

IN RE: PACIFICO M. DECAPUA

S.J.C. Order of Indefinite Suspension entered by Justice Ireland on March 5, 2009, with an effective date of April 6, 2009.¹

SUMMARY²

On March 5, 2009, the Supreme Judicial Court for Suffolk County ordered that the respondent Pacifico M. DeCapua be indefinitely suspended from the practice of law. The sanction arose from the respondent's conduct as attorney for two related estates.

The respondent, who was admitted to the bar of the Commonwealth on September 7, 1960, was retained by the named executor of an estate in August 1998. After the court allowed the petition for probate of the decedent's will, the respondent deposited \$220,299 from an account in the decedent's name into an interest-bearing account opened for the estate (the estate account).

The decedent's sister was the primary beneficiary of the estate. She died intestate in October 1998, with her interest in her brother's estate as her only significant asset. The sister's daughter (the daughter) retained the respondent to represent her and he obtained her appointment as administratrix of her mother's estate.

Between November 1998 and January 2000, the respondent converted to his own use at least \$83,441 from the estate account. The respondent intentionally used these funds for his own business and personal expenses, and his misuse of the funds caused actual deprivation to the estate and the beneficiaries. By April 2000, the remaining balance in the estate account, after payment of some estate expenses and a \$75,000 distribution to the daughter, was \$37,626.96. The respondent closed the account in April and converted all the remaining funds to his own use.

MassHealth had a lien against the sister's estate to recover \$67,087 for Medicaid assistance provided prior to her death. When the respondent sent the daughter \$75,000, he intentionally misrepresented to her that he was negotiating with MassHealth concerning its lien and that he would make an additional \$50,000 distribution to her when he concluded the negotiations. In fact, the respondent never attempted to negotiate with MassHealth concerning its lien.

After April 2000, the respondent drew on his personal funds to pay estate obligations, including a \$15,000 payment to the daughter as a purported further distribution of estate funds. With that payment, the respondent sent another letter to the daughter that intentionally misrepresented that he was negotiating with MassHealth concerning its lien.

In August 2003, the daughter contacted another lawyer to look into the reason why it was taking the respondent so long to complete the probate of her uncle's estate. The new lawyer sent a letter to the respondent asking for a status report on the estate, but the respondent failed to respond to this letter.

The executor of the uncle's estate died in September 2003. The respondent was aware of the executor's death, but he did not file a suggestion of death or move for the appointment of a new executor or administrator. The respondent also did not inform the daughter that the

executor had died. After the executor's death, the respondent had no legal or other authority to take any action on behalf of the uncle's estate.

In October 2003, the daughter, unaware of the executor's death, retained the new lawyer to represent her in the administration of her mother's estate and to complete the administration of her uncle's estate. The new lawyer filed a petition for the removal of the executor of the uncle's estate on October 30, 2003.

The respondent received notice of the petition for removal in November 2003. On November 28, 2003, the respondent intentionally used \$9,000 of unrelated client funds in his IOLTA account to pay nine beneficiaries of the uncle's estate. On December 1, 2003, the respondent filed in court an inventory for the uncle's estate that had been signed by the executor prior to his death. The respondent did not advise the court or the daughter's lawyer at that time that the executor had died.

On February 12, 2004, during a pretrial conference on the petition to remove the executor of the uncle's estate, the respondent disclosed for the first time that the executor had died. The respondent and the daughter's new lawyer agreed on a person, a local lawyer, to be appointed as successor administrator of the uncle's estate. After his appointment, the new administrator attempted to obtain from the respondent information about the funds that had been in the uncle's bank account at the time of his death and an accounting of the respondent's handling of estate property. The respondent did not respond to administrator's request until October 2004, when he delivered his file for the uncle's estate to the administrator. The respondent did not keep adequate records of his administration of estate assets and never provided the administrator with a full accounting of his receipt and disposition of estate assets, or the balance of funds belonging to the estate.

From and after July 1, 2004, the respondent failed to keep the records required by Mass. R. Prof. C. 1.15(f) for his IOLTA account. On May 6, 2005, the respondent borrowed \$90,000 and deposited the funds into his IOLTA account. On May 9, 2005, the respondent used the borrowed funds to purchase a cashier's check made payable to the new administrator. The respondent used this check and an additional \$17,000 from his IOLTA account to purchase another cashier's check for \$107,000, which he delivered to the administrator on May 10, 2005 with a partial accounting of his handling of estate assets.

On February 7, 2006, the administrator filed his First and Final Account for the uncle's estate. The court allowed the account on March 17, 2006.

The respondent also failed to respond to bar counsel's inquiries in 2006 and 2007 concerning the administration of these estates. Pursuant to Supreme Judicial Court Rule 4:01, § 3, bar counsel therefore filed a petition for administrative suspension against the respondent on December 12, 2006, based on his failure to cooperate. On December 18, 2006, the Court entered an order of immediate administrative suspension of the respondent's license to practice law. On January 15, 2007, the respondent provided the information bar counsel had been seeking. On January 19, 2007, the court allowed the respondent's motion for termination of his administrative suspension.

By failing diligently to complete the probate of the two estates, the respondent violated Mass. R. Prof. C. 1.1 (competence), 1.2(a) (lawyer to seek lawful objectives of client), and 1.3 (diligence). By failing to notify the daughter that the administrator had died and that he was no longer authorized to take action in the uncle's estate, the respondent violated Mass. R. Prof. C. 1.4(a) and (b) (communication). By failing promptly to file a suggestion of death or otherwise to inform the court that the administrator had died, by continuing to act on behalf of the estate after his client had died, and by failing to file a notice to withdraw and to seek the appointment of a new executor, the respondent violated Mass. R. Prof. C. 1.16(a)(1) and (3), as well as Mass. R. Prof. C. 3.4(c) (lawyer shall not knowingly disobey obligation under rules of a tribunal) and 8.4 (d) (conduct prejudicial to administration of justice) and (h)

(conduct adversely reflecting on fitness to practice law).

By failing to maintain adequate records of his receipt, maintenance, and disposition of estate assets and of funds in his IOLTA account, the respondent violated Mass. R. Prof. C. 1.15(a), as in effect prior to July 1, 2004, and Mass. R. Prof. C. 1.15(f), as in effect on and after July 1, 2004. By failing promptly to deliver his file and estate assets to the administrator, the respondent violated Mass. R. Prof. C. 1.16(d) and (e). By failing to render a full, written accounting of estate property when he turned over funds to the administrator, the respondent violated Mass. R. Prof. C. 1.15(d)(1), as in effect on and after July 1, 2004.

By intentionally commingling estate funds with his own funds and by intentionally misusing estate funds, with the intent to deprive the estate and its beneficiaries of the funds at least temporarily, and with actual deprivation resulting, the respondent violated Mass. R. Prof. C. 1.15(a), as in effect prior to July 1, 2004, and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and (h). By intentionally misusing client funds in his IOLTA account to repay funds he had misappropriated from the estate, the respondent violated Mass. R. Prof. C. 8.4(c) and (h), and Mass. R. Prof. C. 1.15(a), for conduct occurring before July 1, 2004, and 1.15(b) and (d), for conduct occurring on and after July 1, 2004.

By misrepresenting to the daughter that he was negotiating with MassHealth concerning its lien and concealing the true reason for delaying the completion of the uncle's estate, the respondent violated Mass. R. Prof. C. 1.4(a) and (b), and 8.4(c) and (h).

By intentionally failing without good cause to cooperate with bar counsel's investigation, the respondent violated Mass. R. Prof. C. 8.4(g), as well as Mass. R. Prof. C. 3.4(c), 8.1(b) (knowing failure to respond to lawful demand for information from disciplinary authority) and 8.4 (d).

This matter came before the Board of Bar Overseers on a stipulation of facts and disciplinary rule violations and a joint recommendation for an indefinite suspension from the practice of law. On January 20, 2009, the Board voted to accept the stipulation and recommend the agreed-upon disposition to the Supreme Judicial Court. The court so ordered on March 5, 2009.

FOOTNOTES:

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.