IN RE: WAYNE T. HENRY

NO. BD-2012-082

S.J.C. Order of Term Suspension entered by Justice Gants on October 15, 2012, with an effective date of November 14, 2012.[1]

SUMMARY[2]

The respondent was admitted to the Massachusetts bar in 1983 and since that time has conducted a general practice. In March 2006, a husband and wife retained the respondent to file a petition to partition a two-family duplex they owned with a relative and his wife. For a number of years the clients had paid the expenses on the property and had had difficulties getting the relatives to contribute their share.

The clients and the respondent entered into a written fee agreement which required a $10,000 retainer and specifically estimated that the cost of the case would be $15,000. The fee agreement stated that the respondent would charge $200 per hour for out-of-court time and $400 per court appearance. That same day, the clients paid the $10,000 retainer.

In August 2006, the respondent sent his first bill to the clients which was for over $7,500. Although no pleadings other than the petition to partition had been filed with the court, in this bill, the respondent charged for 7.3 hours of travel time, namely seven round trips to probate court; 5.6 hours of conferences with probate court clerks; and 3.4 hours to draft the petition. After reviewing the bill, the clients called the respondent, questioning its amount, but he informed them that the work had been necessary. Thereafter, the respondent sent bills at least monthly to the clients and they, at numerous times, expressed concern about the mounting legal fees.

From October 2006 through October 2007, the commissioner marketed the property. Upon learning in August 2007 that the relatives had leased their duplex, the commissioner filed a complaint for contempt and in November, the court found the relatives in contempt and ordered the commissioner to negotiate a termination of the lease with any related costs to be assessed against the relatives.

In October 2007, the commissioner and a buyer entered into a purchase and sale agreement for the property, with a purchase price of $860,000. Despite his limited involvement in this matter, essentially a few telephone conversations checking on the status of the sale, on January 3, 2008, the respondent sent a bill to the clients with a total of $43,140.80 in legal fees.

After the sale in January 2008, resulting in net proceeds of about $442,000, the clients and their relatives each wanted credit for improvements and expenses they claimed to have made. In late May 2008, the respondent sent his clients a bill totaling $72,290.80 in fees. Since the sale of the property, the respondent had billed $24,950.00 in fees for obtaining and providing

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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.

the records to submit to the commissioner regarding the clients' expenses with regard to the property and for the meetings about those expenses.

The clients called the respondent and told him that they were very upset about the amount of the bill. Shortly thereafter, the respondent sent the clients a letter stating that he would agree to hold any funds that he received from the sale of the property "in trust" and that they had the "right to a hearing to be conducted by the Massachusetts Bar Association Fee Arbitration Board [FAB] of whatever amount" of the fee they chose to contest.

At the end of September 2008, the respondent received a check from the commissioner for $214,228.89, representing the clients' share of the net proceeds and exceeding the relatives' share by about $70,000. He deposited this check into his IOLTA account.

The commissioner's total bill for fees and expenses was $62,297.52: $45,561 was for determining the parties' respective contributions to the property (of which $9,564 was the cost of the bond); $6,178.52 was for the sale of the property; and (3) $10,558 was for the contempt matter.

About October 1, 2008, the respondent delivered to the clients his final bill showing a balance owed of $81,070.80. Thus, since they had paid a $10,000 retainer, the total of the respondent's legal fees was $91,070.80.

On receipt of the bill, the clients informed the respondent that they disputed the amount. After meeting, the parties agreed that the clients would pay the respondent $30,000 in legal fees in addition to the $10,000 retainer. They further agreed that the clients disputed the remaining legal fees of $51,070.80 and that the parties would submit this dispute to the Fee Arbitration Board. The respondent agreed to hold the disputed funds in his IOLTA account pending arbitration. On October 10, 2008, the respondent disbursed to his clients the proceeds from the sale less the $30,000 in agreed-upon legal fees and the $51,070.80 in disputed legal fees, which were retained in the respondent's IOLTA account.

On May 4, 2009, after a hearing, the FAB panel issued a decision finding the "total fee for legal services" charged by the respondent was $91,070.80; the "total reasonable amount for fees, costs, and disbursements" was $35,000; the amount paid by the client was $40,000; and the "total amount of $5,000 is due to be repaid by the attorney to the client." Neither the clients nor the respondent appealed the award.

In July 2009, the respondent paid $5,000 to the clients, stating in his cover letter that, based on the FAB decision, this payment "concludes the matter." The clients retained an attorney who sent a letter to the respondent demanding payment of the $51,070.80 he still held. In August 2009, the respondent responded denying the clients had any claim to the funds: "The Fee Board found that $35,000 was a reasonable fee for the $91,070.80 charged. Therefore, $56,070.80 was unreasonable. Out of that $56,070.80 $5,000 was unreasonable in fees because of me. The other $51,070.80 was unreasonable in fees because of your clients. Had the other $51,070.80 been unreasonable in fees because of me your clients would have been awarded $56,070.80 instead of just $5,000…."

Between mid-July and mid-September 2009, the respondent used almost $50,000 of the disputed funds to pay personal and business expenses.

In late August 2009, the clients filed a request for investigation with bar counsel and an incident report with the Cambridge police, alleging that the respondent had taken their money.

In October 2009, the respondent sent responses to the clients' complaint to bar counsel and to the District Attorney, in which he stated that he was entitled to the $51,070.80 because the FAB had only ordered him to repay the clients $5,000 after considering the total of $91,070.80.

After a criminal complaint was issued, the respondent retained counsel and subsequently paid the $51,070.80 to the clients, together with interest and attorney's fees, and the criminal complaint was dismissed. The hearing committee credited the respondent's testimony that these payments were made because his attorney had dissuaded him of his position that the money was his and was not owed to the clients.

The hearing committee found that the respondent was willfully blind to the fact that he had owed the remainder of the disputed legal fees to his clients.

The hearing committee made findings with respect to each of the factors set forth in Mass. R. Prof. C. 1.5(a) and concluded that that the total amount charged by the respondent was a clearly excessive fee. The committee noted that the commissioner had been responsible for most of the work in this matter yet his legal fee was substantially less than the respondent's.

The hearing committee found the following rule violations: (1) by charging a clearly excessive fee, the respondent violated Mass. R. Prof. C. 1.5(a); (2) by failing to pay his clients promptly the escrowed proceeds of the sale after the FAB set his fee at $35,000.00, the respondent violated Mass. R. Prof. C. 1.15(c); and (3) by his willfully blind misuse of $49,796.60 of the clients' funds for his own purposes, with deprivation resulting, the respondent violated Mass. R. Prof. C. 1.15(b) and 8.4(c). In mitigation, the hearing committee found that the respondent made full and complete restitution, including interest and attorney's fees, when advised to do so by his counsel.

The hearing committee concluded that the presumptive sanctions for intentional misuse of client funds with deprivation resulting would be unduly harsh in the unique circumstances of this case, noting that the respondent's conduct was very different from the typical misappropriation case in which the attorney goes to great lengths to conceal the misuse of client funds, while knowing he was not entitled to them.

The hearing committee recommended that the respondent be suspended for two years. The parties did not appeal. The Board of Bar Overseers adopted the findings of fact, conclusions of law and recommendation of the hearing committee. A single justice entered an order on October 15, 2012, suspending the respondent for two years.