NO. BD-2011-029

S.J.C. Order of Temporary Suspension entered by Justice Spina on May 5, 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
DOCKET NO. BD-2011-029

IN RE: DAVID M. COHEN

MEMORANDUM OF DECISION

Bar counsel filed a notice of conviction under S.J.C. Rule 4:01, § 12 (4), advising that David M. Cohen, an attorney admitted to practice in Massachusetts, had been convicted on February 22, 2011, of attempted extortion, witness intimidation, and filing a false police report.[1] Attempted extortion and witness intimidation are felonies, see G. L. c. 265, § 25, and G. L. c. 268, § 13B, and as such are "serious crimes" under S.J.C. Rule 4:01, § 12 (3). Filing a false police report is a crime requiring proof of a misrepresentation, see G. L. c. 268, § 6A, and as such is a "serious crime" under Rule 4:01, § 12 (3). As a result of bar counsel's notice, a hearing was held before me pursuant to Rule 4:01, § 12 (4), for the respondent to show cause why he should not be

[1] The respondent previously had been convicted of these offenses, but the Supreme Judicial Court reversed the convictions and ordered a new trial. See *Commonwealth* v. *Cohen*, 456 Mass. 94 (2010). The respondent was suspended temporarily on October 5, 2007, after his first trial, but he was reinstated on January 22, 2010, after he was granted a new trial. See S.J.C. Rule 4:01, § 12 (6) (a lawyer who has been suspended under § 12 (4) "will be reinstated immediately upon the filing of a certificate that the underlying conviction for a serious crime has been reversed or set aside"). As a result of his second trial and convictions, the respondent was sentenced to two and one-half years to two and one-half years plus one day in the State prison, with 773 days credit for time served. The respondent filed an appeal from his convictions, and that appeal is pending. In the meantime, the respondent has served out his sentence and is at liberty.

immediately suspended from the practice of law. All proceedings in this matter before the Board of Bar Overseers have been stayed pending the respondent's appeal of his conviction. See Rule 4:01, § 12 (4). See also *In re: Bartlett*, 442 Mass. 1021 (2004).

The presumptive sanction for conviction of a "serious crime" is disbarment or indefinite suspension. *Matter of Concemi*, 422 Mass. 326, 329 (1996). A temporary suspension based on conviction of a "serious crime" should be entered absent mitigating circumstances. See *Matter of Norton*, 3 Mass. Att'y Discipline Rep. 164 (1983). Factors to be considered when deciding whether to issue a temporary suspension include the following:

1. whether the respondent's sentence was stayed pending appeal;
2. whether the appeal is meritorious;
3. whether the appeal is being pursued diligently;
4. the seriousness of the crime and whether it is related to the attorney's practice of law;
5. the threat to the public interest should the attorney continue to practice law; and
6. whether the temporary suspension would be longer than the sanction imposed after discipline.

See *Matter of Scott*, 3 Mass. Att'y Discipline Rep. 179, 179-180 (1982).

As to the first factor, the defendant did not seek a stay of his sentence pending appeal. Having 773 days' credit for time already served, he elected to serve out his sentence, and he is now free. This factor is thus neutral.

The respondent has identified some issues he intends to raise on appeal, but has indicated the trial transcript has not yet been prepared and his presentation to me

necessarily was incomplete. The little that was presented to me suggests the respondent's appeal is worthy of presentation to an appellate court, and in this sense it is meritorious. See *Commonwealth* v. *Hodge (No. 1)*, 380 Mass. 851, 855-856 (1980). See also *Matter of Burke*, 3 Mass. Att'y Discipline Rep. 25, 26 (1982). This standard, meritoriousness, is to be distinguished from a likelihood of success on the appeal. See *Commonwealth* v. *Hodge (No. 1), supra*. The second factor weighs in favor of the respondent.

Bar counsel does not dispute that the respondent is pursuing his appeal diligently, and the record does not suggest otherwise. The third factor favors the respondent.

The crimes for which the respondent has been convicted are moderately serious. Although they do not relate directly to the respondent's practice of law, they relate to the administration of justice and the respondent's fitness to practice law. The fourth factor weighs heavily against the respondent.

The fifth factor in this case is related to the fourth factor. I consider this factor to weigh against the respondent.

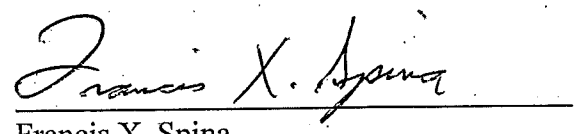
The sixth factor weighs in favor of the respondent. He was suspended temporarily from the practice of law on October 5, 2007, after his first trial, and reinstated on January 22, 2010, after he was granted a new trial. That suspension lasted nearly two years and four months. The presumptive sanction for conviction of serious crimes is disbarment or indefinite suspension. If so disciplined, the respondent may not be reinstated until he has served a suspension of at least eight or five years, respectively. See S.J.C. Rule 4:01, § 18 (2). In the case of an indefinite suspension, it is possible that a

temporary suspension may exceed five years, especially where proceedings before the Board of Bar Overseers have been suspended pending the outcome of his appeal and will not be resolved until well after the appeal is decided. If he is disbarred, a temporary suspension will not likely exceed eight years. I also have taken into consideration the added disruptive effect that two temporary suspensions will have on the respondent's development and retention of a law practice. I did not get the impression that he ever developed a busy practice.

After considering these factors, especially what I find are the most weighty factors in this case, namely, factors four, five, and six, I find that factors four and five outweigh factor six and thus temporary suspension is appropriate in this case.

An order shall enter temporarily suspending the respondent from the practice of law pending the outcome of disciplinary proceedings.

By the Court,



Francis X. Spina
Associate Justice
Supreme Judicial Court

ENTERED: May 5, 2011