

**IN RE: HARLAND L. SMITH, JR.****NO. BD-2011-65****S.J.C. Order of Term Suspension/Suspended with Conditions entered by
Justice Cordy on July 19, 2011.¹****CORRECTED SUMMARY²**

The respondent received a suspension of six months, with the execution of the suspension stayed for two years, on conditions that the respondent undergo an evaluation at the Law Office Management Assistance Program (LOMAP) within sixty days of the entry of the order, that the respondent implement the recommendations of LOMAP, and that the respondent carry malpractice insurance for two years to commence within ninety days of the entry of the order. The misconduct resulting in this sanction was as follows:

In August 2006, a client saw a neurologist who informed the client that his ongoing pain and other symptoms were the result of nerve damage caused during surgery in December 2004. In June 2007, the client retained the respondent to represent him in a medical malpractice claim against the two surgeons who performed the surgery.

The client signed a contingent fee agreement under which the client paid the respondent \$3,000 “for initial investigation and research of the claim” and agreed that the respondent’s fee would be one-third of any recovery. The fee agreement was in violation of the provisions of G.L. c. 231, § 60I, which mandates a sliding scale of maximum percentage fees in medical malpractice cases. The respondent expended the \$3,000 by reviewing the medical records provided to him by the client and reviewing literature and material related to the surgical procedure performed.

The respondent did not obtain certified copies of any of the client’s medical records from the hospital, nor did the respondent send any claim letters to the doctors or the hospital or retain a medical expert to review the medical records or examine the client. The respondent did not file suit on or before December 2007, which was three years after the surgery and arguably when the three-year statute of limitations expired.

Instead, the respondent filed suit against the doctors in August 2009, days before the statute of limitations would expire, if the cause of action had accrued in August 2006 when the client saw the neurologist and was diagnosed with nerve damage. The respondent did not make service of process within 90 days of filing the complaint, nor did he seek an extension of time within which to make service of process.

For three months after the complaint was filed, the client repeatedly requested a copy of the complaint, but the respondent did not comply until December 2009. In November 2009, the client wrote the respondent requesting a copy of his file and an accounting for the

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.

\$3,000. In his letter, the client did not terminate the respondent and indicated that he wanted to continue working with him.

However, in December 2009, the respondent sent the client per his request a copy of his file and an accounting. The respondent also sent a motion to withdraw to the client and instructed the client to have his new attorney file the motion to withdraw. The respondent did not seek the court's permission to withdraw from the client's case, nor did he take any action to advance the pending malpractice suit. The respondent did not advise the client of the deadline for serving the defendants or of the potential consequences of failing to make service of process. In February 2010, the court entered a judgment of dismissal for failure to complete service of process by the deadline. The respondent failed to inform the client of the dismissal and took no action to vacate it.

The respondent's failure to obtain certified copies of the client's medical records, retain a medical expert, file the complaint within three years of the surgery, and make service of process on the defendants or seek an extension of time to do so was in violation of Mass. R. Prof. C. 1.1, 1.2(a), and 1.3. The respondent's failure to promptly respond to the client's request for a copy of the complaint and to advise him of the dismissal of his case was in violation of Mass. R. Prof. C. 1.4(a) and (b). The respondent's withdrawal from representation without obtaining the court's permission and without protecting the client's interests was in violation of Mass. R. Prof. C. 1.16(c) and (d). The respondent's conduct in entering into a contingent fee agreement with a client that was not in compliance with G.L. c. 231, § 60I was in violation of Mass. R. Prof. C. 1.5(a), as in effect prior to March 15, 2011.

In aggravation, the respondent had a history of discipline. In two unrelated matters, the respondent received a public reprimand in 1999 for conduct that is prejudicial or damaging to a client, failure to maintain proper records of a client's property, failure to return papers on discharge, failure to account on request or on final disbursement, and failure to cooperate in bar discipline investigations. *Matter of Smith*, 15 Mass. Att'y Disc. R. 560 (1999). The respondent also received an admonition in 1997 for neglect of a legal matter, failure to seek the lawful objectives of a client, failure to carry out a contract of employment, and conduct that is prejudicial or damaging to a client where the respondent failed to take any action on a client's potential claims or to adequately communicate the three-year malpractice statute of limitations to a client. *AD No. 97-42*, 13 Mass. Att'y Disc. R. 936 (1997).

In mitigation, the respondent refunded \$3,000 to his former client.

This matter came before the Board of Bar Overseers on the parties' stipulation of facts and rule violations and an agreed recommendation for discipline of a suspended suspension with conditions. On June 13, 2011, the board voted unanimously to accept the stipulation and impose the recommended discipline.