

**IN RE: STEPHEN L. TUNNEY****NO. BD-2011-091****S.J.C. Order of Term Suspension entered by Justice Lenk on January 10, 2012.¹****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 SUFFOLK COUNTY
NO: BD-2011-091

IN RE: STEPHEN L. TUNNEY

MEMORANDUM OF DECISION

Bar counsel filed a petition for reciprocal discipline on September 15, 2011, pursuant to S.J.C. Rule 4:01, § 16, as appearing in 425 Mass. 1319 (1997), after the respondent was suspended for ten months from the practice of law in Arizona. On September 16, 2011, an order issued requiring the respondent to notify the court why Massachusetts should not impose reciprocal discipline. The respondent did not file a response to that order and did not appear at the hearing before me on December 1, 2011.

1. Background and Procedural History. The respondent was admitted to the bar of the Commonwealth on June 14, 2000. He has been administratively suspended since November 18, 2003, for failure to pay registration fees.

On June 10, 2011, a hearing panel ordered that the respondent be suspended from the practice of law in Arizona for ten months, with conditions for reinstatement.¹ The respondent

¹ Those conditions include restitution and payment of the costs and expenses of the State Bar of Arizona.

failed to notify the Board of Bar Overseers (board) or bar counsel about his Arizona suspension within ten days, as required by S.J.C. Rule 4:01, § 16(6).

The respondent's suspension in Arizona resulted from the following facts. In 2004, Jill and Craig Early retained the respondent in connection with a dispute with their homeowners' association. The respondent filed suit in August, 2005, prevailed after a jury trial in April, 2008, and successfully defended the verdict on appeal in September, 2009. In upholding the jury verdict, the Arizona Court of Appeals also granted the Earlys' request for costs and reasonable attorney's fees; those fees were approximately \$8,000.

On September 16, 2009, the respondent promised the Earlys by electronic mail that he would file an application for attorney's fees and costs with the Court of Appeals. He did not do so.² As a result, the request for attorney's fees and costs was denied. The Earlys made repeated efforts to contact the respondent by telephone and electronic mail concerning the attorney's fees, but often did not receive a response. Subsequently, the Earlys retained new counsel, thereby incurring additional expense, and submitted a complaint to the Arizona bar regarding the respondent's conduct. The respondent did not respond to the charges, did not contact the State Bar of Arizona, and failed to

² There was some evidence that the respondent left his Arizona practice and relocated to Michigan around the time of the conduct at issue in the Arizona disciplinary proceeding.

file an answer or otherwise defend against the allegations.

The hearing panel (panel), presided over by the Disciplinary Judge of the Supreme Court of Arizona, concluded that the respondent violated the duty of diligence owed to his clients and his duty as a professional. Specifically, the panel held that the respondent violated Arizona Supreme Court Rules 42,³ 53(d), and 53(f). The panel found in aggravation that the respondent had failed to cooperate with the disciplinary proceedings and had substantial experience in the practice of law. In mitigation, the panel found that the respondent had no prior disciplinary record. The panel ordered that the respondent be suspended from the practice of law for ten months, pay restitution to his clients, and pay all costs and expenses incurred by the Arizona Bar Association in the proceedings.

2. Appropriate Sanction. "A final adjudication in another jurisdiction that a lawyer has been guilty of misconduct . . . may be treated as establishing the misconduct for purposes of a disciplinary proceeding in the Commonwealth." S.J.C. Rule 4:01, § 16(5). Indeed, "[t]he judgment of suspension or disbarment shall be conclusive evidence of the misconduct unless . . . the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard or there was significant

³ Arizona Supreme Court Rule 42 incorporates, by reference, the Arizona Rules of Professional Conduct. The panel found further that the respondent violated Arizona Rules of Professional Conduct 1.2(a), 1.3, 1.4(a)(4), 1.16(d), and 8.1(b).

infirmity of proof establishing the misconduct." S.J.C. Rule 4:01, § 16(3). The respondent has not alleged any deficiency in the procedures of the Arizona panel. I therefore accept the judgment of suspension in Arizona as conclusive evidence of the respondent's misconduct.

The respondent has been suspended from the practice of law in Arizona for ten months. In reciprocal discipline cases, this court "generally give[s] effect to the disciplinary decisions of another jurisdiction without undertaking the often difficult and protracted task of redoing the inquiry which has already been concluded there." Matter of Lebbos, 423 Mass. 753, 755 (1996), cert. denied, 520 U.S. 1275 (1997). This deference, however, "does not automatically lead to reciprocity." Id. I "may impose the identical discipline" imposed in Arizona unless, among other considerations not relevant here, "the misconduct established does not justify the same discipline in this Commonwealth." S.J.C. Rule 4:01, § 16(3).

In 1997, the board adopted new guidelines for discipline in cases involving neglect or failure of zealous representation. Matter of Kane, 13 Mass. Att'y Discipline Rep. 321, 327-328 (1997). See In re Shaughnessy, 442 Mass. 1012, 1014 (2004). (recognizing that Matter of Kane adopted "new guidelines for discipline in cases involving neglect"). That decision clarified that "[s]uspension is generally appropriate for misconduct involving repeated failures to act with reasonable diligence, or

when a lawyer has engaged in a pattern of neglect, and the lawyer's misconduct causes serious injury or potentially serious injury to a client or others." Matter of Kane, supra at 328. Here, the respondent's actions injured his clients because, during the period of the respondent's neglect, the time in which to file a claim for attorney's fees expired. In the circumstances, the respondent's failure to seek attorney's fees precluded his clients from recouping the thousands of dollars they had expended over the course of the litigation.

An attorney's "[f]ailure to cooperate with Bar Counsel or the Board of Bar Overseers" has been considered an aggravating factor in determining the appropriate disciplinary sanction. See Matter of Kane, supra at 328. In this case, the respondent has failed to respond to repeated inquiries from both the Arizona and Massachusetts boards. He did not notify either bar counsel or the board of his suspension in Arizona,⁴ did not respond to the order to show cause, and did not appear at the hearing before me on December 1, 2011. His failure to cooperate constitutes a significant aggravating factor. See Matter of Cronin, 22 Mass. Att'y Discipline Rep. 161 (2006) (failure to cooperate an

⁴ Because the respondent failed to notify bar counsel or the board of the discipline against him, in violation of S.J.C. Rule 4:01, § 16(6), I decline to make his suspension retroactive to the effective date of the Arizona suspension. See Matter of Sheridan, 449 Mass. 1005, 1008 (2007), and cases cited.

aggravating factor where lawyer was administratively suspended).⁵

I conclude that, given these circumstances, the ten-month suspension "is not markedly disparate from what has been ordered in comparable cases" in the Commonwealth. See In re Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited. See also In re Shaughnessy, 442 Mass. 1012 (2004) (ordering, under pre-Matter of Kane standards, a six-month and one day suspension for attorney's neglect of client matter, while recognizing that, after Matter of Kane, "similar conduct [] would merit a substantially more serious sanction"); Matter of Hopwood, 24 Mass. Att'y Discipline Rep. 354, 354-359, 361-364 (2008) (one-year suspension for intentionally misusing retainer, refusing to refund unearned retainer, deceiving client, and failing to cooperate with bar counsel's investigation).

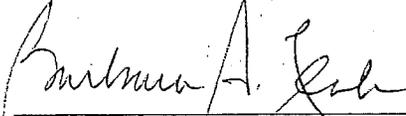
Finally, in cases involving reciprocal discipline, it is the usual practice to condition reinstatement in the Commonwealth upon prior reinstatement in the jurisdiction in which the discipline originated. See, e.g., Matter of Ritzo, 26 Mass. Att'y Discipline Rep. 555 (2010); Matter of Carey, 25 Mass. Att'y Discipline Rep. 89 (2009); Matter of Anderson, 23 Mass. Att'y Discipline Rep. 14 (2007). I impose such a condition here.

3. Disposition. An order shall enter suspending the respondent from the practice of law in the Commonwealth for a

⁵ I acknowledge that the respondent has no prior disciplinary offenses.

period of ten months, effective immediately, with reinstatement conditioned upon the respondent's prior reinstatement in Arizona.

By the Court


Barbara A. Lenk
Associate Justice

Entered: January 10, 2012