NO. BD-2011-023

S.J.C. Order of Term Suspension entered by Justice Cordy on July 6, 2011.[1]

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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.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. BD-2011-023

IN RE: Paul A. Gargano

MEMORANDUM OF DECISION

Paul A. Gargano ("respondent") is before the Court on an information filed by the Board of Bar Overseers ("board") recommending indefinite suspension. As single justice, I adopt the board's recommendation. In doing so, I reject respondent's contention that the bar disciplinary proceedings violated his due process rights and further reject respondent's plea for a jury trial. The record confirms that respondent engaged in a course of conduct that is unbecoming of member of the Massachusetts Bar. In light of the relevant mitigating and aggravating factors, as well as the disposition of similarly situated cases, indefinite suspension is the appropriate sanction.

Background

A three-count petition for discipline was filed against respondent on August 27, 2009. After four days of hearings in January 2010, a hearing committee made the following findings, which were subsequently adopted by the board on February 14, 2011.

A) Count #1

Between June 2000 and June 2007, respondent represented the same client in three different matters: (1) a worker's compensation claim against Home Depot, (2) a tort claim for personal injuries against multiple defendants, and (3) an action brought against the client for eviction. The client lost the eviction action at trial. A few months later, upon receiving a $40,000 settlement from one of the defendants in the personal injury action, respondent deducted $13,000 to pay his fees and expenses in the eviction action. Although the client disputed this deduction, respondent failed to place the disputed funds in escrow. Respondent also deducted an additional $3,000 as a retainer against future expenses in the personal injury case but failed to communicate the deduction to his client. Even after the client disputed the retainer deduction's validity and respondent agreed to waive any fees intended to be covered by the retainer, respondent failed to credit his client with the $3,000. To date, the $3,000 retainer has not been returned.

B) Count #2

In December 2003, respondent filed a lawsuit ("Zimmer I") in the Federal District Court of Massachusetts against Pennsylvanian contractors who had been building a vacation home for him in the Cayman Islands. The suit was dismissed for lack of personal jurisdiction. The respondent's appeal was denied by the Court of

Appeals for the First Circuit. On April 26, 2006, the respondent filed a new complaint against the same contractors in the same district court ("Zimmer II"). The only substantive difference between Zimmer I and Zimmer II was that the respondent now claimed that the contractors resided in the Cayman Islands instead of Pennsylvania. Additionally, the respondent misrepresented to the district court that the new complaint differed from the old complaint in that it relied on Tatro v. Manor Care, Inc., 416 Mass. 763 (1994), when in fact the respondent had specifically relied on Tatro in Zimmer I. The district court judge, again, dismissed the case. Thereafter, respondent filed a motion for reconsideration, in which he knowingly made false statements regarding when the court had agreed to hold a hearing on the motion to dismiss. The judge assessed Rule 11 sanctions against the respondent.

C) Count #3

Beginning in November 2004, respondent was hired by a different client as successor counsel in a worker's compensation claim. At that time, predecessor counsel delivered the file to respondent and sent a notice of lien to the Department of Industrial Accidents ("DIA"), the insurer, the client, and to an associate in respondent's office. In May 2004, respondent sent a letter to predecessor counsel asking him to "identify the extent of his lien" and invited him to "resolve any lien you may have at

this time so as not to hinder the case in the future." However, despite respondent's knowledge of the lien, in June 2004, respondent instructed his associate to draft, and his client to sign, a false affidavit stating that respondent's firm had been the client's attorney throughout the duration of the case. Respondent also directed his associate to draft, and his client to sign, a DIA lien disclosure form falsely certifying that there were no outstanding liens on the case. Thereafter, respondent accepted a settlement check for $58,760 from the insurance company and told the insurance adjuster that he would deal directly with predecessor counsel to resolve any lien issue. When respondent failed to do so, predecessor counsel sued respondent and was awarded triple damages under 93A. During that lawsuit, respondent falsely testified at a deposition that he had no knowledge of the lien.

Discussion

Although the Supreme Judicial Court retains the ultimate authority to determine who may practice law in the Commonwealth, Matter of Prager, 422 Mass. 86 (1996), the board's findings and recommendations are entitled to great weight. Matter of Fordham, 423 Mass. 481, 487 (1996). "[S]ubsidiary facts found by the Board and contained in its report filed with the information shall be upheld if supported by substantial evidence." Matter of Brauer, 452 Mass. 56, 66 (2008), quoting S.J.C. Rule 4:01, § 8(6).

Respondent makes two arguments against the board's recommendation: (1) the bar disciplinary procedure violated his due process rights, for which he is entitled a jury trial, and (2) the board's findings of fact are erroneous. As a threshold matter, I find the board's findings to be supported by substantial evidence and decline to credit respondent's contentions in this regard. Additionally, I adopt the board's conclusions of law.[1]

Turning to respondent's due process argument, respondent claims the bar disciplinary proceedings were mired in procedural error. At the single justice hearing on June 16, 2011, respondent

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[1] Under Count I, respondent violated: (1) Mass. R. Prof. C. 1.5(b) by failing to explain to his client the basis for his fee in the eviction matter, (2) Mass. R. Prof. C. 1.15(b)(2)(ii) by failing to place in escrow the $13,000, which the respondent had deducted from the first personal injury, once the respondent disputed their deduction, and (3) Mass. R. Prof. C. 1.15(c)&(d) by failing to account for the $3,000 retainer, which he deducted from the personal injury award and failed to credit to his client. Under Count II, respondent violated: (1) Mass. R. Prof. C. 3.1 and 8.4(d)&(h) by filing Zimmer II on legal bases that were unwarranted under existing case law, were frivolous, were not advanced in good faith, and were not based on a good faith argument for the modification or reversal of existing law, and (2) Mass. R. Prof. C. 3.3(a)(1) and 8.4(d)&(h) by knowingly falsely stating that the parties and court had overlooked applicable case law and in knowingly falsely stating that the court had agreed to hold a hearing on the defendant's motion to dismiss after the motion had already been decided. Under Count III, respondent violated: (1) Mass. R. Prof. C. 3.3(a)(4), 3.4(b), and 8.4(c),(d),&(h) by causing or permitting the client's affidavits to be prepared and/or filed with the DIA knowing that they were false, and (2) Mass. R. Prof. C. 3.3(a)(1) & (a)(4) and 8.4(c),(d),&(h) by intentionally giving false, misleading, or deceitful testimony at his deposition that was part of predecessor's suit against respondent.

opined that: (1) bar counsel did not provide him with adequate notice of discovery, (2) he was given insufficient time to conduct his own discovery and supplement the record with "designate[d] records of his choosing," and (3) he was not allowed to participate in selecting the make-up of the hearing committee. Respondent suggests the only way to rectify these errors is to grant him a jury trial pursuant to Part I, Article XV of the Constitution of the Commonwealth. I reject respondent's argument.

In Massachusetts, control and membership of the bar is the sole prerogative of the judiciary. In re Opinion of the Justices, 279 Mass. 607, 609-611 (1932) (interpreting Art. 30 of the Declaration of Rights of the Massachusetts Constitution). Part and parcel of this plenary authority is the power of the judiciary to adopt "any procedure in a disbarment proceeding that it deems appropriate for such a proceeding." In re Keenan, 313 Mass. 186, 204-205 (1943). The only limitation on the judiciary's authority, in this regard, is the requirement that the "essential elements of notice and opportunity to be heard must be preserved." In re Keenan, 313 Mass. 186, 204 (1943).

Here, Respondent was notified of the charges against him, had an opportunity to present evidence and argue his case to the hearing committee, was represented by counsel at all relevant times, and had an opportunity to appeal the hearing committee's

recommendation to the full board and the single justice of this Court, which he has done. Respondent's due process rights were not violated.

Nevertheless, respondent argued at the hearing before the single justice and in his pleadings that he is entitled to a jury trial. However, S.J.C. Rule 4:01, § 8, which governs bar disciplinary procedure, does not provide respondent with the right to a jury trial. This is dispositive of the issue.[2] Moreover, respondent's reliance on the disciplinary procedure of Texas, Georgia, and North Carolina, which he claims permit jury trials in this setting, is misplaced[3] and, in any event, is non-

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[2] Likewise, Section 3.2 of the Rules of the Board of Bar Overseers states that, "[e]xcept where inconsistent with these Rules, proceedings before hearing committees, hearing panels, special hearing officers and the Board shall conform generally to the practice in adjudicatory proceedings under Chapter 30A of the General Laws (State Administrative Procedure)." This is significant given that G.L. c. 30A, §14 (5) specifically indicates that "review shall be conducted by the court without a jury." Although neither the board's rules or Chapter 30A are binding on this Court, the board's de facto procedural reliance on this statute does reinforce the conclusion that respondent is not entitled to a jury trial.

[3] Texas law provides that "[i]n a Disciplinary Action, either the Respondent or the Commission shall have the right to a jury trial upon timely payment of the required fee . . . *The Complainant has no right to demand a jury trial*." Tex. Gov't Code Ann. T.2, Subt. G, App. A-1, Disc. Proc. 3.06 (emphasis added). Georgia law provides that while "former Bar Rules 4-214, 4-215, and 4-216 previously provided procedures for jury trials . . . jury trials are no longer permissible in disciplinary proceedings . . . " In re Ervin, 271 Ga. 707, 708 (1999). North Carolina does not recognize a jury trial in disciplinary proceedings as a state constitutional right, North Carolina State Bar v. DuMont, 304 N.C. 627, 640-641 (1982), and the North Carolina legislature has

binding on this Court.

Turning now to the appropriateness of the sanction, the Court's primary concern is "the effect upon, and perception of, the public and the bar." Matter of Finnerty, 418 Mass. 821, 829 (2008). In determining "what measure of discipline is necessary to protect the public and deter other attorneys from the same behavior," In re Crossen, 450 Mass. 533, 573 (2008)(internal quotation marks omitted), the Court must consider "whether the judgment is markedly disparate from those ordinarily entered by the various single justices in similar cases," keeping in mind that each case must be decided on its own merits. Matter of Alter, 389 Mass. 183, 156 (1983).

As noted by the board, Respondent's most serious offenses were his misrepresentations to the federal court, his filing of a frivolous case, and his misrepresentations under oath in state court. The standard sanction for intentional or knowing misrepresentations to a court, such as respondent's false assertion to the federal court that Tatro had not been considered in Zimmer I and his false statements regarding the scheduling of a hearing, is a one-year suspension. Matter of McCarthy, 416

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also repealed the statutory right to a jury trial in bar discipline cases. See 1975 N.C. Sess. Laws Ch. 582 (repealing N.C. Gen. Stat. § 84-28). Thus, Texas only permits such practice where an offending attorney pays a fee, and Georgia and North Carolina have abolished jury trials in bar disciplinary proceedings long ago.

Mass. 423, 423 (1993) (one year suspension for eliciting false testimony, introducing false documents and failing to correct the record); Matter of Neitlich, 413 Mass. 416, 423-424 (1992) (one year suspension for perpetrating a fraud on the court by misrepresenting the terms of the client's pending real estate transaction). Moreover, the filing of a frivolous lawsuit and false and misleading affidavits coupled with a history of disciplinary action has earned a three year suspension. In re Kerlinsky, 428 Mass. 656 (1999). The presumptive sanction for a knowing misrepresentation made under oath, such as respondent's misrepresentation during his deposition in the lien action, is a two year suspension. Matter of Shaw, 427 Mass 764 (1998) (two-year suspension for false testimony in court, a false affidavit, and false opinion letters under oath).

In this case, additional aggravating factors weigh in favor of a heightened sanction. In re Crossen, 450 Mass. 533, 580 (2008). First, the respondent failed to acknowledge any of his misconduct in any of the three counts presented. Matter of Eisenhauer, 426 Mass. 448, 456 (1998). Second, the respondent engaged in multiple acts of misconduct. Matter of Saab, 406 Mass. 315, 326-28 (1989). Third, the respondent's misconduct was motivated by his own financial interests. Matter of Pike, 408 Mass. 740, 745 (1990). Fourth, the respondent's testimony at the disciplinary hearing lacked candor and contained knowing

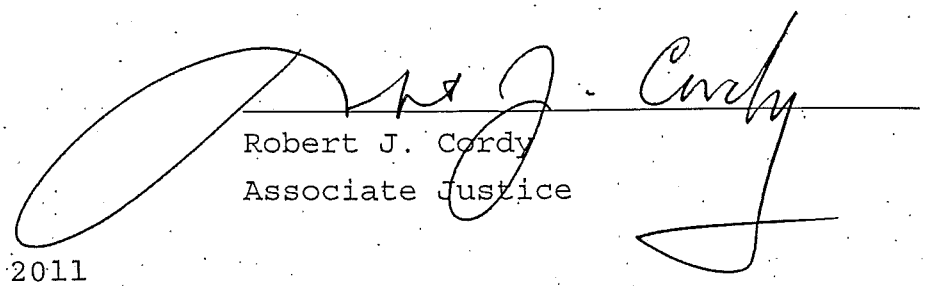
misrepresentations. In re Crossen, 450 Mass. 533, 580 (2008). Fifth, the respondent's substantial experience in the practice of law (he was admitted to practice law in 1963) aggravated his misconduct. Matter of Luongo, 416 Mass. 308, 311-312 (1993). Finally, respondent's continued refusal to return the $3,000 retainer under Count I openly defies the board's findings and reinforces the appropriateness of indefinite suspension. See In Re Murray, 455 Mass. 872, 887-888 (2010)(holding that where an attorney fails to convince that funds are missing by virtue of negligence rather than purpose, deprivation will be presumed, and a sanction of disbarment or indefinite suspension will be imposed).

Moreover, respondent has not presented any "special" mitigating factors, which might otherwise have reduced his sanction. In re Crossen, 450 Mass. 533, 577 (2008)(special mitigating factor where undue delay in the prosecution of a disciplinary matter, substantially prejudices the defense or causes public opprobrium); In re Finneran, 455 Mass. 722, 736 n.20 (2010)(serious physical or psychological conditions affecting the attorney's capacity to act in accordance with legal and ethical obligations constitutes special mitigating factor). Rather, respondent's reliance on his community involvement, his experience in the practice of law, and his veneration by his peers and the judiciary amount to "typical" mitigating factors,

which are given little weight. Matter of Alter, 389 Mass. 153, 157 (1983).[4]

Disposition

In light of the foregoing, an order shall enter indefinitely suspending the respondent from the practice of law in Massachusetts. The respondent may petition for reinstatement beginning three months prior to five years from the effective date of the order of suspension. S.J.C. Rule 4:01, § 18 (2) (b).



Robert J. Cordy
Associate Justice

ENTERED: July 6, 2011

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[4] Respondent's claims regarding his reputation have been refuted in multiple court decisions and orders. Gargano & Assocs. v. Swider & Assocs., 55 Mass. App. Ct. 256 (affirming summary judgment on G.L. c. 93A arbitration award in favor of defendants against both Gargano and law firm for failure to pay contractor); Gargano & Assocs. v. Mass. Comm. Against Discrimination, 74 Mass. App. Ct. 1128 (2002) (finding that law firm failed to provide reasonable accommodation to a temporarily disabled employee and wrongfully terminated her employment); Gargano vs. Barnstable Conservation Comm'n, Superior Court, No. MICV2003-03141 (July 14, 2008) (noting the ten-year period of ongoing litigation and ordering Gargano to cease unauthorized activity within protected wetlands area); Thomas Graves Landing Condominium Trust vs. Gargano, Superior Court, Nos. MICV2004-04613, SUCV2004-05018 (June 16, 2008) (noting Gargano's "wholly non-credible trial testimony" and ordering him to pay $230,408 for a "knowing and intentional" consumption of unbilled heating gas between 1996 and 2004).