



IN RE: BARRY P. WILSON

NO. BD-2012-059

S.J.C. Order of Term Suspension entered by Justice Hines on August 31, 2016.¹

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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-2012-059

IN RE: BARRY P. WILSON

MEMORANDUM OF DECISION

This matter came before me on an Information and Record of Proceedings pursuant to S.J.C. Rule 4:01, § 8(6), and a vote by the Board of Bar Overseers (board) recommending that the respondent, Barry P. Wilson, be suspended from the practice of law in the Commonwealth for one year and one day. Bar counsel filed a five-count petition for discipline with the board on April 3, 2013, alleging that, during multiple proceedings, the respondent engaged in intemperate advocacy, conduct intended to disrupt the tribunal, and made statements impugning the integrity of a judge. At its July 13, 2015 meeting, the board adopted the committee's findings of fact and proposed sanction.

After a hearing on January 20, 2016, review of the record and consideration of the arguments of counsel, I conclude that the board's findings are supported by substantial evidence, and I adopt the board's recommended sanction.

Background and procedural history. The respondent was duly admitted to the Bar of the Commonwealth on June 11, 1975. He has maintained a criminal defense practice since his admission to the bar.

The following summary of the conduct that is the subject of this petition for discipline is drawn from the hearing committee's (committee) findings of fact which were adopted without exception by the board.

1. May 5, 2011.¹ On May 5, 2011, the respondent was trial counsel for a criminal defendant on a Superior Court indictment. During empanelment of the jury, the respondent objected to the Commonwealth's peremptory challenge of a woman of color, a challenge that was accepted by the judge based on the reasoning that the potential juror could have family members "on the wrong side of the criminal justice system." Subsequently, the judge seated a juror who had been employed by the Department of Homeland Security and the respondent exploded, refusing to try the case. In the

¹ Count one is based on this incident which led to a finding of criminal contempt against the respondent. The board alleges that this conduct violated: (i) Mass. R. Prof. C. 3.5(c) (conduct intended to disrupt a tribunal); (ii) Mass. R. Prof. C. 8.4(b) (criminal conduct that adversely reflects on fitness to practice); (iii) Mass. R. Prof. C. 8.4(d) (conduct prejudicial to the administration of justice); and (iv) Mass. R. Prof. C. 8.4(h) (other conduct that adversely reflects on fitness to practice).

middle of his prolonged outburst, the respondent shouted: "And the other thing is I think maybe if he's standing outside there you better go ask him if he heard me screaming, because I think you gotta excuse him now cause I think he knows I don't like him."² After the judge asked the respondent to cease shouting seven times, the judge then inquired if there was any reason why the court should not hold the respondent in contempt. The respondent continued his tirade, stating "I'll go with my client and maybe we can get a cell together and maybe you could declare a mistrial and then we can start all over again . . ."³

The court entered a judgment of summary criminal contempt, finding the respondent in violation of Mass. R. Crim. P. 43, 378 Mass. 919 (1979).⁴ On May 9, 2011, the

² Record of Proceedings, Hearing Committee Exhibit 1 at 26.

³ Record of Proceedings, Hearing Committee Exhibit 1 at 27.

⁴ Rule 43(a) provides that "[a] criminal contempt may be punished summarily when it is determined that such summary punishment is necessary to maintain order in the courtroom and: (1) The contemptuous conduct could be seen or heard by the presiding judge and was committed within the actual presence of the court; (2) the judgement of contempt is entered upon the occurrence of the contemptuous conduct; and (3) the punishment imposed for each contempt does not exceed three months imprisonment or a fine of five hundred dollars."

judge issued written findings, concluding that the respondent's conduct was likely motivated "by a desire to force the court to excuse [the prospective juror]." ⁵ On May 19, 2011, the judge held a sentencing hearing. The respondent offered no mitigating factors to explain his behavior. Nor did the respondent request a substitute remedy. The judge sentenced the respondent to ninety days in the house of correction but stayed execution of the sentence until June 29, 2011. A single justice of the Appeals Court allowed the respondent's motion to stay the sentence for the duration of his appeal to that court, which affirmed the conviction. Commonwealth v. Barry Wilson, No. 11-P-1143 (March 20, 2012). The respondent ultimately served a thirty-eight day sentence at the South Bay House of Correction. ⁶ The board concluded that the respondent's loud and abusive conduct was patently disruptive to the proceeding.

⁵ Findings Upon Entry of Judgment of Contempt, Commonwealth v. Garrett Jackson, Superior Court No. 09-10930 (May 9, 2011).

⁶ Record of Proceedings, Evidentiary Hearing (October 22, 2013), Tr. II at 153.

2. March 4, 2011.⁷ On March 4, 2011, the respondent appeared for a criminal defendant in the Superior Court. During a sidebar conference, the judge warned the defense team about fraudulent attempts to create an error in the record. The respondent accused the judge of bias against the defense, stating "You're doing what you're accusing us of doing. . . You're the one, who, whenever I make any points, shows that you're biased against the defense. You're the one who's already said that these guys are guilty as far as you're concerned."⁸ When the judge demanded to know the basis for these allegations, the respondent replied, "I've heard rumor," and "I heard that it was said."⁹ After being pressed to name the source of the claimed bias, the respondent stated "I don't know and

⁷ Count two, involving the respondent's claim of judicial bias, is based on this conduct. The board alleges violations of Mass. R. Prof. C. 3.1 (counsel must have non-frivolous basis for defense or claim); Mass. R. Prof. C. 8.2 (attorney statements known to be false regarding integrity of a judge); Mass. R. Prof. C. 8.4(d) (conduct prejudicial to the administration of justice); and Mass. R. Prof. C. 8.4(h) (other conduct that adversely reflects on fitness to practice).

⁸ Record of Proceedings, Hearing Committee Exhibit 4, pages 36-37; Trial Transcript Excerpt of Testimony of Latoya Thomas-Dickson, Commonwealth v. Carter & another, Superior Court Nos. 2007-11194, 2007-11195 (March 4, 2010).

⁹ Record of Proceedings, Hearing Committee Exhibit 4 at 37.

I'm not going to tell it."¹⁰ The board concluded that the respondent's charge of bias had no reasonable basis in fact.

3. July-August, 2011.¹¹ This incident involved the respondent's attempt to secure the judge's recusal in a hearing on a motion to suppress. During pretrial hearings held in July and August of 2011, after the trial judge declined to hold an evidentiary hearing on the respondent's motion to suppress, the respondent reminded the judge that he had filed a motion to recuse the judge. Asked to argue that motion, the respondent asked "You haven't allowed -- you have allowed not even one percent of the motions. What is the sense of even arguing? . . . I can't even get it. So what's the point? They bring you here so what, you can deny everybody in this court before you even hear it. You are not going to even give me surveillance, notes or locations when they did something because it's a four corners? You don't even know. The affidavit says its

¹⁰ Record of Proceedings, Hearing Committee Exhibit 4 at 38.

¹¹ Count three is based on the events surrounding the respondent's motion to recuse the judge in a motion to suppress. Based on this conduct, the board alleged violations of Mass. R. Prof. C. 3.5(c) (conduct intended to disrupt a tribunal); 8.4(d) (conduct prejudicial to the administration of justice); and 8.4(h) (other conduct that adversely reflects on fitness to practice).

somebody, he didn't look like that, you know. This is a farce and it's a disgrace and you sitting here is ridiculous..."¹² The court warned the respondent about the risk of contempt, to which the respondent replied "The contemptuous conduct is by you, not me . . . The contemptuous conduct is you won't even let me, give me an obligations [sic], as I'm guaranteed, as my client has under the constitution to defend himself. And I'm in contempt? I don't think so. I think you are in contempt."¹³ The judge ordered a five minute recess in order to end the respondent's tirade. The board concluded that this conduct was intended to and did disrupt the proceeding.

4. August 30, 2011.¹⁴ In the supporting affidavit to his motion for reconsideration, the respondent wrote:

¹² Record of Proceedings, Hearing Committee Exhibit 5, pages 8-9; Hearing on Defendant's Motion to Suppress, Commonwealth v. Fernandes, Superior Court No. 2009-11094 (July 14, 2010).

¹³ Record of Proceedings, Hearing Committee Exhibit 5 at 9.

¹⁴ Count four involves the same matter as count three. It concerns the respondent's motion to reconsider the denial of his motion to suppress. As in count three, the board alleges that this conduct violated Mass. R. Prof. C. 3.1 (counsel must have non-frivolous basis for defense or claim); 8.2 (attorney statements known to be false regarding integrity of a judge); 8.4(d) (conduct prejudicial to the administration of justice); 8.4(h)

a. The denial of all motions, including the Motion to Suppress, does not surprise me as Judge [Hely] in the years he has been sitting in Suffolk is rumored to have allowed two (2) of the hundreds of motions he has heard. It is inconceivable that anyone could believe that this represents the record of a fair, impartial jurist.

....

b. A review of the cases handled by Justice [Hely] when he sits in the motion session of Suffolk County will only reaffirm my statements as to his conduct. Further, a conversation with any knowledgeable court personal [sic] will again support the denial of right to defendants by Judge [Hely].

c. Having practiced criminal law for over thirty-five years, with almost half of that time being only criminal law and probably sixty (60) percent being defense of drug cases, I can honestly state that the prosecution/defense is different from any other aspect of criminal law. . . Motions are very much connected with the credibility of the participants, primarily the police. To have a judge who never heard a police officer do anything but tell the truth is nothing but a charade that creates a travesty of justice daily.

During the evidentiary hearing before the hearing committee, the respondent claimed that the judge had a reputation "among other lawyers" for bias against defendants and estimated that ten to twelve of his motions to suppress were denied by this judge. Keith Halpern, an experienced criminal defense attorney, testified on the respondent's behalf, stating that in his rough calculation,

(other conduct that adversely reflects on fitness to practice).

the judge had denied fifty-nine of sixty motions to suppress. Although the hearing committee credited Halpern's testimony, the committee questioned the accuracy of Halpern's sampling because the total number of the judge's motions was unknown and there was no basis for comparison with other judges.

The board concluded that the respondent's allegation of bias was frivolous. Specifically, the board determined that the respondent had no basis for his written allegations of judicial bias. The board did not credit the respondent's hearing testimony nor the sampling as described by witness Halpern. Lacking a reasonable basis for the allegations, the board concluded that the respondent improperly utilized his motion for reconsideration as a medium for unfounded criticism of the judge's integrity.

5. March 23, 2011.¹⁵ On March 23, 2011, the respondent engaged in a pattern of conduct deemed by the board to involve relentless and inappropriate provocation

¹⁵ Count five alleges that the respondent's conduct violated Mass. R. Prof. C. 3.1 (counsel must have non-frivolous basis for defense or claim); 3.5(c) (conduct intended to disrupt a tribunal); 8.2 (attorney statements known to be false regarding integrity of a judge); 8.4(d) (conduct prejudicial to the administration of justice); and 8.4(h) (other conduct that adversely reflects on fitness to practice).

of the judge. During an evidentiary hearing, the respondent requested a different judge, stating that "no matter what I do here, it's already been decided and it's already been denied."¹⁶ Immediately thereafter, the judge declined the respondent's request to sequester the witnesses and the respondent retorted "Right. Fair trial. Can't even get that out of him."¹⁷ When the respondent disagreed with the prosecution regarding the intended scope of the hearing, he requested that the police officer on the stand be excused in order to make an offer of proof regarding a pre-existing agreement between the parties to limit the hearing. The judge refused and the respondent remarked that "the train already left."¹⁸

Thereafter, both the respondent and the court had difficulty hearing the proceeding and an amplifier was set up. During its installation, the respondent refused to stop talking, complaining that "It doesn't matter. You don't listen anyway." The judge started to warn the

¹⁶ Record of Proceedings, Hearing Committee Exhibit 6, Hearing on Defendant's Motion to Suppress, Commonwealth v. Dossantos, Superior Court No. 2008-00462 (March 23, 2011), at 5-6.

¹⁷ Record of Proceedings, Hearing Committee Exhibit 6 at 7.

¹⁸ Record of Proceedings, Hearing Committee Exhibit 6 at 13-14.

respondent about his conduct, to which the respondent replied: "What do you want to hold me in contempt? . . . Let's do it. . . . Do it now. . . . Do it now. That way I don't have to go through with this nonsense." The judge warned the respondent that his conduct was contemptuous and the respondent spoke over the judge, stating "You can do it. Hold me in contempt right now. You're contemptuous, not me."¹⁹ The court again "warned Mr. Wilson regarding contemptuous shouting and insulting, personal comments during the course of this witness's testimony that were repeated and interrupted while the Court was warning Mr. Wilson."²⁰ Later in the hearing, the court changed its prior ruling regarding the admission of certain defense documents. The respondent remarked that "my yelling is insignificant in relationship to the Court on its own changing its own rulings," and deemed the session a "facade" and a "game."²¹

During the respondent's cross-examination of a witness regarding a search warrant, the court restricted the

¹⁹ Record of Proceedings, Hearing Committee Exhibit 6 at 24.

²⁰ Record of Proceedings, Hearing Committee Exhibit 6 at 25.

²¹ Record of Proceedings, Hearing Committee Exhibit 6 at 28.

respondent's line of questioning by stating that "[i]f it's in the warrant, you don't even have to ask the question."

The respondent retorted "Well, sure I do. I got to make sure you -- I don't know if you're going to read the warrant. As far as I'm concerned, I don't think you do read the warrants. So, therefore, I think I got to make it part of the record so at least nobody can deny that I didn't raise it. Sorry. So that's why I wish to ask."²²

Subsequently, the court terminated the respondent's line of questioning regarding the same witness's affidavit, reminding the respondent that the contents of the affidavit were before the court. The respondent became very agitated and suggested that he feared he was rendering ineffective assistance of counsel. He added that "I've already submitted you're not going to let me make a record and I can't do my job completely, I'm not going to ask anybody any questions. I'm going to tell you hold me in contempt now. Send me to the jail, I really don't care. But I'm not going to continue."²³

²² Record of Proceedings, Hearing Committee Exhibit 6 at 34-35.

²³ Record of Proceedings, Hearing Committee Exhibit 6 at 40.

When the judge called the next witness, the respondent refused to continue and threatened to leave the courtroom, asking the judge to "hold me in contempt and put me in a jail cell," because he felt prohibited from doing his job. He then stated "I'm leaving, Judge. My client can defend himself. I'm not participating in this joke of a hearing, that you don't even let me defend my client --." ²⁴ Later on, the court disallowed the respondent's questioning of a police supervisor regarding the discrepancies between the physical description of a suspect contained in a warrant and the dissimilar physical characteristics of the defendant. The respondent refused to move on to another line of questioning, yelling at the judge that the Commonwealth had raised the issue on direct. The respondent then taunted the court by three times requesting to be held in contempt. ²⁵ The proceeding continued but the respondent complained that "what I got out of the witness doesn't really matter because you don't listen, because you already made up your mind." ²⁶

²⁴ Record of Proceedings, Hearing Committee Exhibit 6 at 41.

²⁵ Record of Proceedings, Hearing Committee Exhibit 6 at 54-55.

²⁶ Record of Proceedings, Hearing Committee Exhibit 6 at 56.

Near the end of the hearing, the respondent was warned for shouting at a witness. Questioning continued and minutes later, the court ordered the respondent to stop shouting and threatened to discontinue the hearing. The respondent replied, "I'm going to continue shouting. Discontinue the hearing. Because I object." After being ordered to proceed with questioning, the respondent stated "Ah, fuck you."²⁷ The hearing committee found that the respondent's conduct disrupted court proceedings because the judge had to repeatedly stop the respondent from speaking in order to permit the Commonwealth to proceed; and because the judge was forced to interrupt witness questioning on numerous occasions in order to counteract the respondent's intemperate remarks.

Discussion. 1. Sufficiency of the evidence. In attorney discipline proceedings, bar counsel bears the burden of proving misconduct by a preponderance of the evidence. Mass. R. Prof. C. § 3.28. Respondents bear the same burden of proof with respect to affirmative defenses and matters in mitigation. Id.

a. May 4, 2011. The respondent asserts that the board's petition for discipline should have been dismissed

²⁷ Record of Proceedings, Hearing Committee Exhibit 6 at 84, 90.

as a matter of law because a conviction for criminal contempt is not a *per se* violation of the rules of professional conduct. He further argues that the judge never made a finding that he intended to disrupt the proceedings; rather, the judge found only that the respondent's intent was to excuse the challenged juror. Specifically, the respondent disputes the trial judge's subsidiary finding²⁸ that he prejudiced the administration of justice, arguing that the judge would not have seated a juror who was compromised or allowed the respondent to continue his representation if the proceeding had been impaired. See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1047 (1991) (attorney's pretrial publicity did not create material prejudice and was protected by Nevada Supreme Court Rules of Professional Conduct 177(3); a safe harbor provision repealed for vagueness). Finally, the respondent complains that the matter was improperly referred to the board by the Suffolk County District Attorney's office.

Contrary to the respondent's assertion, bar counsel was not required to prove the respondent's subjective intent to disrupt the tribunal in order to prove that the

²⁸ The respondent does not dispute the trial judge's factual findings.

respondent violated Mass. R. Prof. C. 3.5(c). This court previously has determined that intemperate, insulting, and disrespectful conduct can be objectively determined as disruptive to the judicial process. Matter of Cobb, 445 Mass. 452, 468 (2005) ("The State's interest in protecting the public, the administration of justice, and the legal profession supports use of an objective knowledge standard in attorney discipline proceedings involving criticism of judges in pending cases").²⁹

Nor is there any basis to conclude that a prosecutor may not report conduct deemed violative of the rules of professional conduct. Pursuant to S.J.C. Rule 8.3, attorneys have a responsibility to inform the Board of Bar Overseers of known misconduct. Additionally, it is bar counsel's duty to "investigate all matters involving alleged misconduct by a lawyer coming to his or her attention from any source." S.J.C. Rule 4:01, § 7(1).

²⁹ As to the respondent's claim that criminal contempt is not a *per se* violation of the Rules of Professional Conduct and therefore his conviction could not serve as a basis for violating Mass. R. Prof. C. 8.4(b), the respondent is incorrect given the circumstances of this case. When the chair of the hearing committee granted bar counsel's motion for issue preclusion, prohibiting the respondent from challenging the factual basis of the judge's contempt order, that conviction offered the factual predicate necessary for a violation of Mass. R. Prof. C. 8.4(b).

b. March 4, 2011. The respondent argues that his opinion concerning the judge was protected by the First Amendment and that bar counsel failed to meet its burden of proving that there was no reasonable factual basis for his allegations. See Matter of Cobb, 445 Mass. at 452, 469, 472-473 ("Judges are not above criticism or immune from review of their court room conduct" but attorney must have objectively reasonable basis for allegations made in court). During the evidentiary hearing, the respondent testified that the session clerk revealed to him that the judge had listened to recorded jail conversations of the respondent's client and remarked that he [the judge] believed the defendant was guilty. The respondent further testified that the judge did not deny making the comment when pressed at sidebar. The respondent complains that his testimony did not support a factual finding of falsity. As with count one, the respondent asserts that the matter was improperly referred by the District Attorney's office.

The respondent fails in his claim that his intemperate remarks were protected by the First Amendment. "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." Gentile v. State Bar of Nevada, 501 U.S. at 1071. Indeed, "'the speech of

lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of ' other kinds of speech protected by the First Amendment." Matter of Cobb, 445 Mass. at 467-468, quoting Gentile v. State Bar of Nevada, 501 U.S. at 1074.

c. July-August, 2011 Motion to recuse. As with the March 4, 2010 incident, the respondent argues that he was exercising his constitutionally protected right to free speech during the recusal motion hearing. He reiterates that bar counsel failed to disprove that he had a reasonable factual basis for his criticisms because his motion to discover all the judge's denied motions was rejected by the board and no independent investigation was undertaken to prove or disprove the respondent's comments. This argument properly was rejected by the board.

d. August 30, 2011 Motion for reconsideration. The respondent reiterates that this matter was improperly referred by the District Attorney's office and that the burden was on bar counsel to prove that his statements were false or made with reckless disregard for their likely falsity. Specifically, he complains that he was improperly required to prove, with statistical certainty, the truth of his claim.

The respondent misallocates the burden of proof in denying that his conduct violated Mass. R. Prof. C. 8.2. It is the attorney who must have a reasonable, factual basis for his or her allegations of judicial bias before they are made to a judge.³⁰ Id. at 472, 473-474. Here, the respondent offered his personal opinion at his disciplinary proceeding but nothing more. While it is clear that the respondent disagrees with the hearing committee's credibility determinations concerning the testimony of witness Keith Halpern, such determinations are within the sole purview of that body -- adopted in full by the board -- and will not be disturbed here. Matter of McBride, 449 Mass. 154, 161-162 (2007); S.J.C. Rule 4:01, § 8.5(a). The respondent fairly points out that "judges are not above criticism or immune from review of their court room conduct," see Matter of Cobb, 445 Mass. at 472. Still, the respondent's personal opinion and vague third-party statements concerning a judge's reputation are insufficient to support a reasonable, factual basis for allegations of judicial bias against defendants and their counsel.

e. May 23, 2011. The respondent argues that he did not disrupt the proceedings or impair the fair

³⁰ Therefore, bar counsel was not obligated to review all motions to suppress ever granted by the judges presiding over the matters at issue.

administration of justice because the hearing was completed. The respondent specifically objects to the board's consideration of his statement "Ah, fuck you" in its determination of intended misconduct where the judge wrote a letter to the board disavowing that he heard or considered the comment. Last, the respondent argues that the judge's referral to bar counsel was untimely because it was filed three months after the hearing. See S.J.C. Rule 3:09: Code of Judicial Conduct, Rule 2.15 "Responding to Judicial and Lawyer Misconduct," Comment [1] (judges shall make such reports "as soon as practicable").

The respondent's arguments fail. Here, the mere fact that empanelment was completed in one matter, or that a hearing concluded in another matter, does not bear on whether an attorney has engaged in misconduct under Rule 8.4(d). The question is whether the attorney's actions negatively impacted a judicial proceeding. Indeed, many bar discipline cases involve matters that were successfully concluded. See, e.g., Matter of Harrington, 27 Mass. Att'y Disc. R. 432 (2011) (baseless accusations regarding judge's character, reported after case was dismissed, violated Mass. R. Prof. C. 8.4(d), 8.4(h), 8.2); Matter of Kurker, 18 Mass. Att'y Disc. R. 353 (2010) (conspiracy claims against judges and opposing counsel, filed after final

disposition, undermined legitimacy of judicial process). Requiring bar counsel to show the cessation or total corruption of a proceeding in order to prove a violation of Mass. R. Prof. C. 8.4(d) would lead to absurd results.³¹ Thus, the respondent's reliance on Gentile v. State Bar of Nevada, 501 U.S. at 1047, is misplaced; in that case, the Court reviewed the petitioner's comments during a pre-trial press conference for material prejudice impacting the trial. All of the respondent's verbal explosions and taunting of various judges reflected adversely on his fitness to practice, in violation of Mass. R. Prof. C. 8.4(h).

Having reviewed the hearing committee's findings, adopted in full by the board, as well as the hearing transcripts, I conclude that the board's determination that the respondent violated Mass. R. Prof. C. 3.5(c), 8.2, 8.4(d), and 8.4(h) is based on substantial evidence.

I conclude, however, that the record does not support the board's determination that the respondent violated Rule 3.1 (frivolous pleadings or issues) as charged in counts two, three, four, five. Although the respondent

³¹ It is worth noting that the board found that the respondent's conduct, as alleged in count three, resulted in an actual disruption of the court room, in violation of Mass. R. Prof. C. 3.5(c).

memorialized his baseless allegations of judicial bias in an affidavit attached to his motion to reconsider the denial of his motion to suppress (see count four), this is an act different in kind from the conduct normally violative of Rule 3.1. For example, in Matter of Kurker, 18 Mass. Att'y Disc. R. 353, the attorney commenced suit alleging conspiracy between the presiding judge and opposing counsel. During his disciplinary hearing, Kurker offered only his pleadings in support of his filing. Here, the respondent did not bring a new proceeding or base his motion to reconsider solely on his allegations of judicial bias. Thus, the evidence was insufficient to support a violation of Mass. R. Prof. C. 3.1.

2. Appropriate Sanction. "Each case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of Pudlo, 460 Mass. 400, 404 (2011), quoting Matter of Crossen, supra. However, the sanction imposed should not be "markedly disparate from what has been ordered in comparable cases." See Matter of Goldberg, 434 Mass. 1022, 1023 (2001).

Citing the misconduct found in Matter of Harrington, 27 Mass. Att'y Disc. R. 432 (2011)³² and Matter of Kurker, 18 Mass. Att'y Disc. R. 353 (2010),³³ the board recommended a one year and one day suspension.³⁴ Despite the respondent's assertion that his conduct was necessary as a zealous advocate, the board found no mitigating circumstances warranting a reduction in sanction. Instead, the board found numerous aggravating factors: the respondent's substantial experience in the practice of law,

³² In Harrington, the attorney appeared pro se in post-divorce proceedings. After the judge issued an adverse ruling, the attorney accused the judge of being a pathological liar and a rat, "corrupt, dishonest and incompetent." In eight motions to recuse and in five letters to justices of the probate court, Harrington characterized the judge's courtroom as a sewer, and her award of counsel fees to his ex-wife as a "wedding gift." In court filings, Harrington also made false statements about the record, obfuscated facts and misstated the holding of reported appellate cases.

³³ In Kurker, the attorney was embroiled in a bitter dispute involving his family business. After five lawsuits and twelve appeals were resolved against him, Kurker filed suit in three counties and in federal court, accusing the twelve judges and opposing counsel of conspiracy. All of Kurker's complaints were dismissed as unsubstantiated and the federal judge opined that the attorney had become "obsessed" with the litigation and lacked proper judgment.

³⁴ The board additionally cites Matter of Cohen, 435 Mass. 7, 17 Mass. Att'y Disc. R. 133 (2001) (suspension for a year and a day after being held in contempt for commencing new actions immediately after class action settlement and thereby prejudicing clients' receipt of funds). I agree with the respondent that this case is not applicable as his conduct did not materially prejudice his clients' rights.

see Matter of Luongo, 416 Mass. 308, 312 (1993); his repeated acts of misconduct with multiple judges despite repeated warnings from several judges, see Matter of Saab, 406 Mass. 315, 326-327 (1989); his lack of remorse, see Matter of Clooney, 403 Mass. 654, 657 (1988); and his public censure on December 6, 2001. Matter of Wilson, 17 Mass. Att'y Disc. R. 608 (2001). See Matter of Dawkins, 412 Mass. 90, 96 (1992) (existence of prior discipline is substantial factor in selecting sanction).

The respondent counters that his conduct is not comparable to the conduct found in Harrington and Kurker because he had no personal stake in the outcome of the proceedings and he did not personally impugn the character, intelligence, or truthfulness of the presiding judges. The respondent suggests that In re Zeno, 517 F. Supp. 2d 591, 597 (D. P.R. 2007), is more appropriate than the cases cited by the board. In Zeno, an attorney made a personal attack against a federal judge and threatened to file a complaint against another judge in an attempt to pressure her to approve his petition for payment concerning an indigent client. Zeno received a three month suspension from accepting new cases but was permitted to continue practicing. 517 F. Supp. 2d at 597.

The respondent's behavior was sufficiently disrespectful and disruptive to warrant the one year and one day suspension recommended by the board. As with the attorney misconduct found in Harrington and Kurker, the respondent made baseless allegations regarding the fitness, qualifications, and integrity of numerous judges. Where the respondent has failed to produce any evidence in support of his intemperate remarks, it is of no import that the respondent lacked a personal stake in the outcome of the proceedings at issue. Likewise, the fact that the respondent did not "personally impugn" three separate judges does not mitigate the ferocity of his professional attacks against them. Thus, the three month suspension ordered in Zeno is not an appropriate sanction in this case. The volume and vitriol of the respondent's attacks, in numerous courtrooms over a span of years, and memorialized in written documents, is far more egregious than the two isolated comments at issue in Zeno.

3. Disposition. The respondent argues that his ninety day incarceration functionally suspended his practice and the time served should be credited against the recommended sanction. I reject the request to reduce the term of the suspension but I agree that fairness warrants a reduction in the actual duration of the suspension to account for the

time served on the contempt judgment. An order shall enter suspending the respondent from the practice of law in the Commonwealth for a period of one year and one day with the proviso that the actual duration of the suspension shall be reduced by the time served on the contempt sentence.

By the Court.

Geraldine S. Hines
Geraldine S. Hines
Associate Justice

Entered: August 24, 2016

A True Copy

8/31/16
Date

Attest

Steph. G.
Assistant Clerk