

**COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT**

BAR COUNSEL,)	
)	
Petitioner,)	
)	
vs.)	BBO File Nos. C1-10-0064
)	& C1-08-0128
JANE JONES, ESQ.,)	
)	
Respondent.)	

AMENDED BOARD MEMORANDUM

A hearing committee has recommended that the respondent* be publicly reprimanded for her handling of an immigration matter. Both parties have appealed. Bar counsel asks us to reject certain critical findings of fact made by the committee, including findings based on credibility determinations, and to recommend a suspension for two and a half years. The respondent asks that the matter be concluded by admonition and that she be awarded costs for having to defend this appeal. Oral argument was held before the full board on February 11, 2013. We deny bar counsel's appeal, reject the respondent's requests for costs, and dismiss the petition for discipline.

The Findings of the Hearing Committee

We summarize the hearing committee's findings of fact, supplemented where necessary with evidence from the record. The petition for discipline alleges numerous violations against respondent in the context of a single immigration matter: that the respondent was incompetent; that she suggested her client supply false information to a

*Because this matter has been concluded with a dismissal, the board has not identified the respondent and has used pseudonyms in this memorandum.

tribunal; that she filed a motion with the court that included intentional misrepresentations of material facts; that she failed to investigate the reasons behind a December 29, 2009 deportation order; and that she failed to communicate the status of the matter to her client.

The respondent was the only witness at the hearing. The parties took the videotaped deposition of Sue Smith, the client's wife, prior to the hearing, and the videotape and transcript were admitted at the hearing. The parties stipulated that the complainant, Sam Smith, a native and citizen of Iran, had stated through counsel that if called to testify, he would not do so based on his fifth amendment privilege against self-incrimination. Fifty-two exhibits were admitted at the hearing. The respondent was retained in March of 2009 to represent Smith in an immigration matter. HC Report, ¶ 2. At that time, Smith was in removal proceedings as a result of a B-2 visitor overstay and had filed, through prior counsel, an application to adjust his status based upon his marriage in 2003 to a United States citizen, Sue Smith. Id. While the respondent and her client were in court together on March 31, 2009, an Immigration Court Judge scheduled a master calendar hearing for June 16, 2009. Id. ¶ 3. Smith was sitting next to the respondent in the courtroom. Although the respondent does not have a specific memory, the hearing committee credited her testimony that her practice when she received in-person notice of a hearing date, as she did here, was to write the date in her agenda book and give the original to the client. Id.

Smith failed to appear at the June 16, 2009 hearing, and the Immigration Court entered a deportation order in absentia. Id. ¶ 5. In detailed, meticulous findings, the hearing committee parsed respondent's explanation of what happened next. It found that

later in the day on June 16, the respondent spoke with Smith's wife, Sue, by telephone and advised her that Smith had failed to attend the hearing.¹ Id. ¶ 6. The committee further found that the respondent spoke with Smith the next day or so and a number of times more over the summer. Id. ¶ 8. When she first asked Smith why he had not attended the hearing on June 16, he replied that he had forgotten. The respondent informed him that it was very serious that he had missed a court appearance. She explained the consequences and advised that they could file a motion to reopen, but that he would have to show good cause. Id.

The hearing committee credited the respondent's testimony that she then told Smith there was specific language in the Immigration Nationality Act regarding motions to reopen. She read the actual language to him, which stated that a motion to reopen could be filed based on (1) lack of notice, which would not work since Smith had been in court when the judge announced the date of the new hearing, (2) ineffective assistance of counsel, or (3) exceptional circumstances. She told him that she believed the latter could be applicable in this case. Id. The hearing committee specifically credited the respondent's testimony that she then gave Smith some examples of exigent circumstances that she believed were from a law book, such as if he, his wife, or his son had been sick, if there had been an emergency at his or his wife's work, or something similar. Id. The committee further credited her testimony that, in that same conversation, she asked Smith what had been going on in his life that could have caused him to

¹ The hearing committee did not find credible Sue's statement that she told the respondent she thought the hearing was scheduled for June 23, 2009, and that was the date placed on their calendar. As indicated infra, the committee generally found Sue's testimony to be lacking in credibility. See HC Report, ¶ 6.

forget an important court date, and he had replied that he had recently been in the hospital for three days with heart problems. Id. The respondent advised him that if he could get a doctor's letter or certified medical records to that effect, she could file a motion to reopen based on a claim that he had been ill and distracted due to his medical problems. Id.

The hearing committee found that the respondent communicated with the client a number of times over the summer in efforts to get information from him in support of a motion to reopen. Id. ¶ 8. He called her a week or two before August 26 and informed her that he had an appointment with the Immigration and Customs Enforcement (ICE) on August 26, 2009. Id. ¶ 11. At that time, he also informed her that he had been arrested on July 27, 2009, as a consequence of the June 16, 2009 removal order. Id. When arrested, he had told ICE that he had an appointment with his kidney doctor that day, which ICE confirmed. He had also informed ICE that he had been in the hospital recently and that he had high blood pressure and high cholesterol. Id. ICE released him and ordered him to appear at the Burlington ICE office on August 26, 2009. Id.

Concerned that ICE might be preparing to take Smith into custody to deport him, the respondent advised him that, to prevent such action, the motion to reopen needed to be filed, in person, prior to the August 26, 2009 ICE appointment and that it should be date-stamped to ensure that it was recorded on the court's computers. Id. ¶ 12. Two days before the hearing, on August 24, 2009, the respondent received by fax medical documentation of a visit by Smith on August 10, 2009, to Mercy Hospital for hypertension. Id. ¶ 13. She immediately drafted a motion to reopen and an affidavit in support, to which she appended the medical records she had just received. Id. The same

day, the respondent went in person to the Immigration Court and filed the motion papers. Id. ¶ 14.

The respondent's affidavit is not a model of clarity: it was not based on personal knowledge, and it included hearsay statements. See id. ¶ 18. The hearing committee credited her testimony that she did not try to get her client or his wife to lie or concoct a story about the reasons for the respondent's failure to appear at the hearing on June 16, 2009. Id. ¶ 9. The hearing committee also found that the respondent did not knowingly lie to the court in her motion or affidavit, did not fabricate the information, and based her statements on what she believed her client had told her in various conversations. Id. ¶ 17. Further, it credited her testimony that, because she had only recently learned of the ICE appointment on August 26 and had not been provided with medical documents until August 24, she did not believe she had enough time to send an affidavit to be signed by Smith and returned to her so that she could file it personally with the Immigration Court before the ICE appointment. Id. ¶ 18.

The motion to reopen was allowed on November 27, 2009. Id. ¶ 19. The hearing committee found that no evidence was introduced on the issue of whether notice of this order was ever served on the respondent. Id. On December 7, 2009, the Immigration Court sent a notice of hearing in the Smith matter to the respondent by mail scheduling the hearing for December 29, 2009, at 1:30 PM. No notice was sent to the client. Id.

The hearing committee credited the respondent's testimony that she was unaware of both the allowance of the motion to reopen and the hearing date. It specifically found that, if she had been aware, she would have requested a continuance, as she did for another client whose case was scheduled for the same date, because she was going to be

on vacation on December 29. Id. ¶ 20. Since neither the respondent nor her client knew about the December 29 hearing, neither appeared. Id. ¶ 21. Accordingly, the court that same day issued and mailed to the respondent an order stating that because Smith had failed to attend the hearing, he was ordered removed from the United States to Iran. Id. ¶ 20.

The respondent returned from vacation in early January 2010. Id. ¶ 22. On January 5, the respondent sent Smith a letter advising him of this order, stating that she would file a new motion to reopen for him, and requesting payment of the \$110 filing fee for the motion. Id.

Since she had not heard and was not aware of what action the court had taken with respect to the August 2009 motion to reopen, the respondent was confused when she received the order of removal. Id. ¶ 23. Except for calling on the court hotline, which failed to provide her the needed information, the respondent took no other action to determine why the deportation order had issued and what had happened with respect to the motion to reopen. The hearing committee found that she did not try to reach a clerk or make an appointment to go to the court to review the file. Id.

On January 27, 2010, Smith was arrested by immigration agents and taken to the Bristol County Correctional Facility. Id. ¶ 24. The same day, upon learning that Smith had been arrested by ICE, the respondent filed another motion to reopen. Id. ¶ 25. Assuming incorrectly that the August 24 motion to reopen had never been acted on, this new motion and its supporting documents were identical to the earlier package, with one exception: the respondent attached the December 29 notice and order and added in

handwriting: "Neither myself nor my client have received notice of another Court date. He called today and stated he is in ICE custody." Id.

About a month later, Smith terminated the respondent's services and retained Attorney Jane Doe to represent him. Id. ¶ 27. On February 3, 2010, the Immigration Court denied the January 27 motion to reopen with the notation: "Motion does not adequately address [Smith's] failure to appear on 12/29/09." Id. ¶ 29. Notice of this decision was sent to the respondent on February 9. Id.

On or about February 26, 2012, Attorney Doe filed a motion to reopen the removal proceedings based on the allegation of ineffective assistance of counsel. Essentially, she alleged that the respondent had failed to inform Smith of the granting of his motion to reopen on November 27 and of the scheduling of the hearing on December 29. Id. ¶ 30. Attached to the motion were declarations under oath by Sam and Sue, the respondent's letter of January 5, 2010, a declaration by Attorney Doe, a letter to the respondent dated February 24, 2010, and Smith's notification to the Board of Bar Overseers alleging ineffective assistance of counsel by the respondent. Id.

The hearing committee reviewed the declarations of both Smith and his wife, Sue. As to Smith's declaration, it noted in essence that his reasons for missing the June 16 hearing were consistent with the respondent's testimony. Id. ¶ 33. As to Sue's declaration, the committee noted – as it had several times previously – that it did not credit her explanation. Id.; see also id. ¶¶ 6, 7. The Immigration Court allowed Smith's motion to reopen in April 2010, but he remained in custody. Id. ¶ 45.

Smith sent another letter to bar counsel claiming, among other things, that he had understood after the March 2009 hearing that his next hearing date was June 23, 2009,

and that he had so told his wife in the respondent's presence. Id. ¶ 39. In the letter, Smith claimed that, on June 16, 2009, the respondent had called his home and asked his wife why he was not in court, and that his wife had replied that the hearing was on the June 23. Id. Two to three weeks later he received a packet of documents from the respondent explaining that he had been ordered removed and they would file a motion to reopen. Id. Smith also stated in this letter he had been admitted to Mercy Medical Center for four days in June 2009, after having a stroke. Id. In addition, Smith admitted receiving a copy of the motion to reopen that had been filed by the respondent in August 2009. Id. By letter dated July 14, 2011, the respondent received notice of a claim of malpractice on behalf of Smith. Id. ¶ 40.

Bar Counsel's Appeal

Bar counsel disputes the hearing committee's findings that the respondent did not encourage Smith or his wife to lie or fabricate a story about his reasons for failing to appear at the June 16, 2009 hearing. Bar counsel acknowledges that the Board's authority to set aside a committee's credibility determinations is sharply circumscribed. See SJC Rule 4:01, § 8(5)(a) (board may revise findings "paying due respect to the role of the hearing committee . . . as the sole judge of the credibility of the testimony presented at the hearing") (emphasis added); Matter of Murray, 455 Mass. 872, 880 (2010) (credibility findings may not be disturbed unless "wholly inconsistent" with other findings), quoting Matter of Hachey, 11 Mass. Att'y Disc. R. 102, 103 (1995). See also Matter of McCabe, 13 Mass. Att'y Disc. R. 501, 507 (1997) (credibility determinations based on permissible choices among conflicting testimony must be upheld unless wholly inconsistent with other findings).

Bar counsel does not meet this high threshold. The hearing committee heard different iterations of what transpired on and after June 16, the date of the missed hearing. It heard Smith's claim that he "forgot" about the hearing, the respondent's own testimony about what she then asked him, and the respondent's recounting of the subsequent production of the affidavit and motion. The committee duly weighed each of the declarants' credibility, bias, and motivation to lie. Mindful that the respondent had no burden to prove exactly what happened on June 16 or afterwards, we conclude that bar counsel has failed to identify any direct evidence that undermines the committee's finding that there was no improper suggestion or fabrication.

The respondent testified – credibly, as the committee determined – that she neither suggested nor endorsed fabrication, but merely explained to her client what he needed to demonstrate in order to excuse his failure to appear at the hearing before the Immigration Court. Like the committee, we decline to infer intent to encourage fabrication from the provision of advice to a client about the requisites for a successful motion. Nor is the provision of such advice forbidden merely because the client's first proffer ("I forgot") was legally insufficient. A lawyer may probe a client's initial response. Absent a conviction that the client is planning to perjure himself or work a fraud on the court (which, as the hearing committee found, is clearly absent here), a lawyer is entitled to take her client at her word and defend her on that basis. In these circumstances, we cannot say "with certainty," Matter of Hachey, 11 Mass. Att'y Disc. R. 102, 103 (1995), that the committee was flat wrong in assessing the respondent's credibility. There was no error in concluding that bar counsel has failed to prove that the respondent engaged in fabrication.

The same considerations keep us from accepting bar counsel's contention that the committee erred in finding that the respondent did not make intentional misrepresentations of fact to a tribunal. To a large extent, the committee's conclusion on this point follows logically from its earlier finding that there was no impermissible suggestion or fabrication. A lawyer should not be required, on pain of discipline, to accept at face value, and to present to a court unadorned, a client's initial explanation for his actions.

It bears repeating that the respondent bore no burden to prove what happened during the discussion with her client on June 16. Her description, captured in her affidavit and motion, finds corroboration in the record. The committee was particularly careful to find that respondent "did not knowingly lie to the court in her motion or affidavit, she did not fabricate the information, and she based her statements on what she believed her client had told her in various conversations." HC Report ¶ 17. Moreover, these credibility findings, while independent and separate, were largely buttressed by Smith's own statements. See *id.* ¶ 17 n.4.

We reject the suggestion that this case is analogous to Matter of Zimmerman, 17 Mass. Att'y Disc. R. 633 (2001). Zimmerman admitted having notarized a signature that had not been executed in his presence and which turned out to be forged. After recounting numerous details of which Zimmerman had personal knowledge, we concluded that "if these facts do not suffice to support an inference of willful ignorance, it is nearly impossible to imagine a set of facts that would. The circumstances fairly bristle with indications that the signature was forged." *Id.* at 649. *Zimmerman* is inapposite here, where there was – at best – equivocal evidence about what the

respondent knew or should have known about her client's state of mind. Bar counsel has not carried her burden of proving that the respondent made intentional misrepresentations of fact.

The Respondent's Request for Costs

In her cross-appeal the respondent asks that we impose costs for having to defend against bar counsel's appeal, and she asks that she be admonished instead of reprimanded for her conduct.

We do not have authority to impose costs against bar counsel. In fact, the only mention of costs in the rules governing our procedures appears in S.J.C. Rule 4:01, § 23, which provides that the Court, "in its discretion, may direct that a respondent-lawyer pay the costs incurred in connection with the processing of a disciplinary proceeding" An express authorization for the assessment of costs against respondents appears to exempt, by necessary implication, the assessment of costs against parties not mentioned as subject to them.

The Appropriate Disposition

Our review of the record indicates that the respondent generally acted with competence, diligence, and perspicacity in handling Smith's immigration matter – up until January 5, 2010, when she returned from vacation to discover that the court had allowed the motion to reopen and had scheduled a hearing on a date when she was away. The committee found that she had not been aware of the court's action or the scheduled hearing, that she would have sought a continuance if she had known of it because of her vacation plans, and that the client received no notice at all. When no one appeared at the hearing, the court ordered the client's deportation to Iran for failing to attend the hearing.

The respondent admitted that she was confused when she received this notice because, like the client, she did not know that the court had acted on the motion to reopen. She called the court's hotline, but it did not supply her with sufficient information. She then failed to act between January 8, when she learned of removal order, and January 27, when the client was arrested by immigration agents. At that point, she immediately filed another motion to reopen. The client then obtained new counsel, who sought a new hearing based on a claim of ineffective assistance of counsel.

The hearing committee found misconduct in the respondent's failure, between the time she learned of the missed hearing and her client's subsequent arrest, to investigate more vigorously the reasons why an order of removal had issued, and it recommended that she be reprimanded for that lapse. The respondent asks that the sanction be reduced to an admonition.

We agree that the respondent could have acted with more vigor and dispatch, given the outstanding order of removal, and that her client might not have been arrested if she had. Yet in the context of the entire representation and the diligent work previously performed on her client's behalf, we are not convinced that discipline is called for here. We view her twenty-two-day lapse, stemming from confusion and coming hard on the heels of her return from vacation, as an isolated instance of neglect. Given all the circumstances, we do not believe that her lapse requires discipline. See, e.g., Matter of an Attorney, 18 Mass. Att'y Disc. R. 586, 599 (2002); Bar Counsel v. Attorneys A & B, 26 Mass. Att'y Disc. R. 744, 755 (2010); Bar Counsel v. John Doe, BBO File No. C5-03-022 (2007) (board memorandum).

Conclusion

For all of the foregoing reasons, we deny bar counsel's appeal and reject the respondent's motion for costs. We adopt the hearing committee's findings of fact and conclusions of law, but we decline its recommendation to impose discipline. The petition for discipline is dismissed.

Respectfully submitted,

BOARD OF BAR OVERSEERS

By: _____
W. Lee H. Dunham, Secretary pro tem

Voted: June 3, 2013