

IN RE: HENRY MICHAEL DOWNEY

NO. BD-2013-001

**S.J.C. Order of Indefinite Suspension entered by Justice Cordy on January 10, 2013,
with an effective date of February 11, 2013.¹**

SUMMARY²

This matter came before the Supreme Judicial Court for Suffolk County after the Board of Bar Overseers voted to accept the parties' stipulated recommendation for discipline based on the following misconduct.

Case I. Between 2008 and 2012, the respondent represented the administratrix of an estate with multiple heirs and about \$600,000 in assets. The respondent obtained the client's appointment in early 2009. The respondent failed to explain to the client adequately the obligations, responsibilities and liabilities of a fiduciary. He marshaled the estate assets but failed to place and maintain all the funds in a segregated, interest-bearing account. The respondent deposited estate funds to his operating account and converted over \$138,000 of those funds to his own use. In addition, the respondent withdrew and paid himself or his firm nearly \$56,000 in claimed fees without giving his client, on or before the date of each withdrawal, an itemized bill or other written accounting showing the services rendered, the date and amount of the withdrawal, and the balance of the client's funds remaining.

By no later than the fall of 2010, the estate was or should have been ready for final disposition. The respondent failed to effect any distributions until 2011, when he filed a belated inventory and issued some partial payments to the heirs. At that point the respondent gave the client and other heirs a draft account in which he listed fabricated or inflated fees exceeding \$195,000. The respondent obtained the heirs' assents to the draft account under false pretenses. He made further distributions in 2012 and sent invoices for his claimed fees to the client, who disputed the fees. The respondent did not promptly restore the disputed fees to a trust account. He failed to file probate accounts or account accurately to the client.

The respondent's conversion of the estate funds violated Mass. R. Prof. C. 8.4(c) and (h). The respondent's failure timely to give the heirs the funds due them heirs violated Mass. R. Prof. C. 1.2(a) and 1.15(c). The respondent's failure to hold the estate funds in a separate, interest-bearing trust account and failure to maintain all the funds in trust violated Mass. R. Prof. C. 1.15(b) and (e)(5). His failure to give the client the required bill or accounting upon each fee withdrawal violated Mass. R. Prof. C. 1.15(d)(2).

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 respondent's failure to file a timely inventory and probate accounts for the estate violated Mass. R. Prof. C. 1.1, 1.3, 3.4(c), and 8.4(d). His failure to account accurately for the estate funds violated Mass. R. Prof. C. 1.4(a) and (b), 1.15(d)(1), and 8.4(d). The respondent's failure to render competent and diligent services violated Mass. R. Prof. C. 1.1 and 1.3, and his failure to provide adequate explanations to the client violated Mass. R. Prof. C. 1.4(a) and (b).

The respondent's misrepresentations about his fees and ensuing procurement of the assents violated Mass. R. Prof. C. 4.1 and 8.4(c) and (h). His claimed fees were clearly excessive in violation of Mass. R. Prof. C. 1.5(a), as then in effect. His failure to restore the disputed fees to a trust account violated Mass. R. Prof. C. 1.15(b)(2)(ii).

Case II. In 2009, a client engaged the respondent to provide legal services in developing a plan to invest about \$1 million in life insurance proceeds paid to the client on account of her husband's death. The respondent executed a fee agreement with the client requiring her to pay him \$150 per hour, but he failed to explain adequately that his intended representation would involve routine, non-legal services.

The respondent was entrusted with about \$827,000 of the client's proceeds, of which he deposited about \$402,000 to a separate, interest-bearing trust account he established for the client and \$400,000 to his IOLTA account. The respondent deposited the balance of \$25,000 to his operating account and converted those funds to his own use. He subsequently converted another \$15,000 from the proceeds, depriving the client of a total of \$40,000 of her funds.

In addition, the respondent withdrew about \$8,500 as claimed fees. The respondent charged inflated fees for routine services such as going to the bank and paying bills, and his fees were clearly excessive. The respondent failed to give the client a written bill or accounting with the information required by Mass. R. Prof. C. 1.15(d)(2) at or before each fee withdrawal. The respondent disbursed the remaining proceeds as directed by the client but failed to render a complete and accurate accounting of the funds upon his final distribution.

The respondent's conversion of the client's proceeds violated Mass. R. Prof. C. 8.4(c) and (h). The respondent's failure promptly to remit all funds due the client violated Mass. R. Prof. C. 1.2(a) and 1.15(c). The respondent's failure to hold all the funds in a segregated, interest-bearing account and failure to maintain all the funds in trust violated Mass. R. Prof. C. 1.15(b) and (e)(5). His failure to give the client the required bill or accounting upon each fee withdrawal and failure to account for all the funds violated Mass. R. Prof. C. 1.4(a) and (b) and 1.15(d)(1) and (2).

The respondent's failure adequately to explain to the client the scope of the representation and the basis for his fees violated Mass. R. Prof. C. 1.4(b) and 1.5(b), as then in effect. The respondent's charging and collecting clearly excessive fees violated Mass. R. Prof. C. 1.5(a), as then in effect.

Case III. The respondent represented a client in a workers' compensation claim and obtained a \$77,000 lump sum settlement in 2009. The respondent offered to the client to invest the funds for a fee. He failed to set forth the terms of the intended services in a manner that could be reasonably understood by the client or give the client a reasonable opportunity to get advice from independent counsel. Because the respondent intended to hold the investment in his own name and charge \$200 per hour for his services, the terms were not fair or reasonable, and the client did not consent to the arrangement in writing.

The client turned the settlement proceeds over to the respondent, who failed to place the funds in a segregated trust account with interest as directed by the client and instead deposited the funds to an operating account. The respondent reimbursed himself from the funds for loans to the client in advance of the expected settlement, made some disbursements to the client, and transferred the balance of \$65,000 to a non-trust investment account he established in his own name. The respondent failed to assure that the client would be recognized as the owner of the investment account or the invested funds and thereby intentionally misused those funds.

During 2009 and 2010, the respondent made periodic disbursements to the client from the invested funds and paid himself a total of about \$2,550 as fees for maintaining the funds in the investment account. Those fees were clearly excessive. The respondent failed to give the client a written accounting or bill on or before the date of each fee withdrawal.

In early 2011, the client asked the respondent for his remaining funds. The respondent gave the client about \$54,500, which he advised the client was the balance of the investment account with accrued interest or dividends and a refund of his fees. In fact, the respondent retained the investment account for his own use and paid the client from his operating account using, at least in part, funds misappropriated from the clients in Case I and Case II. The respondent gave this client a purported written accounting that was inaccurate and incomplete. He then owed but failed to remit \$1,000 to the client, who was deprived of those funds for several months before the respondent repaid them later in 2011.

The respondent's advances to the client violated Mass. R. Prof. C. 1.8(e). His conduct in entering into a business transaction with the client under terms that were not fair and reasonable and without written disclosure of the terms, an opportunity for the client to consult independent counsel, and written consent from the client violated Mass. R. Prof. C. 1.8(a). The respondent's intentional misuse of the client's funds violated Mass. R. Prof. C. 8.4(c) and (h). The respondent's failure to hold those funds in a separate, interest-bearing trust account and failure to maintain the funds in trust violated Mass. R. Prof. C. 1.15(b) and (e)(5). His failure timely to remit the balance of funds due the client and account adequately for the funds violated Mass. R. Prof. C. 1.2(a) and 1.15(c).

The respondent's failure to give the client a bill or accounting upon each fee withdrawal violated Mass. R. Prof. C. 1.15(d)(2). His charging and collection of clearly excessive fees violated Mass. R. Prof. C. 1.5(a), as then in effect.

Trust fund violations. From at least 2009 to the fall of 2012, the respondent failed to make and maintain required records of trust funds he deposited to non-trust accounts, including chronological check registers, individual ledgers, and reconciliation reports. The respondent's failure to maintain those required records violated Mass. R. Prof. C. 1.15(f)(1)(B)-(E). In violation of Mass. R. Prof. C. 1.15(e)(4), the respondent failed to make all his fee withdrawals by checks payable to him or his firm.

In mitigation, the respondent made full restitution to the heirs in Case I and to the client in Case II. In addition, the respondent returned to escrow his fee withdrawals in both cases pending the resolution of fee disputes with the clients.

Bar counsel commenced formal disciplinary proceedings against the respondent before the Board of Bar Overseers in September 2012. In November 2012, the parties filed an amended petition for discipline and an answer and stipulation whereby the respondent

acknowledged that the facts alleged in the amended petition could be proved by a preponderance of the evidence. The parties recommended that the respondent be indefinitely suspended. The board voted in December 2012 to accept the stipulation and the recommendation. On January 10, 2013, the Supreme Judicial Court entered an order for the respondent's indefinite suspension.