



IN RE: ROSEMARY A. MAUER

NO. BD-2011-027

S.J.C. Order of Term Suspension entered by Justice Spina on April 8, 2011, with an effective date of May 9, 2011.¹

(S.J.C. Judgment of Reinstatement entered by Justice Spina on May 4, 2012.)

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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
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL,
Petitioner,
vs.
ROSEMARY A. MACERO, ESQ.,
Respondent.

BOARD MEMORANDUM

The respondent, Rosemary A. Macero, Esq., has appealed from a hearing committee report that recommended she be suspended for a year, based on findings that she made misrepresentations and submitted falsified evidence concerning her office's payment of an appellate docketing fee. Bar counsel's cross-appeal asks that we reject the hearing committee's proposed sanction and recommend an eighteen-month suspension. Oral argument was held before the full board. We adopt the hearing committee's findings, conclusions, and recommendation.

1. Findings of fact and conclusions of law. During 2008, the respondent filed a timely notice of appeal. Around March 10, 2008, she received notice that she was required to pay the appellate docketing fee within ten days.

The respondent's office attempted to pay the fee by a check dated March 17, 2008, and sent to the court under a cover letter dated March 28, 2008. The court received

the letter and check around April 1, 2008. The court notified the respondent that payment was late and she would have to file a motion or take some other action to perfect the appeal.

On April 25, 2008, the respondent filed a motion for late payment and docketing. The motion asserted that the docketing fee had been mailed "immediately," and the court's late receipt had resulted from delay at the post office. The respondent attached to the motion a copy of the March 28, 2008 cover letter, but on this copy the date and about half of the firm's letterhead had been redacted.

On April 29, 2008, the court denied the motion. The court's order pointed out that the original of the respondent's cover letter was dated March 28, 2008, the envelope had been postmarked March 29, 2008, and the date of the cover letter had been removed from the copy submitted with the motion. The court also announced that it would notify this board of the respondent's apparent dishonesty.

On May 1, 2008, the respondent filed a motion for reconsideration. The motion asserted that the respondent had been unaware of the date on the original cover letter and did not know it had been omitted from the copy attached to her first motion. After reconsideration, the court maintained its prior ruling.

The hearing committee found that sometime on or after March 27, 2008, the respondent had backdated the check for the docketing fee. She knowingly misrepresented that the post office was to blame for the late payment. When the court found that to be false, the respondent compounded the misrepresentation by claiming falsely that it was an innocent result of her ignorance of the facts and the alterations to the cover letter.

The committee based these findings on a number of subsidiary findings. The most pertinent was that the handwritten check to the Appeals Court dated March 17 (No. 4494) fell in numerical sequence after computer-generated checks dated March 27, 2008. The committee did not credit the testimony the respondent offered in an effort to explain the inculpatory circumstances.

Based on these findings and credibility determinations, and others which we will discuss as they become pertinent, the committee found that the respondent had violated Mass. R. Prof. C. 3.3(a)(1) (knowingly false statement of material fact to a tribunal); 3.3(a)(4) (knowingly offering false evidence); 8.4(c) (dishonesty, deceit, fraud, or misrepresentation); 8.4(d) (conduct prejudicial to the administration of justice); and 8.4(h) (conduct reflecting adversely on fitness to practice).

In aggravation, the committee found that the respondent demonstrated lack of candor at the hearing. Two members found that the respondent had offered intentionally false testimony.

2. The Respondent's Appeal.

The respondent appeals primarily from the committee's finding that she backdated check No. 4494, the initial misrepresentation from which all the others flowed. She argues that the inference of backdating was contrary to the evidence, and that the committee drew it improperly based solely on its disbelief of her testimony. See Hopping v. Whirlaway, Inc., 37 Mass. App. 121, 126 (1994).

Check No. 4494 is out of chronological sequence with other checks drawn on the same account. Like No. 4494, computer-generated checks numbered 4464 through 4487 are dated March 17. The next six, Nos. 4488 through 4493, are dated March 27, 2008.

They, too, were computer-generated. The most likely inference is that check No. 4494 was written on or after March 27. The next four checks in numerical sequence are consistent with that conclusion. Like 4494, they are hand-written. Each is dated on or within six days after March 28, 2008.

The committee rejected the respondent's testimony that check No. 4494 was out of numerical sequence because she had produced a series of computer-generated checks on March 17, 2008, postdated some of them to March 27 to avoid an overdraft, and then handwrote No. 4494. When cross-examination disclosed that all of the computer-dated checks could have been paid without overdrawing her account, the respondent changed her reason for purportedly postdating the March 27 checks. HR ¶ 10(d), at 3. The committee likewise did not credit respondent's explanation as to why check No. 4494 was handwritten when the other checks purportedly written on the same day had been computer generated.¹ HR ¶ 10(g), at 4.

The committee further noted two inconsistencies in the respondent's evidence. The respondent's denial at the disciplinary hearing in March 2010 that she had backdated the check was inconsistent with her sworn statement in August 2008 that she could not recall whether she had backdated it. She proffered no explanation for this inconsistency. Also, the respondent's testimony that she wrote the check and gave it to her assistant with instructions to mail it immediately did not comport convincingly with the testimony of her administrative assistant, who testified that she had allowed the check to become lost under a pile of other materials.

¹ In brief, the respondent testified that the computer-generated checks were prepared for bills for which she had invoices. Yet, the respondent had received written notice that the appellate docketing fee was due, and this put that fee on the same footing as expenses evidenced by invoices. The respondent later qualified this explanation, and on cross-examination she falsely denied having offered it in direct testimony.

In light of the foregoing, the hearing committee's finding that the respondent had engaged in misrepresentation was not based solely on its disbelief of her testimony. Presented with the natural inference of backdating arising from the dates and sequence numbers of the checks and whether they were computer-generated or handwritten, and presented with the implausible testimony the respondent offered to explain away these facts, the committee drew the natural inference.² The committee's inference of intent to deceive was bolstered by the respondent's false explanations. See Matter of London, 427 Mass. 477, 482-483, 14 Mass. Att'y Disc. R. 431, 438-439 (1998). See also Commonwealth v. Herbert, 421 Mass. 307, 311-313 (1995) (even in a criminal case, where the defendant enjoys the presumption of innocence, the trier of fact could infer the contrary from a conviction that discredited testimony was a contrivance so long as there is other evidence to support the inference). We draw the same conclusion as the committee.

The respondent also argues on appeal that the committee erred by finding that she was not busy during the weeks surrounding her misconduct. She argues that the hectic pace at her office explains her inadequate investigation of the missed deadline and her

² That inference is not rebutted simply because, as the respondent argues, three later handwritten checks were also out of numerical sequence. The committee considered these checks and found that they supported its conclusions because they were all handwritten within six days after March 27, 2008, unlike the sequence of computer-generated checks, the latest of which were dated March 27. HR ¶¶ 10.e, 10.f.

The respondent also argues that the fact the unaltered cover letter to the March 17 check was dated March 28 implies that the respondent could not have intended to mislead the court. Yet, the respondent's assistant admitted that she had mistakenly put a date on the cover letter when her intent was to send it undated. Tr. 34, 48-49. The committee did not reject this testimony; it rejected only the assistant's testimony that she had made this error before the respondent became aware of the missed deadline.

Finally, the respondent argues that it is implausible that she would have sent the court a backdated check under a letter dated March 28, and then send the court an altered copy a month later, especially where the respondent could have confessed error and filed a simple motion. That argument presumes that the respondent must have acted with complete rationality and with knowledge of her assistant's slip-up in submitting the check under a dated cover letter. It does not persuade us to reverse the committee's credibility findings.

consequent negligent misrepresentation. While the committee declined to make any finding on the issue (nor was it required to), it did note that her testimony in this regard was not corroborated by her timesheets. HR ¶ 8. The committee also noted that a hectic pace at the respondent's office was not inconsistent with the respondent's knowing misrepresentations.³

3. Disposition. Both parties have appealed from the hearing committee's proposed disposition. We prefer the sanction recommended by the committee.

The presumptive sanction for misrepresentation to a tribunal of material, disputed facts is a one-year suspension. Matter of Neitlich, 413 Mass. 416, 8 Mass. Att'y Disc. R. 167 (1992); Matter of McCarthy, 416 Mass. 423, 9 Mass. Att'y Disc. R. 225 (1993). The respondent's misrepresentations concerned facts material to a procedural ruling, not facts central to the underlying litigation. They are more akin to the misrepresentation in Matter of Smoot, S.J.C. No. BD 2009-0108 (March 22, 2010), where the attorney certified that he had served a summary judgment motion on opposing counsel who had died. The Court granted a downward departure from the presumptive a one-year suspension, instead suspending Smoot for six months and a day with the final three months stayed. The circumstances of this case differ from Smoot in two important respects.

³ The respondent construes the hearing committee's determination (see HR ¶ 18) as a finding that she was not busy. In that paragraph, the committee merely rejected the respondent's proffered explanation that her busy schedule had caused her to make negligent misrepresentations. The committee adverted to (1) what would have been the respondent's natural desire to confirm a belief that the check had been mailed on time, (2) the conspicuous alterations to the cover letter that would have leaped to the respondent's attention if she had examined the file copy of the altered letter, and (3) the short time required to discover the truth. HR ¶ 18. These natural inferences undercut the respondent's attempt to leverage her busy schedule into an innocent explanation for her misrepresentations.

First, the Court stayed three months of the board's proposed sanction in Smoot because the respondent had paid the opposing party's attorney's fees. The Court treated this payment as analogous to restitution in cases concerning misuse of trust funds, where restitution is a powerful factor in mitigation. Id. at 8-9. The respondent cannot offer similar evidence in mitigation.

Second, Smoot made a single misrepresentation concerning service of a filing, and he did not attempt to conceal it in subsequent court filings. Here, in contrast, the respondent engaged in repeated dishonesty. First, she attempted to mislead the court by paying the fee with a backdated check. When the check was refused, she filed a motion falsely blaming the post office for its late receipt. When that misrepresentation was discovered, she attempted to mislead the court into believing that the misrepresentations in her motion had been negligent.

In all of the circumstances, the respondent's compounded and unmitigated misrepresentations warrant imposition of the presumptive sanction, especially when viewed in connection with her continued lack of candor at the disciplinary hearing. See Matter of Friedman, 7 Mass. Att'y Disc. R. 100, 103 (1991) (lack of candor before tribunal weighed as aggravating circumstance).

We do not believe, however, that the sanction should exceed one year, as bar counsel recommends. This misrepresentation concerned only an appellate filing fee. The respondent's cumulative misconduct is not more grievous than that at issue in Matter of Neitlich, 413 Mass. 416, 423-424, 8 Mass. Att'y Disc. R. 167, 175-176 (1992), or in Matter of McCarthy, 416 Mass. 423, 428-429, 9 Mass. Att'y Disc. R. 225, 231 (1993), the two cases that established the presumptive sanction for material misrepresentations to

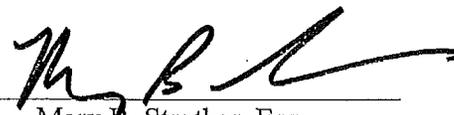
a court: Neitlich sought to deceive the court by drafting two purchase-and-sale agreements and represented that there was only one, all in an attempt to obtain his fee. McCarthy knowingly introduced false documents on the merits of an adversarial matter before a rent control board. The respondent's conduct does not warrant greater discipline than these lawyers received.

4. **Conclusion.** For the foregoing reasons, we adopt the hearing committee's findings of fact, conclusions of law, and proposed disposition. An information shall be filed recommending that the respondent be suspended from the practice of law for one year.

Respectfully submitted,

THE BOARD OF BAR OVERSEERS

By: _____


Mary B. Strother, Esq.
Secretary pro tem

Voted: February 14, 2011