for summary judgment was allowed and judgment entered dismissing Paul's complaint.

In March 2009, the respondent filed a notice of appeal and the respondent's appeal was entered in the Appeals Court. On March 5, 2010, the Appeals Court affirmed the court's entry of judgment in an unpublished memorandum issued pursuant to Rule 1:28. The respondent then sought further appellate review by the Supreme Judicial Court and in March 2010, his application was denied without comment.

On June 1, 2009, Richard filed a motion for attorneys' fees in the superior court action. On September 28, 2010, the superior court found that the respondent had willfully violated Mass. R. Civ. P. 11(a) and acted in bad faith in commencing and pursuing meritless claims against June's estate. The court further found that the respondent's actions were a clear violation of Mass. R. Prof. C. 1.9(a). The court awarded sanctions against the respondent in the amount of \$40,000.00 in attorney fees and \$2,382.58 in costs. Undaunted, on October 27, 2010, the respondent filed a notice of appeal to the Appeals Court. The appeal was not perfected and in April, 2011, the superior court dismissed the appeal. On the same date, the respondent filed a notice of appeal concerning the dismissal of his appeal.

On June 2, 2011, the superior court granted an attachment on certain of the respondent's real estate in the amount of \$45,000.00. On December 30, 2011, the Appeals Court

under a standing order dismissed the respondent's appeal of the dismissal of his appeal for lack of prosecution, and on February 10, 2012, an execution issued against the respondent in the amount of \$49,367.67.

On November 28, 2012, the respondent filed an application with the single justice of the Appeals Court seeking a stay of the forced sale of his realty pursuant to the attachment and execution. Richard was required to retain counsel to respond to the application. The Appeals Court denied the respondent's application on November 29, 2012.

The respondent asserted legal arguments of breach of contract in the litigation and in appeals to the Appeals Court and to the Supreme Judicial Court, where there was no basis for such legal arguments that were not frivolous.

The respondent's conduct in representing Paul in litigation against Richard that was substantially related to the estate in which the respondent had represented Richard, where Richard did not consent to the respondent's representation of Paul, was in violation of Mass R. Prof. C. Rule 1.9(a). The respondent's assertion of legal arguments and claims that were not meritorious, in superior court and on appeal, is conduct in violation of Mass R. Prof. C. Rule 3.1 and 8.4(d).

In addition, the respondent failed to cooperate in the investigation of bar counsel, resulting in his administrative suspension from the practice of law, and he failed without good cause to comply with the requirements of the administrative order and S.J.C. Rule 4:01, § 17.

By knowingly failing without good cause to respond to bar counsel's requests for information in connection with an investigation, the respondent violated S.J.C. Rule 4:01, § 3(1)(b), and Mass R. Prof. C. 3.4(c), 8.1(b) and 8.4(g). The respondent's failure to comply with the order of administrative suspension and court rule is conduct in violation of Mass. R. Prof. C. 3.4(c) and 8.4(d).

The respondent was admitted to practice in 1961 and had no prior discipline.

On June 13, 2014, bar counsel filed a petition for discipline against the respondent and the respondent defaulted. On September 11, 2014, the Board voted to recommend to the Supreme Judicial Court that the respondent be suspended for six months and one day and that he be required to petition for reinstatement pursuant to the provisions of S.J.C. Rule 4:01, § 18. On April 23, 2015, the Court (Hines, J.) so ordered, effective immediately upon entry of the order.