

**IN RE: DOUGLAS MICHAEL SURPRENANT****NO. BD-2011-044****S.J.C. Order of Term Suspension entered by Justice Duffly on September 6, 2011, with an effective date of October 6, 2011.¹****(S.J.C. Judgment of Reinstatement entered by Justice Duffly on April 3, 2012.)****Page Down to View Memorandum of Decision**

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 THE COUNTY OF SUFFOLK
DOCKET NO. BD-2011-044

IN RE: DOUGLAS MICHAEL SURPRENANT

MEMORANDUM OF DECISION

This matter comes before me on an information and record of proceedings and a vote of the Board of Bar Overseers (board) pursuant to S.J.C. Rule 4:01, § 8 (4). The proceedings were initiated by a petition for discipline filed by bar counsel, and then assigned to a hearing committee. See S.J.C. Rule 4:01, § 8. Following an evidentiary hearing, the committee concluded that the respondent's conduct in: a) filing and signing a bankruptcy petition on the part of a husband and wife, without ever meeting or speaking with the husband; b) impersonating the husband during a telephone credit counseling session; c) signing a false certification on behalf of the husband stating that the husband had attended credit counseling; and d) signing his own name on a certificate stating that he had discussed different bankruptcy options with both husband and wife, and had made the statutorily required disclosures to both of them, was in violation of Mass. R. Prof. C. 1.2 (a), 1.2(d), 1.4(a), 3.3(a)(1), 4.1(a), 4.1(b), 8.4(c), and 8.4 (d). The committee determined that the respondent had engaged in dishonesty and misrepresentation to a

tribunal, and recommended that the respondent be suspended from the practice of law for nine months. Upon cross appeals by the respondent and bar counsel, the board adopted the committee's findings of fact and conclusions, but determined that, given the mitigating circumstances in this case, a three-month suspension was appropriate.

While the respondent does not dispute the facts found by the board, at a hearing before me he suggested that a public reprimand would be a more appropriate sanction given the circumstances; bar counsel, by contrast, argued that the board erred in applying the factors in mitigation, and that a longer suspension should be imposed. For the reasons discussed below, I conclude that the respondent's conduct violated the rules of professional conduct as determined by the board, and that a suspension of six months is the appropriate sanction in the circumstances.

Background. The following facts are from the hearing committee's and the board's findings. The respondent was contacted initially by a potential client, the wife, who informed him that her house was to be foreclosed within a week.¹ The respondent scheduled a meeting with the wife and the husband; the wife came to the appointment alone. The wife told the respondent

¹ The potential client was referred by a business associate of the respondent.

that she had been responsible for paying the mortgage on the family home, that she had failed to make timely payments, that she and her husband had been fighting over their financial situation, and that her husband wanted her to take care of the problem she had created and had authorized the filing of a joint petition for bankruptcy. Notwithstanding the wife's representations, the husband was unaware of the impending foreclosure and had had no discussions with the wife concerning a bankruptcy filing.

The respondent advised the wife to file an immediate petition for bankruptcy, and prepared the necessary documents. When he was unable to reach the husband by telephone during that initial meeting with the wife, the respondent participated the same day in a mandatory credit counseling session with the wife, representing during that session that he was the husband, in reliance on personal information supplied by the wife. The credit counseling session was a prerequisite to filing a bankruptcy petition; certificates of completion were issued that day on behalf of the husband and the wife.

After the meeting, the wife took with her the documents prepared by the respondent for her husband to sign and return. She returned the next day with the documents purportedly signed by her husband, but in fact signed by her. The respondent filed the bankruptcy petition electronically on behalf of both husband

and wife; he attached the husband's electronic signature to the petition, representing as the husband that the husband had undergone credit counseling and that the statements in the petition were true and correct; these assertions were made under the pains and penalties of perjury. The respondent certified also, under his own name, and falsely, that he had explained to both the husband and the wife their bankruptcy filing options, and that he had made mandatory disclosures to them.

After filing the petition, the respondent made repeated efforts to contact the husband at the telephone numbers supplied by the wife. The husband's business number, provided by the wife, was in reality the couple's home telephone number; the husband never received any messages from the respondent. When the bankruptcy trustee scheduled a creditor meeting for the couple, the respondent attempted unsuccessfully to contact the couple by telephone. After failing to receive any reply, he advised them by telephone message that he would not be attending the meeting, because he assumed that they would not be. He did not contact the bankruptcy trustee to attempt to reschedule the meeting.

On the day of the scheduled creditor meeting, the wife telephoned the respondent to say that she had gotten lost en route to the meeting, and that her husband would not be attending; the respondent advised her that he would not be

attending, but that she should go to the meeting, request a continuance, and telephone him afterwards. The wife did not attend the meeting and did not again contact the respondent.

Approximately a week after the scheduled meeting, the bankruptcy trustee moved to dismiss the petition because the couple had failed to make scheduled payments according to their chapter 13 bankruptcy plan. The respondent wrote to the couple, explaining the pending dismissal, and advising the couple that, if the case were dismissed, they would become ineligible for further bankruptcy relief. He stated also that he would be willing to accept a reduced fee of less than half of the originally agreed upon \$2,500 fee that he had negotiated with the wife; at the time he wrote the letter, the respondent had not been paid any portion of his fee. Neither the wife nor the husband responded, and the bankruptcy court dismissed the petition.

Shortly after the dismissal, the husband learned of the impending foreclosure, and learned subsequently from his wife of the dismissed bankruptcy petition. He hired separate counsel and moved to expunge his portion of the bankruptcy filing. When the respondent learned of the wife's falsehoods from the husband's attorney he admitted his role in the filings to the attorney and filed a response to the motion to expunge in which he acknowledged his role in the matter and his errors. The

respondent appeared at a hearing before a judge of the bankruptcy court and fully disclosed his conduct. The husband, however, has been unable to get the bankruptcy filing deleted from all of the credit reporting agencies' records.

Sanction. Although he relied on the representations of the wife, who misled him as to her husband's intentions while concealing from her husband her efforts to seek bankruptcy protection, the respondent does not dispute that he engaged in the misrepresentations found by the board. Although he left telephone messages for the husband at the numbers provided by the wife, the respondent admits that he never spoke to or met with the husband before filing the bankruptcy petition on behalf of both the husband and the wife. The respondent admits further that he did represent himself to be the husband, both orally and in a signed certification to the bankruptcy court, and did certify to the bankruptcy court that he had consulted with the husband, advised the husband as to possible bankruptcy options, and made the statutorily mandated disclosures to the husband, well aware that these statements were false.

The respondent asserts however, as the board found, that his misrepresentations were made in a misguided effort to assist the wife (and her husband) in an emergency situation in order to avoid an imminent foreclosure on their home. The board noted, in mitigation, that the husband was a relatively inexperienced

attorney; at the time of the filings at issue, he had been practicing law for only five years, and had filed approximately twelve bankruptcy petitions. The board emphasized, as well, that the respondent had been "duped" by the wife, was acting in an emergency situation, did not act from self-interest, promptly and fully admitted his conduct, and showed remorse.

Review of attorney disciplinary proceedings is de novo, but a reviewing court gives substantial deference to the board's recommendations. See Matter of Murray, 455 Mass. 872, 882 (2010). The board's recommendations are not binding, and "[w]hen deciding what sanction is appropriate we look to the discipline imposed in comparable cases." In re Angwafo, 453 Mass. 28, 34, 37 (2009). The sanction imposed should not produce outcomes "markedly disparate" from the results in similar cases. See Matter of Murray, supra at 882-883. The offending attorney "must receive the disposition most appropriate in the circumstances." Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984).

As the board stated, deliberate misrepresentation by an attorney to a tribunal generally warrants a one-year suspension, see Matter of McCarthy, 416 Mass. 423 (1993), and, in some circumstances, misrepresentation under oath warrants a two-year suspension. Compare Matter of Shaw, 427 Mass. 764, 764, 768-770 (1998) (two-year suspension where respondent made false

statements under oath in federal criminal trial, filed false affidavit in civil proceeding, issued false opinion letter to which he affixed notarization, and forged another attorney's name); Matter of Balliro, 453 Mass. 75, 86-87 (2009) (six-month suspension where attorney falsely testified in criminal trial in which she was victim witness; substantial mitigation warranted deviation from presumptive two year suspension). Notwithstanding the respondent's intention to assist the couple, the respondent engaged in deliberate and repeated misrepresentation to the bankruptcy court, on behalf of an alleged client whom he had never met. See Matter of Neitlich, 413 Mass. 416, 420, 422 (1992) (one-year suspension where false statement was "active," "deliberate," and "planned").

In applying mitigating factors to the presumptive sanction, the board emphasized that the respondent was a "relatively new attorney" facing an "emergency situation." The board noted that, while the respondent could have pursued other alternatives to respond to the wife's emergency, "[t]he ability to respond to an emergency with flexible and creative solutions is one of the marks of a seasoned professional." This conclusion is unavailing. At the time of the misconduct, the respondent had been practicing for five years and was not a newly-minted attorney. More significantly, impersonating a client one has never met is so obvious an error that lack of experience is not

mitigating. See Matter of Bryan, 411 Mass. 288, 291 (1991).

The board relied heavily on disciplinary cases where a three- to six-month suspension was imposed, based on mitigating factors, because the misrepresentations were not "material" and did not concern "facts at the heart" of the client's case. The board noted that the respondent did not misrepresent the essential, dire facts of the couple's financial situation.² The misrepresentations in the cases cited, however, involved statements such as the attorney claiming to have a scheduling conflict in order to obtain a continuance. See, e.g., Matter of Long, 16 Mass. Att'y Disc. R. 250 (2000).

A false statement that one is the client, and that one has met with a client one has never seen, is not an "immaterial" element of a client's case.

"All attorneys, whether those of long standing or those recently admitted to the Massachusetts bar, are expected to know and understand their professional obligation to be truthful in court. It is a simple and unambiguous standard of ethical conduct, and the respondent violated it. Notwithstanding the substantial mitigating factors in this case, we cannot condone the actions of an attorney in giving false testimony under oath, irrespective of the circumstances."

See Matter of Balliro, supra at 88-89. The court concluded in that case that the appropriate disciplinary sanction was a

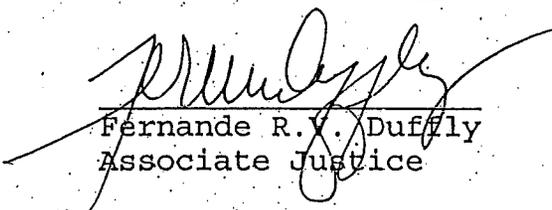
² Nonetheless, as the board stated also, "Here, Congress has required a certificate of credit counseling as a necessary part of a bankruptcy petition. Under such circumstances, it must be considered material to the bankruptcy."

six-month suspension from the practice of law. Id. See also In Matter of Finnerty, 418 Mass. 821 (1994) (six-month suspension for misrepresentation on attorney's personal financial statement in own divorce action).

As the board observed, in this case there were several "decision points" at which the respondent had an opportunity to "cure or mitigate his earlier missteps" and failed to do so. Nonetheless, I agree with the board that, in the circumstances here, substantial mitigation from the presumptive one- or two-year suspension is warranted.

Conclusion. Having considered these facts and the discipline that has been imposed in comparable cases, I conclude that the appropriate sanction in this case is a six-month suspension.

By the Court,



Fernande R.V. Duffly
Associate Justice

Entered: August 31, 2011