

IN RE: DAVID M. LIPTON

S.J.C. Order of Term Suspension entered by Justice Cordy on November 4, 2004, with an effective date of December 4, 2004.¹

SUMMARY²

The respondent engaged in misconduct in three separate client matters. In addition, he failed to cooperate with Bar Counsel's investigations and was defaulted for failure to respond to a Petition For Discipline.

In the first matter, the respondent represented a dentist who had sold his practice to another dentist in part for a promissory note requiring monthly payments. When a dispute broke out between the parties, the buyer stopped making monthly payments to the seller. The respondent filed a lawsuit on behalf of the seller against the buyer to collect on the promissory note. He also filed an ex parte motion for approval of trustee process of the buyer's bank account, which was granted ex parte.

When he filed the motion for trustee process, the respondent knew that the buyer was making monthly payments to his attorney to be held in escrow pending a resolution of the dispute. The respondent did not inform the court of this fact, which was material to the question of whether ex parte relief was warranted and which would have assisted the court in making an informed decision on the motion. After the seller brought the payment information to the attention of the court, the court dissolved the trustee process attachment and sanctioned the respondent.

The respondent's failure to bring to the court's attention that the buyer was making monthly payments to his attorney was in violation of Mass. R. Prof. C. 3.3(d) (lawyer in ex parte proceeding "shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse") and 8.4(d) (conduct prejudicial to the administration of justice).

In the second matter, the respondent represented a client who sold a restaurant in 1996. The buyers paid in part with a promissory note secured by all assets of the restaurant and gave the respondent a Financing Statement, Form UCC-1, to be filed pursuant to the Uniform Commercial Code. The respondent did not record the UCC-1 with the Secretary of State or the local town clerk, thereby failing to perfect his client's security interest or protect that interest from subsequent liens.

A dispute broke out between the seller and his broker concerning the broker's commission on the sale of the restaurant. The broker gave the respondent a check for \$2,000 and retained the rest of the buyers' deposit as its commission. The respondent advised the seller to reject the \$2,000, asserted that the broker was not entitled to a commission and demanded the full deposit. The respondent believed that this claim was of doubtful validity and did not pursue it. He did not, however, so advise his client or advise his client to accept the \$2,000 check.

The buyers defaulted on their note, and the respondent discussed some collection options with his client in 1997. After the respondent failed to return a number of calls from the client concerning his claims against the buyers and the broker in 1998 and 1999, the client retained

another attorney to take over his claims. The respondent did not turn over the client's files to successor counsel until he was administratively suspended by the Supreme Judicial Court for failing to cooperate with Bar Counsel's investigation of the client's grievance. After he received the respondent's files, the seller's new counsel determined that a number of liens had been filed with priority over the client's security interest in the assets of the restaurant.

The respondent's failure to file the UCC-1, his failure to inform the client that he was not pursuing the claim against the broker and his failure to advise the client to accept the \$2,000 check were in violation of Canon Six, Disciplinary Rule 6-101(A)(3) (neglect of a legal matter), and Canon Seven, Disciplinary Rules 7-101(A)(1) (failure to seek lawful objectives of client), (2) (failure to carry out contract of employment) and (3) (prejudice to client), and, for conduct on and after January 1, 1998, Mass. R. Prof. C. 1.1 (competent representation), 1.2(a) (lawyer shall seek lawful objectives of client through reasonably available means), and 1.3 (reasonable diligence).

The respondent's failure to respond to inquiries from the client concerning the status of the claims against the broker and the buyers throughout 1998 and 1999 was in violation of Mass. R. Prof. C. 1.4(a) and 1.4(b). The respondent's failure to provide the client's files to successor counsel within a reasonable time upon request was in violation of Mass. R. Prof. C. 1.16(e) (lawyer must make file material available to client within a reasonable time of client's request).

In the third matter, the respondent filed a lawsuit on behalf of a client in June of 2001. He failed to respond to a number of inquiries from the client about the status of the case, in violation of Mass. R. Prof. C. 1.4(a) and 1.4(b). In February of 2003, the client retained successor counsel. Despite written requests, the respondent did not provide his client's file to successor counsel, in violation of Mass. R. Prof. C. 1.16(e).

The respondent repeatedly failed to cooperate with Bar Counsel's investigations of the above three matters, as well as a fourth matter, from January of 2000 forward. His failures to provide responses to the first two matters resulted in an administrative suspension by order dated March 31, 2000. He was reinstated when he provided the requested information five days later. He then failed to further respond to inquiries from Bar Counsel, requiring the issuance of subpoenas by the Board.

The respondent's failure to respond to requests for information from Bar Counsel violated Mass. R. Prof. C. 8.1(b) (failure to respond to lawful demand for information from a disciplinary authority), 8.4(d) (conduct prejudicial to the administration of justice), 8.4(g) (failure to cooperate with Bar Counsel) and 8.4(h) (conduct adversely reflecting on fitness to practice law), and S.J.C. Rule 4:01, §3 (failure to respond to requests for information by Bar Counsel).

In aggravation of his misconduct, the respondent has been disciplined on three prior occasions for neglect, failure to return client files and failure to cooperate with Bar Counsel. In 1989, the respondent received an informal admonition for neglect of a medical malpractice case. In 1991, he received a private reprimand for neglect in abandoning a divorce case, failure to return a file and unearned retainer, and failure to cooperate with Bar Counsel. PR No. 91-41, 7 Mass. Att'y Disc. R. 394 (1991). In 1997, the respondent received a six-month suspension, stayed for three years on probationary terms, for neglect and failure to communicate with clients in two matters. In one of the matters, the respondent had also failed to cooperate with Bar Counsel's investigation and to turn over the client's file to successor counsel in a timely manner. Matter of Lipton, 13 Mass. Att'y Disc. R. 422 (1997).

Bar Counsel filed and served a Petition For Discipline on March 24, 2004. As a further matter in aggravation, the respondent failed to file a timely answer to the Petition For Discipline and was defaulted. After then filing an answer late, he failed to file a motion to remove the default, despite specific communication from the Board's staff that he was required to do so.

On September 13, 2004, the Board of Bar Overseers voted to recommend that the respondent be suspended for three years for his misconduct. On November 4, 2004, the Supreme Judicial Court for Suffolk County (Cordy, J.) entered an order suspending the respondent from the practice of law for three years, effective thirty days from the date of the order.

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 before the Court.

Please direct all questions to webmaster@massbbo.org.

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